THE VIRGINIA SUPREME COURT, BLACKS, AND THE LAW, 1870-1902

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When the native white Virginians reclaimed control of the state in 1870, they faced the demand of the new black citizens for equal treatment under the law. Such treatment ran counter to southern traditions, and there was uncertainty whether white officials would accord blacks true justice. Many scholars have studied blacks and the law during the years after Reconstruction, but their investigations have been limited to such areas of public policy as segregation and voting rights. Yet, the ability of blacks to receive fair treatment in the courts when attempting to collect a just debt, or when standing trial for petit larceny, probably was of greater importance to the majority of the black community. The treatment by the courts of blacks in the daily pursuit of private justice has remained unexamined. A study of such cases provides a more precise picture of the black legal experinece than does the analysis of isolated civil rights cases.

The opinions of the Virginia Supreme Court of Appeals prove an excellent source for such a study. The opinions show that blacks did receive substantial justice before the

high court. Blacks appeared as both appellants and appellees in a variety of civil causes. Even when the opposing litigants were of different races, the court approached the cases objectively and often ruled for the black party. The court also approached criminal cases on their merits. Black defendants, including some convicted of violent interracial crimes, earned reversal on the grounds of insufficient evidence and procedural irregularity. Even in criminal prosecutions under the antimiscegenation statutes, which the court strongly endorsed, the judges required the prosecution to meet a strict burden of proof.

Beyond reporting the specific result of individual cases, the appellate opinions contain comments by the judges which reveal their attitude toward the rights of black citizens and the law's responsibility to protect those rights. The reports also provide other helpful information. The facts of the cases contain references to such aspects of black life as family relations, business transactions, and relations between the races. Finally the case reports serve as a source of information about the treatment of blacks in the state's legal system generally. The histories of the cases recapitulated in the reports suggest that the lower courts did not always accord blacks the same level of justice as did the Supreme Court.

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TABLE OF CONTENTS

INTRODUCTION

The years following Reconstruction in the South constituted one of the most significant periods in the history of American law. The capability and the integrity of the legal system faced a severe test. Emancipation and the new constitutional amendments had transformed an entire class, hitherto treated under special rules, into full citizens. Most had little knowledge of the law that was to protect their rights and monitor their responsibilities. Adding to the uncertainty of the situation was the attitude of the white officials charged with carrying out the law. Those officials were the products of a society predicated on the alleged inherent inferiority of blacks. The law, when it had applied to blacks at all, had legitimated and formalized that inferior position. A new order proclaiming the equal legal status of the black citizen, especially an order imposed by force by outsiders, could hardly change overnight social beliefs held for generations. What the law said was one thing. What people might do was quite another.

It was a time of great uncertainty in southern race relations. The antebellum slave codes had done more than define the legal status of slaves and free blacks. They had also provided the framework upon which an entire race-conscious society was built. The new codes declared only that blacks

were equal citizens before the law. The experience of Reconstruction had shown that southern whites were not willing to let the law determine the nature of social relations between the races. With native whites in control of the legal system, doubt existed whether they would let the formal law determine the nature even of legal relations between the races.

This contrast between the letter of the law and the actual treatment of blacks has been the reference point for most recent histories of the black during the postreconstruction period. Yet, despite this acknowledged importance of the law, historians have viewed the legal history of the period from a limited perspective. Their failure to probe more deeply into the subject has left a void in our knowledge of the working of the legal system during the period. It also has left untouched information valuable to the study of general history as well.

The controversy engendered by C. Vann Woodward's path-breaking work, The Strange Career of Jim Crow,[1] exemplifies the lack of interest in detailed legal history. In arguing that the southern attitude toward race relations during the postreconstruction period was not so definite and restrictive as it became in succeeding years, Woodward emphasized the relatively late development of Jim Crow legislation. Ensuing criticism concentrated on the distinction between codified and de facto discrimination. Woodward, his supporters, and

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[1]C. Vann Woodward, The Strange Career of Jim Crow (2d rev. ed.; New York: Oxford University Press, 1966).

his critics thus have all touched upon the law only as it concerned segregation and other obvious civil rights questions--the franchise, public accommodations and transportation, education, and jury service.

This emphasis on major issues of racial policy, although understandable, ignores an important aspect of the legal system. The law, at its fundamental level, serves to arbitrate conflicts between private citizens and between citizens and the state. These conflicts are often of more immediate concern to the individual citizen than are momentous issues of public policy. A poor black laborer in 1880 may or may not have cared about the law's attitude toward segregated hotels. He certainly had a greater interest in whether the courts would help him collect a just debt. Black parties to a case involving a contested will were concerned more with the judge's willingness to protect the rights of black heirs than his willingness to protect the rights of black voters. A black man charged with rape took a consummate interest in the intricacies of criminal procedure. It is within such situations that the true strengths and weaknesses of a legal system lie. A study of such cases during the postreconstruction era may afford a more precise picture of the law's treatment of blacks than have previous analyses of isolated civil rights cases.

The subject of legal protection, or lack of protection, of the civil rights of black citizens has not lacked attention. This approach has been characterized by the study of enforcement of the Fourteenth and Fifteenth Amendments,

especially at the federal level. It is exemplified by the comprehensive title but restricted approach of Richard Bardolph's The Civil Rights Record: Black Americans and the Law, 1849-1970.[2] Loren Miller gave extended attention to the Supreme Court's treatment of civil rights in The Petitioners: The Story of the Supreme Court of the United States and the Negro.[3] Mary Frances Berry widened the scope of study in Black Resistance/White Law: A History of Constitutional Racism in America.[4]

Other scholars, forsaking the attempt to portray general history by surveying institutional discrimination, have provided valuable studies by looking at the law's treatment of blacks in more detail. Gilbert T. Stephenson's Race Distinctions in American Law,[5] published in 1910, remains useful despite its age. Stephenson's great contribution was his methodological approach. He used constitutions, legislation, and cases, state as well as federal, as his source material. He arranged his discussion topically, emphasizing the development of the law on each point and facilitating comparison

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[2]Richard Bardolph, ed., The Civil Rights Record: Black Americans and the Law, 1849-1970 (New York: Thomas Y. Crowell Company, 1970).

[3]Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (Cleveland: World Publishing Company, 1966).

[4]Mary Frances Berry, Black Resistance/White Law: A History of Constitutional Racism in America (New York: Appleton-Century-Crofts, 1971).

[5]Gilbert Thomas Stephenson, Race Distinctions in American Law (New York: D. Appleton and Company, 1910).

among jurisdictions. Finally, he examined a broad range of topics often ignored, such as the definition of a Negro, marital relations, intermarriage, and the black citizen as trial participant. Unfortunately, Stephenson's use of the material was, at best, competent. Some topics suffered from superficial treatment, and all lacked detailed analysis.

Thirty years later Charles S. Mangum, Jr., remedied the problem of superficiality with The Legal Status of the Negro.[6] Continuing Stephenson's topical approach, Mangum supplied the detailed analysis missing in the earlier work. His comprehensive survey of case law still constitutes an excellent guide to the subject. Although Mangum did not intend the book to be a work of history, his approach made each topical discussion a miniature historical study. He also added new topics to the inquiry, especially those concerning various aspects of criminal prosecution.

Despite its breadth and detail, however, Mangum's work and others like it present an incomplete picture of black citizens before the law.[7] They have treated black rights by

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[6]Charles S. Mangum, Jr., The Legal Status of the Negro (Chapel Hill: University of North Carolina Press, 1940).

[7]Jack Greenberg, Race Relations and American Law (New York: Columbia University Press, 1959), a more recent survey, also is oriented toward the segregation-formal discrimination approach. Derrick A. Bell, Race, Racism, and American Law (Boston: Little, Brown and Company, 1973), is a casebook for law students and suffers the weaknesses of that genre, so far as the historian is concerned. The articles in Jack Greenberg, ed., Blacks and the Law, The Annals of the American Academy of Political and Social Science, CDVII (May, 1973), basically concern contemporary issues, although they include some general historical studies such as A. Leon Higginbotham, Jr., "Racism and the Early American Legal Process, 1619-1896," pp. 1-17.

cataloguing those rights and describing the controversies surrounding them. They have omitted, to a large extent, a related question. In many cases that brought blacks into the courtroom no civil rights issue was formally involved. No question existed about the rights of the black citizen. The question concerned how he was to be treated. Did the black receive equal justice, not just from the written law, but from the system which administered it?[8]

Specific studies of black history during the postreconstruction period have recognized the question, but the authors have lacked either the knowledge or desire to answer it fully. Discussions of black life often touch on legal subjects, but the theme is carried no further. Philip A. Bruce, in The Plantation Negro as a Freeman,[9] attempted to describe the

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In the area of state legislation, Pauli Murray, States' Laws on Race and Color (n.p.: n.p., 1950), is a compilation of statutes in effect at the time of publication. More helpful is June Purcell Guild, ed., Black Laws of Virginia: A Summary of the Legislative Acts of Virginia Concerning Negroes from Earliest Times to the Present (Richmond: Whittet & Shepperson, 1936). Germaine A. Reed, "Race Legislation in Louisiana, 1864-1920," Louisiana History, VI, No. 4 (1965), 379-92, attempts to put the relevant legislation into historical perspective. Theodore B. Wilson, The Black Codes of the South (University, Ala.: University of Alabama Press, 1965), is a helpful study.

[8]An excellent discussion of the relationship between blacks and the law as a functioning system is Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (2 vols.; New York: Harper & Brothers, Publishers, 1944), I, 523-69.

[9]Philip A. Bruce, The Plantation Negro as a Freeman (New York: G. P. Putnam's Sons, 1889).

"character, condition, and prospects" of the freedmen as he saw them from southside Virginia in the late 1880's. His wide-ranging treatment included such quasi-legal topics as marriage and divorce, employer-employee relations, property holding, and attitude toward law and government, in addition to the expected chapter on black crime. Unfortunately, so convinced was Bruce of black inferiority that many of his observations, not to mention the resulting conclusions, are questionable.[10]

Recent works covering specific states have continued to deal only with the periphery of legal history. They have, however, shown an understanding of the problem, going beyond statutes to consideration of the black man's actual contact with the legal system. Vernon Lane Wharton's The Negro in Mississippi, 1865-1890,[11] set the pattern for these studies, looking at such topics as miscegenation and the presence of

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[10]Yet, as late as 1952, Bruce's book served as a major source for another scholar's conclusions about Virginia and, by extension, the South as a whole. Henderson H. Donald, The Negro Freedman: Life Conditions of the American Negro in the Early Years After Emancipation (New York: Henry Schuman, 1952). Donald ignored most twentieth century scholarship and depended mainly on nineteenth century accounts, accepting such reports as accurate without questioning the bias or competence of the authors. On the changing nature of black historiography, see George B. Tindall, "Southern Negroes Since Reconstruction: Dissolving the Static Image," in Arthur S. Link and Rembert W. Patrick, eds., Writing Southern History: Essays in Historiography in Honor of Fletcher M. Green (n.p.: Louisiana State University Press, 1965), pp. 337-61. The recent explosion of publications in black studies is rapidly leaving Tindall's article behind, but it remains a valuable essay.

[11]Vernon Lane Wharton, The Negro in Mississippi, 1865-1890, James Sprunt Studies in History and Political Science, Vol. 28 (Chapel Hill: University of North Carolina Press, 1947).

black lawyers as well as at the growth of Jim Crow. George B. Tindall followed shortly afterward with South Carolina Negroes, 1877-1900,[12] using a similar approach. Later books have devoted separate chapters to the administration of the legal system. Charles E. Wynes, in Race Relations in Virginia, 1870-1902,[13] and Lawrence D. Rice, in The Negro in Texas, 1874-1900,[14] discussed black jurors in some detail, in addition to noting such topics as the competence of black witnesses and use of the criminal law to disfranchise black voters. Frenise A. Logan's study of North Carolina included an examination of state cases dealing with black suffrage and education. Although confining the discussion to those topics, Logan at least recognized the importance of the state supreme court in determining the quality of black citizenship.[15]

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[12]George B. Tindall, South Carolina Negroes, 1877-1900 (Columbia: University of South Carolina Press, 1952).

[13]Charles E. Wynes, Race Relations in Virginia, 1870-1902 (Charlottesville: University of Virginia Press, 1961).

[14]Lawrence D. Rice, The Negro in Texas, 1874-1900 (Baton Rouge: Louisiana State University Press, 1971).

[15]"But, by and large, the judges who sat on the [North Carolina] Supreme Court bench between 1876 and 1894 were earnest, conscientious men . . . who were usually ready to grant protection to the unfortunate Negroes to the very limit of the law. Without [such justices], the lot of the Negroes of North Carolina . . . would have been even more precarious than it was." Frenise A. Logan, The Negro in North Carolina, 1876-1894 (Chapel Hill: University of North Carolina Press, 1964), p. 163. Henry C. Dethloff and Robert R. Jones, "Race Relations in Louisiana, 1877-98," Louisiana History, IX, No. 4 (1968), 301-23, ignores detailed legal history almost entirely, except for a small discussion of black jurors, and concentrates on civil rights questions.

The use of separate chapters for legal history, though welcome, clearly demonstrated the serious lack of knowledge about the subject among historians. Wynes's belief, that "there is considerable evidence revealing the Negro's position before the bar of justice,"[16] is correct, but such evidence is not visible in the state studies. Discussion of the administration of justice, after a few tentative pokes into other areas, always return to the dramatic and easily researched topics of lynching and the penitentiary convict-lease system. Most areas of the civil law are ignored. Treatment of the criminal law appears satisfactory until one fact emerges from all the lynching stories, prison statistics, and selected contemporary quotes: There is no reference to a body of cases. The universal finding among these authors, that blacks failed to receive true justice before the bar, is in fact no more than a universal assumption.

The assumption is understandable. Blacks were usually excluded from juries. Black lawyers were few. Prison statistics showed great racial discrepancies. Policemen, attorneys, and judges, all white, were usually vocal supporters of unquestioned white supremacy. More than a few contemporary observers complained that southern courts were not dispensing equal justice. None of these factors or sources of information, however, qualifies as direct evidence. They only suggest. Despite the importance of the subject to both legal and

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[16]Wynes, Race Relations in Virginia, p. 135.

black history, little detailed information is generally available. The present study is an attempt to remedy this absence.

The basic material for an investigation of the black legal experience in postreconstruction Virginia is the body of opinions handed down by the Virginia Supreme Court of Appeals and included in the official reports of that court. This repository, untapped by historians, is of even greater value because, upon close reading, it provides information on three separate but related aspects of black history. First, the facts of the various cases reported furnish valuable information about black life in general. Second, the cases reflect in some detail the treatment of blacks by the legal system as a whole. Finally, the reports comprise the direct record of the treatment of blacks by the Supreme Court.

G. Edward White, in the leading article on the subject, refers to historians' "well-established custom of paying scant or cursory attention to appellate cases."[17] Legal and constitutional historians, of course, have employed such cases extensively. Because of the focus of these scholars, however, they have used them in a limited way, with the emphasis on the development of specific areas or points of law.[18] General

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[17]G. Edward White, "The Appellate Opinion as Historical Source Material," The Journal of Interdisciplinary History, I, No. 3 (1971), 499.

[18]The leading exponent of moving legal history away from this narrow legalistic approach is James Willard Hurst. In his campaign to broaden the focus and sources of legal history, however, Hurst dismisses too quickly the usefulness of appellate opinions. For certain subjects, they help provide the

historians, when they have considered appellate opinions at all, have approached them within the perspective of intellectual history. White refers to opinions as "indices of the general tone of American culture at various points in time" and as "'representative' of the state and substance of intellectual contributions at a given point in American history." It may profit the historian, however, to look at an opinion not only as the intellectual product of a judge and his society, but also as a source of facts about that society.

Although such an approach has been neglected in recent years, it was a principal motive for the publication of one of the classic works in black legal history, Helen T. Catterall's Judicial Cases.[19] J. Franklin Jameson's preface to the series noted, "The total mass of the decisions . . . exhibits fully and in detail the development of American law respecting slavery and the Negro, insofar as that law was the product of judicial determination." Jameson continued, however, "Even more valuable to the historian is the mass of factual data which the reports offer, either in the narrative portions by which reporter or judge or counsel explains the origin or

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information that Hurst urges students to seek in other legal and nonlegal sources. Hurst's most complete survey of the materials of legal history, the theory as well as the practice of their use, is "Legal Elements in United States History," in Donald Fleming and Bernard Bailyn, eds., Law in American History, Perspectives in American History, Vol. V (Boston: Little, Brown, and Company for the Charles Warren Center for Studies in American History, Harvard University, 1971), pp. 3-92.

[19]Helen Tunnicliff Catterall, ed., Judicial Cases Concerning American Slavery and the Negro (5 vols.; Washington, D. C.: Carnegie Institution of Washington, 1926).

nature of the litigation or in quotations from documents . . . which are imbedded in the official explanations of the case."[20]

Jameson's statement deserves refinement on two points. First, the information gleaned from the opinions need not be concrete facts alone. Careful reading and interpretaton may yield subjective, though no less valid, understanding of situations and relationships. In addition, the appellate reports need not be the sole source of information available on a particular subject. The historian always welcomes additional material from a new perspective, and the nature of litigation adds refreshing novelty to otherwise overworked issues.[21]

A more obvious use of appellate opinions is as a guide to the legal history of a period. The danger here is also obvious. The supreme court of any jurisdiction is but one segment of the judiciary, and the judicial branch is only a part of the legal system. Even the most painstaking study of appellate cases cannot yield a complete picture of the law in action. Recognition of this fact, though, should not obscure the value of the information that the cases do contain.

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[20] Ibid., I, iv.

[21] For example, no aspect of postreconstruction Virginia has been covered so extensively as its politics. Yet no editorial or political correspondence throws the subject into such dramatic relief as the divorce case of Latham v. Latham, 71 Va. (30 Gratt.) 307 (1878). One reason given by the wife for her seeking the divorce was her husband's radical Republican politics. She contended that his open espousal of his beliefs subjected her to public humiliation.

The criticism that supreme court action may not be representative of cases at lower levels overlooks the fact that almost every supreme court case first appeared in an inferior court. The action of that court, perhaps a narrative of the trial, is printed in the appellate reports.

Examples best make the point. The Virginia Supreme Court's disposition of miscegenation cases during the post-reconstruction era may or may not have mirrored the way inferior state courts handled the problem, but each such case in the Virginia Reports does show how one local judge and jury did so. A large sampling of murder cases reveals the type and amount of evidence on which black defendants were convicted. When the Supreme Court pondered the admissibility of an alleged confession, the facts reflected the arrest and interrogation practices of the police. Almost any discussion of procedural rights at the appellate level referred to the denial of those rights below. Consideration of a highly technical point raised by a black defendant's attorney indicated the quality of counsel afforded some blacks. Some civil disputes between whites and blacks included the simple but important fact that the blacks appeared before the high court as appellees.

This argument does not imply that fears of inaccurate representation are groundless. The reported cases constitute a unique class by the very fact that they did reach the appellate level. The vast majority of cases never progressed beyond trial. In some instances the reason for absence of appeal,

such as inadequate counsel or fear of lynching, speaks directly to the question of lower court justice. In general, working with a relatively small sampling of cases carried inherent risks. These dangers emphasize the need for caution in generalizing from appellate cases, but they do not mean that such cases are useless. To dismiss a valuable source simply because it cannot stand alone would be foolish. Read in conjunction with other legal and nonlegal sources, appellate opinions provide much information about a legal system.

The fundamental use of appellate decisions for the historian is as the record of the appellate court itself. The opinions of the Virginia Supreme Court of Appeals, for example, contain the answers to several questions about the court's treatment of cases involving blacks during the period 1870-1902. Simply determining the outcome of such cases is an important first step. Afterwards, two subjective questions may be addressed. First, did blacks receive substantial justice at the hands of the Supreme Court? Second, what was the attitude of the judges toward equal legal rights for blacks?

In pursuing such questions it is necessary to understand the nature of appellate opinions. Opinions are highly-structured in format and content. Judges compose them for a specific purpose, within relatively strict bounds. These limitations reflect the nature of the appellate judicial function. Courts decide cases, not policies. They deal with specific cases within a loose but definite system of precedent. A judge, although unhappy with the outcome, may feel

that his decision in a particular case must be governed by a strong line of precedent. Although the highest court of a jurisdiction is not bound absolutely by its previous decisions, direct reversal of precedent is usually rare and undertaken reluctantly. In addition, the knowledge that any decision in itself sets new precedent forces judges to consider future effects as well as immediate justice. In some cases procedural requirements preclude the substantive merits of a case from being considered at all. To these external factors the judge, consciously or otherwise, adds two more: his consideration of any social policy involved and, finally, his view of the equities of the case regarding the parties themselves. Often, all factors will work in harmony to produce a satisfying decision. At other times, some conflict among them will force a balancing of priorities in the court's mind.[22]

This multiplicity of considerations[23] makes the appellate

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[22]Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975), analyzes in detail the "dissonance" which can arise between a judge's moral beliefs and the perceived imperatives of the law, and the rhetorical patterns used in opinions to rationalize a difficult decision.

[23]The preceding is a greatly simplified discussion of a very complex subject. The literature on the judicial process is itself vast and often controversial. Basic works include Edward H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1948); Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1949); Charles G. Haines, "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges," Illinois Law Review, XVII, No. 2 (1922), 96-116; Roscoe Pound, "Mechanical Jurisprudence," Columbia Law Review, VIII (1908), 605-623. An excellent introduction to the theory and practice of reading

opinion treacherous ground for the historian seeking the judicial thought behind a decision. It is fitting that the factor dealing with the personal feelings of the judge came last in this discussion. The most important point the social scientist must remember is that accepting the opinion in any case as being indicative on its face of a judge's social or political convictions could be dangerously misleading.

In many cases, the presence of obiter dicta, remarks made in passing that do not bear directly on the legal issue at hand, alleviates some of the problems associated with the use of appellate opinions by historians. Much of legal education instills in the lawyer the ability to cut through the surrounding chaff of a case to the legal issue at the core. But the lawyer's chaff may well be the historian's wheat. A judge must confine his formal consideration of a case to the facts and law of the specific litigation, and the legal rule enunciated in the opinion will reflect this limitation. Because the judge knows, however, that his obiter remarks do not bear such a burden, he may feel free to inject some personal views into his opinion. What would he do if the facts were slightly different? What does he think of the controlling precedent? If he is in an expansive mood he may even speculate on the political and social questions of the day as they relate to the case.

Given the great potential of state supreme court reports

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opinions is K. N. Llewellyn, The Bramble Bush: On Our Law and Its Study (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1930), especially pp. 37-81.

as a source for the study of black legal history, why have scholars left this information substantially untapped? The answer lies in the tendency of many scholars, discussed earlier, to examine only those cases in which race played a specific part in the legal issue. As noted, however, such cases comprised a small minority of the appearances by blacks before the law. Of greater importance to the new black citizens was their success or failure in claiming their legal rights in situations where race supposedly was not involved. In such areas as enforcement of contract and criminal due process, the law was color-blind, but judges and juries were not.

Perhaps the most important reason that these cases have remained unexamined is the relative difficulty involved in locating them. American reports are extensively indexed and digested, but only by subject. Only those cases can be found in which the opinion indicated that race was a specific determinant of the decision. Thus, the researcher can easily find all cases dealing with miscegenation or segregation. For locating criminal cases with black defendants, or civil cases in which the parties happened to be black, the legal bibliographical materials are useless. The only effective method is to read the relevant reports case by case. This was the procedure followed in the present study. The source material was the Virginia Reports, volumes 60-100, covering the years 1870-1902.[24]

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[24]Reports of Cases Decided in the Virginia Supreme Court

The procedure is both tedious and time-consuming, but necessary for a complete survey of the subject. Even a civil case between two white parties might contain a reference to a black witness. The result of this search was a record of all cases in which blacks appeared as parties or witnesses at trial, or were mentioned in passing. Simply searching for racial references was insufficient, however, because not all black parties were so identified. This was especially true in criminal cases. The solution was to compile a list of possibly black defendants and attempt to determine their race from other sources. Unfortunately, no objective criteria existed to indicate which defendants should be placed on the list. Possible clues included the name and occupation of the defendant, crime involved, circumstances of the crime, and length of sentence.

The final step was to search other material for references to, and racial identification of, the names on the list. The two sources of greatest use were contemporary newspapers and the records and briefs submitted to the Supreme Court.[25]

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of Appeals (Richmond: Superintendent of Public Printing, 1870-1903). Two periodicals of the time, The Virginia Law Journal (1877-1892) and The Virginia Law Register (1895-1902), carried unofficial reports of some cases. Many of the opinions from these journals and other sources are compiled in Virginia Decisions: A Collection of Virginia Cases not Officially Reported (2 vols.; Charlottesville, Va.: The Michie Company, Law Publishers, 1902).

[25]No whole set of records and briefs exists. The best collection, although it too appears incomplete, is in the custody of the Clerk of the Supreme Court of Appeals. The collection is bound in a series of volumes labeled "Records and Briefs, Supreme Court of Appeals, Old Series." The records and briefs are bound roughly chronologically, but with

Also helpful were the lists of pardons granted by the governor[26] and the annual penitentiary reports.[27] Unfortunately, some of the relevant names appear in these sources devoid of racial identification. Many others do not appear at all. These factors--failure of the opinions always to denote race, the subjectivity of compiling a list of cases for further investigation, and the difficulties in carrying out that investigation--ensure that not every case concerning blacks has found its way into this study. Probably most have done so.[28] Certainly enough have been identified to justify their use as the basic material for an inquiry into the treatment of blacks in the legal system of postreconstruction Virginia.

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no further organization. There is no general index or guide to the series. The only help is the table of contents of each volume, which itself may contain errors. This material is not generally available to researchers, and the author wishes to thank Mr. Howard Turner, Clerk of the Court, for granting access to the collection.

[26]Published periodically in Virginia, House of Delegates (or Senate), Journal, Communication from the Governor of Virginia Transmitting List of Pardons . . . and Reasons Therefor (title varies).

[27]Virginia, Board of Directors of the Virginia Penitentiary, Reports (published annually).

[28]No criminal defendant or party to a civil suit has been designated as black without positive identification either within the report or by external sources. For those opinions which do not include racial identification, the external source is cited at the first mention of the case.

I. THE SUPREME COURT OF APPEALS, 1870-1902

When the Supreme Court of Appeals of Virginia convened in April, 1870, to chart the course of law for the newly redeemed Old Dominion, the judges had only to look to the immediate past to see the dire effects that political and social turmoil could have on a judicial system. The preceding five years had been a time of bitter emotions and institutional instability. The judges looked forward to an era of political peace and legal certainty. But the new court's first case involved a political question, and the great tragedy that accompanied its hearing was an omen that the dream of a halcyon legal era unsullied by politics would indeed be only a dream.

Reconstruction had seen a hodgepodge of courts, often with uncertain powers and overlapping jurisdictions. Military tribunals and Freedmen's Bureau courts shared the arena with civil authorities. Through most of Reconstruction the civil courts were in action and relatively independent.[1] Freedmen's Bureau courts took cogniznace only of cases involving blacks, and even those cases were transferred to the

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[1]Margaret Virginia Nelson, A Study of Judicial Review in Virginia, 1789-1928 (New York: Columbia University Press, 1947), p. 234, gives an organizational chart of the state court system, 1864-1870.

civil courts as soon as local authorities showed a willingness to deal justly with the freedmen. The Freedmen's courts themselves often were three-man tribunals in which one magistrate was the representative of the local white population.[2]

The Supreme Court of Appeals reflected the ambiguities of Virginia politics during this period. The judges were civilians elected by the state legislature and serving by authority of a state constitution. The constitution and the authority, however, were those of the Pierpont or "Restored" government, which had spent most of the war as a loyalist government-in-exile under federal protection in Alexandria. Afterwards it had come to Richmond as the officially recognized [illegible] government of the state.[3] By the Alexandria constitution of 1864, the Supreme Court was composed of three

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[2]The legal system in Virginia during Reconstruction badly needs a thorough study. Preliminary works include Harry August Volz, "The Administration of Justice by the Freedmen's Bureau in Kentucky, South Carolina, and Virginia" (unpublished M.A. thesis, University of Virginia, 1975); John Preston McConnell, Negroes and Their Treatment in Virginia from 1865 to 1867 (Pulaski, Va.: B. D. Smith & Brothers, 1910), pp. 64-86; Leslie Winston Smith, "Richmond During Presidential Reconstruction, 1865-1867" (unpublished Ph.D. dissertation, University of Virginia, 1974), pp. 132-33, 228-29, 300-44; James Douglas Smith, "Virginia During Reconstruction, 1865-1870--A Political, Economic, and Social Study" (unpublished Ph.D. dissertation, University of Virginia, 1960), pp. 411-15.

[3]Hamilton J. Eckenrode, The Political History of Virginia During the Reconstruction, Johns Hopkins University Series in Historical and Political Science, Series 22, Nos. 6-8 (Baltimore: Johns Hopkins Press, 1904); Richard L. Morton, History of Virginia, Vol. III: Virginia Since 1861 (Chicago: American Historical Society, 1924), pp. 59-159. Alrutheus Ambush Taylor, The Negro in the Reconstruction of Virginia (Washington, D. C.: Association for the Study of Negro Life and History, 1926), balances the anti-black bias of the first two works.

judges nominated by the governor and elected by joint vote of the legislature.

Despite the supposed alien nature of the Pierpont government, the judges elected to the high court were among the most respected members of the state bar. R. C. L. Moncure, the president, had sat on the Supreme Court since 1851, and at different times had been elected to that position by both the General Assembly and popular ballot.[4] William T. Joynes of Petersburg was a former United States attorney and had served as a member of the Confederate judiciary.[5] The third member of the court, Lucas P. Thompson, had been for many years a state circuit court judge in Staunton.[6] Thompson died before taking his seat and was replaced by Alexander Rives, the only member of this group about whom the suspicious natives might have had some question. Although, as a practicing Virginia attorney for almost forty years and an antebellum member of both the state Senate and House of Delegates, his state pedigree was excellent, he had also been a staunch and well-known Unionist.[7]

The court first convened for the April session of 1866.

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[4]Lyon Gardiner Tyler, ed., Encyclopedia of Virginia Biography (3 vols.; New York: Lewis Historical Publishing Company, 1915), II, 66; Thomas R. Morris, "The Virginia Supreme Court: An Institutional and Political Analysis," (unpublished Ph.D. dissertation, University of Virginia, 1973), pp. 42-43.

[5]Tyler, EVB, III, 17-18.

[6]Ibid., p. 17.

[7]Ibid.; John M. Schofield, Forty-Six Years in the Army (New York: Century Co., 1897), p. 396.

In March, 1867, Virginia became Military District Number One under the First Reconstruction Act, but the court continued to sit until March, 1869. In October of that year it was replaced by a Military Court of Appeals appointed by military commander John M. Schofield. The new bench consisted of President Horace B. Burnham and Judges O. M. Dorman and W. Willoughby.[8] Virginia commentators reserved their harshest invective for this court. One wrote,

> The Supreme Court of the State . . . was presided over by a Major on General Schofield's staff, another soldier and a civilian, no one of them ever having been heard of as a lawyer. Their decisions are reported in XIX Grattan, and in the copy of that volume in the State Law Library on the page where the names of the so-called judges appear, some wag has made a bracket embracing their names, and written, that "Although they sat upon the eagle's eyrie, they are buzzards still."[9]

This court became a prime example used by Virginians to illustrate the horrors of Reconstruction, but it held power for a short two sessions, and only eight of its decisions "disgrace" Mr. Grattan's nineteenth reporter.[10]

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[8]Nelson, Judicial Review in Virginia, pp. 58, 215; Martin P. Burks, Reports of Cases in the Supreme Court of Appeals of Virginia (Richmond: Superintendent of Public Printing, 1896), XCI, xix.

[9]George L. Christian, The Capitol Disaster: A Chapter of Reconstruction in Virginia ([Richmond]: Richmond Press, Inc., [1915]), p. 4.

[10]60 Va. (19 Gratt.) 545-669. Referring to these opinions, a later state judge instructed an attorney "that he must not refer in his court to any of the alleged decisions of these scalawags, for they were not law, and never should be quoted as authority in his circuit. He had stuck together the leaves containing them with mucilage, so that no one could ever read them in his honors Grattan." S. S. P. Patteson, "The Supreme Court of Appeals of Virginia," The Green Bag, V, No. 9 (1893), 422.

On January 26, 1870, Virginia gained readmission to the Union. Unlike most of her sister states of the old Confederacy, she entered with control already in the hands of the native white Redeemers. The instrument of passage was the Underwood Constitution, ratified by the state's voters in July, 1869. This document was hammered out in a bitter convention from December, 1867, through the middle of April, 1868.[11] Presided over by John Underwood, the convention was under the control of a Radical majority, including twenty-four blacks. Any document produced by such a group was unlikely to meet the approval of most white Virginians. Conservatives especially opposed clauses concerning the disfranchisement of former Confederates and the requirement of a "test-oath" for certain office holders, sections they feared would lead to black control of government.

Even after the hated sections had been excised during the ratification process,[12] many conservatives continued to grumble about the constitution. Thirty years later attorney Camm Patteson still referred to it as "a miserable patchwork" and "baleful instrument."[13] The complaints, however,

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[11]James Douglas Smith, "The Virginia Constitutional Convention of 1867-1868" (unpublished M.A. thesis, University of Virginia, 1956).

[12]For the complicated political and governmental maneuvering behind ratification, see Eckenrode, Political History During Reconstruction, pp. 104-27; Smith, "Virginia Constitutional Convention," pp. 150-87.

[13]Patteson, The Young Bachelor (Lynchburg, Va.: J. P. Bell Company, 1900), p. 19. For this attorney's view of post-war legal conditions, see pp. 18-19, 58-60.

carried less conviction as time passed. Some thoughtful conservatives grew to accept and even respect the convention's handiwork.[14] The constitution withstood more than three decades of conservative rule without repeal or major amendment.[15]

Article Six of the constitution, drafted by a committee of seven men including one black--John Brown of Southampton-[16] dealt with the judiciary. The capstone of the system was the Supreme Court of Appeals. It consisted of five judges, chosen by joint vote of the General Assembly for twelve year terms. The court had original jurisdiction in cases of mandamus, habeas corpus, and prohibition. Its appellate jurisdiction in civil cases was limited to controversies involving more than $500, except in several specifically named categories. Three judges constituted a quorum, although a majority of the complete court was needed to declare a law unconstitutional. The constitution also required that the court hold its sessions at two or more places in the state, thus easing the burden on lawyers from distant counties. The court usually

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[14]Jack P. Maddex, Jr., The Virginia Conservatives, 1867-1879: A Study in Reconstruction Politics (Chapel Hill: University of North Carolina Press, 1970), pp. 117-18. Even Eckenrode admitted that, minus the two political clauses, "[t]he constitution proved to be a good one, in spite of the fact that 'carpet-baggers' had assisted in making it." Political History During Reconstruction, p. 103.

[15]Some changes were made in the early 1870's, especially among provisions dealing with the locus of political power. Morton, History of Virginia, III, 172-75.

[16]Smith, "Virginia Constitutional Convention," p. 195; Luther Porter Jackson, Negro Office-Holders in Virginia, 1865-1895 (Norfolk: Guide Quality Press, 1945), p. 7.

met in Richmond, Staunton, and Wytheville.[17]

The constitution also allowed for the formation of a Special Court of Appeals, consisting of three to five Supreme Court or circuit court judges, to try cases in which conditions precluded a majority of the Supreme Court from sitting. Such a court, consisting of circuit judges Gustavus A. Wingfield, William S. Barton, and William McLaughlin, existed from July, 1872, through January, 1874, to help the Supreme Court reduce the backlog of its swollen docket. This special court decided more than one hundred cases. Despite a unanimous request from the Supreme Court that the life of the special court be extended beyond the original term set by the legislature, the General Assembly refused to do so.[18]

Next below the Supreme Court were the sixteen, later seventeen, circuit courts. Each circuit court had one judge, elected by joint vote of the General Assembly for an eight year term. The circuit courts held original and appellate jurisdiction in both civil and criminal cases.[19]

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[17]Virginia, Constitution (1869), art. 6, secs. 1, 2, 4, 5, 7. This bare framework was filled in by General Assembly, Acts, 1869-1870, ch. 171, pp. 219-221.

[18]Virginia, Constitution (1869), art. 6, sec. 3; General Assembly, Acts and Joint Resolutions, 1871-1872, ch. 124, pp. 98-99; Senate, Journal, 1874, Communication from the Judges of the Supreme Court of Appeals . . ., S. Doc. 6; Senate, Journal, 1871-1872, Communication from Supreme Court of Appeals. . . ., S. Doc. 9; "Misc. Special Court of Appeals," The Virginia Law Journal, IV (March, 1880), 190-91; Virginia, Code (1873), ch. 156, secs. 14-17, 20-29, pp. 1051-54; Charles Curry, Judge William McLaughlin (n.p.: n.p., n.d.), p. 12.

[19]Virginia, Constitution (1869), art. 6, secs. 9-12. For a graphic representation of the court system, see Nelson,

At the next level stood the county and corporation courts. Each county or district (two counties combined due to lack of population) was entitled to one judge, again elected by joint vote of the legislature. The term of office was six years, except that the first group of judges chosen under the constitution served only three years. The county court had general jurisdiction within the boundaries of its district.[20] Corporation courts, for the larger towns, held jurisdiction similar to that of the circuit courts. The city judges, like their county colleagues, were chosen for six year terms by joint vote of the legislature.[21]

On the bottom of the court system were the justice of the peace and magistrate courts. Justices were elected by popular vote for a term of three years in the counties and one year in the cities and towns. Their jurisdiction included minor civil and criminal cases.[22] Magistrate courts were held by town officials and heard cases similar to those heard by justices, plus matters arising from municipal ordinances and

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Judicial Review in Virginia, p. 235; Virginia, Code (1873), ch. 202, sec. 1, pp. 144-45.

[20]Virginia, Constitution (1869), art. 6, sec. 13; Code (1873), ch. 154, secs. 1-19, pp. 1027-33. The chart in Nelson, Judicial Review in Virginia, p. 235, mistakenly lists the term of office for county judges as three years.

[21]Virginia, Constitution (1869), art. 6, sec. 14; Code (1873), ch. 154, secs. 20-50, pp. 1033-39; Nelson, Judicial Review in Virginia, p. 235. Omitted here is a discussion of the unique court system in Richmond.

[22]Virginia, Constitution (1869), art. 7, sec. 2; Code (1873), ch. 48, pp. 462-65; Nelson, Judicial Review in Virginia, p. 235.

by-laws.[23]

At least in theory, black Virginians had some voice in the planning and execution of the legal system under which they lived for the thirty years after Reconstruction. Blacks were relatively well represented at the constitutional convention, and a black man served on the committee that drafted the judiciary article. Blacks voted in large numbers to ratify the constitution. They could elect justices of the peace and municipal magistrates. Even the judges of higher courts were not totally out of reach. So long as black representatives sat in the General Assembly, as they did from 1869 to 1890, they had some voice in choosing judges.[24] In reality, once the conservatives regained control of the state after ratification, black political influence declined abruptly and the black voice was more symbolic than effective. Nonetheless, even the small amount of real power, and the symbolism it offered, were more than blacks in the Old Dominion enjoyed before or after this period.

When the new Supreme Court met in April, 1870, Virginia conservatives would have been justified in thinking that all was again right with the world. Sitting as president was

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[23]Virginia, Code (1873), ch. 48, secs. 2, 13, pp. 462, 465, ch. 54, sec. 25, p. 527; Nelson, Judicial Review in Virginia, p. 235.

[24]Beverley B. Munford, Random Recollections (n.p.: Privately Printed, 1905), pp. 149-50, quotes a black delegate speaking in support of a judicial candidate. On blacks elected as justices of the peace, see chapter II.

R. C. L. Moncure, accomplishing the impressive feat of having served on the court before, during, and after Reconstruction. Joining Moncure was his former colleague on the Reconstruction court, William T. Joynes. The third member of that old court, Unionist and Republican Alexander Rives, was defeated in his attempt to regain his seat.[25] The three new members chosen by the General Assembly were far more orthodox in their views than the departed Rives.

Waller R. Staples had practiced in Montgomery County since 1848. A former member of the House of Delegates, he was a prewar Whig who became an ardent Democrat. His wartime service was as a member of the Confederate House of Representatives.[26] Joseph Christian had also been a wartime legislator, serving in the state Senate. Another old line Whig, he began the practice of law in 1849 in Middlesex County, which he later served as circuit court judge.[27] The fifth judge, Francis T. Anderson, had been a member of the bar since 1829. He was a farmer and iron manufacturer as well as an attorney and sometime law teacher. Yet another former Whig and a Unionist until the war, Anderson served in the House of Delegates during the war.[28]

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[25]Morris, "Virginia Supreme Court," p. 65.

[26]Tyler, EVB, III, 19-20; Patteson, "Supreme Court of Appeals," p. 407.

[27]Tyler, EVB, III, 19; Patteson, "Supreme Court of Appeals," p. 407.

[28]Tyler, EVB, III, 20-21; Patteson, "Supreme Court of Appeals," pp. 410-14.

The court's first case was a direct result of Reconstruction. The Richmond Mayoralty Case[29] was a test case to determine the validity of an enabling act, passed by the General Assembly in March, 1870, which provided for interim officials during the period between the end of military rule and the installation of elected state officials. The litigation pitted George Chahoon, Mayor of Richmond by military appointment, against Henry Ellyson, who claimed the same position as civil appointee under the new act. Given the tenor of the times and the composition of the court, no doubt existed about the outcome of the case.[30] Still, the importance and notoriety of the matter drew many spectators to the proceedings, with the whites anxious to witness the end of Reconstruction. Reconstruction, however, had one more, true tragedy to visit on the Old Dominion.

The courtroom was on an upper floor of the Capitol building in Richmond, immediately above the hall of the House of Delegates. On April 27 a large crowd gathered to hear the decision in the Mayoralty case. Suddenly a portion of the floor and the gallery collapsed, dropping most of the crowd twenty-five feet to the hall below. Parts of the courtroom ceiling followed, sending heavy timbers and suffocating plaster dust onto the victims. Sixty-two people were

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[29]60 Va. (19 Gratt.) 673 (1870). Nelson, Judicial Review in Virginia, pp. 60-61, contains a discussion of the case. Less objective is the analysis in Christian, Capitol Disaster, pp. 9-24.

[30]"Their attorneys debated the complex problem in the language of constitutional law, but power politics, very

killed, including a number of prominent lawyers and officials, and more than 250 were injured. The hole in the floor reached to within several feet of the judges, who remained unscathed. For many Virginians, the disaster was not simply a tragic act of God but "the climax and culmination of 'Reconstruction,' and a direct result of those illegal and infamous measures."[31]

With both Reconstruction and the Capitol disaster behind it, the court settled down to hearing the many new issues raised by changed social and economic conditions. After the turmoil of Reconstruction the twelve year term of the new court passed almost placidly. Joynes resigned in March, 1872, due to ill health, and was replaced by Wood Bouldin. Reflecting the experiences of his new colleagues, Boulding was a former Whig and had served as a state legislator during the war.[32] Bouldin sat on the court only four years, being replaced upon his death in 1876 by Edward C. Burks. A graduate of Washington College and the University of Virginia law department, Burks had practiced in Bedford County since 1842. His only political experience had been

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likely, determined the outcome." Maddex, Virginia Conservatives, p. 89.

[31]Christian, Capitol Disaster, p. 2. Reporter Peachy R. Grattan also describes the disaster in a footnote to the case report, 60 Va. (19 Gratt.) 673 (1870).

[32]Tyler, EVB, III, 18-19; Patteson, "Supreme Court of Appeals," pp. 370-72.

as a wartime member of the House of Delegates.[33]

While the orthodox court went about its business, a new political heresy was rising to disrupt the Commonwealth once again. At issue was the state debt.[34] Years of devastating war had destroyed much of the state's public and private wealth. Despite this devastation, the General Assembly in 1871 passed a Funding Act that, in effect, guaranteed payment to the bondholders of the principal and interest of the debt. It was soon apparent that such funding would place an almost impossible strain on the state budget. Revenue was insufficient to support both the debt and the increased social services of the postreconstruction period. The fiscal conservatives in control of the state government saw only one solution. They cut back on the services. Roads, hospitals, and the new public schools suffered for the state's fiscal honor. Various attempts by the legislature to ease the situation met either gubernatorial veto or judicial invalidation.

The Conservatives split into two factions over the debt question. The Funders believed that the law and the honor

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[33]Tyler, EVB, III, 21; Patteson, "Supreme Court of Appeals," pp. 415-16.

[34]The definitive study is James Tice Moore, Two Paths to the New South: The Virginia Debt Controversy, 1870-1883 (Lexington: University Press of Kentucky, 1974), which supercedes the older Charles C. Pearson, The Readjuster Movement in Virginia (New Haven: Yale University Press, 1917). William L. Royall, History of the Virginia Debt Controversy. The Negro's Vicious Influence in Politics (Richmond: Geo. M. West, Publisher, 1897) is rabidly anti-Readjuster. The opposite view influences Nelson M. Blake, William Mahone of Virginia: Soldier and Political Insurgent (Richmond: Garrett & Massie,

of the state demanded that all obligations be met in full. The Readjusters questioned both the legal and moral necessity of funding the debt. Scorning the idea that the state's honor was more important than the welfare of its citizens, they wanted to readjust, or scale down, the debt. This disagreement over economic policy defined the two groups, but their positions reflected far more profound differences in political and social beliefs.

The Funders were heir to the mantle of the traditional Virginia ruling class, an elite group of economically secure and socially prestigious men. Their leaders were mainly professionals, particularly lawyers, from the towns and cities. They appealed to urban business interests and prosperous farmers. They were, in short, a "coalition of townsmen and farmers, capitalists and aristocrats, . . . cemented by a common commitment to the traditional values of Virginia society--economic orthodoxy, a hierarchical social order and elitist Government."[35]

The Readjusters lacked the homogeneous background and community of interests of their opponents. The coalition's various segments agreed only on their opposition to Funder policies. The original Readjuster spokesmen were themselves borderline members of the agricultural-mercantile elite,

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Publishers, 1935); and William C. Pendleton, Political History of Appalachian Virginia, 1776-1927 (Dayton, Va.: Shenandoah Press, 1927), pp. 274-428.

[35]Moore, Two Paths, p. 29. Moore's excellent plumbing of the Funder mind is on pp. 26-44.

whose sole complaint concerned Funder economics. On political and social issues they could be as conservative as their economic foes. As the party developed, other Readjusters saw it as a source of true democratic change. The backbone of white Readjuster support was the yeoman farmer of southwest Virginia and the northern valley, growing areas desiring increased state services and unwilling to accept government by the traditional elite.[36]

The final Readjuster strength lay in the almost total support of the party by black voters, who had grown frustrated and bitter over their loss of political influence since redemption. The new party promised a change toward a more democratic political system. It was a case of mutual need, recognized by both sides, with political ideology happily reinforcing political pragmatism. Black voters were actively welcomed and black leaders received some minor appointments. Readjuster programs also included many goals desired by blacks, such as abolition of the poll tax and whipping post, black jury service, strong support of public schools, and better public institutions for the ill and insane.[37]

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[36] Ibid., pp. 45-53.

[37] Both contemporary and later unfriendly observers considered the black-Readjuster connection the most significant fact about the Readjuster movement. More objective authors have found nothing sinister or unethical in the relationship. Although, in the end, the black issue was a major factor in the dissolution of the party, black support helped the Readjusters to what success they did enjoy. In return, the blacks received significant recompense for their considered decision to back the Readjusters. Moore, Two Paths, pp. 47-48, 64-65,

Funder adherents controlled the Conservative party and the state government for most of the 1870's. Throughout the decade, however, the Readjusters evolved new leadership, programs, and political strategy. Most important was the emergence of William Mahone as faction leader. Mahone, a brilliant political strategist, built a significant Readjuster caucus within the General Assembly. Lax discipline among the various groups favoring readjustment, and gubernatorial vetoes of the few pieces of legislation that did emerge, convinced Mahone that a strong, independent party organization was needed.

In February, 1879, Mahone and his disparate allies formed the Readjuster party. In the General Assembly session of 1879-1880 the Readjuster caucus formed a majority with the black Republicans. The white Republicans proved less constant allies. The chaotic nature of the anti-Funder coalition meant a shifting of lines on almost every issue. Still, the working majority was secure enough to allow wholesale patronage appointments and to produce some legislation. Again, vetoes by Funder Governor F. W. M. Holliday caused frustration. This

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103-5; Moore, "To Carry Africa into the War: The Readjuster Movement and the Negro" (unpublished M.A. thesis, University of Virginia, 1968); Moore, "Black Militancy in Readjuster Virginia, 1879-1883," The Journal of Southern History, XLI, No. 2 (1975), 167-86; James Hugo Johnston, "The Participation of Negroes in the Government of Virginia from 1877 to 1888," The Journal of Negro History, XIV, No. 3 (1929), 251-71; Charles E. Wynes, Race Relations in Virginia, 1870-1902 (Charlottesville: University of Virginia Press, 1961), pp. 16-38; Blake, William Mahone, pp. 261-64; Richard L. Morton, The Negro in Virginia Politics, 1865-1902 (Charlottesville: University of Virginia Press, 1919), pp. 98-106.

problem disappeared in 1881 when the Readjusters elected majorities to both houses of the legislature and also placed William E. Cameron in the governor's mansion.

By this time the Readjusters were losing their conservative elements and moving to the left. Boldly espousing "liberalism" and racial justice, the Readjusters moved beyond the debt question to a "comprehensive, progressive reform program."[38] By the election of 1883, however, the winds of Virginia politics had shifted again. The loss of the conservative elements of the coalition weakened party strength, and many supporters left because of personal conflict with Mahone. The success of the party in finally easing the debt problem removed the issue that had cemented the coalition. These various factors allowed the race issue to come to the front again. When an election eve riot occurred in the black-controlled town of Danville, the resultant conservative propaganda doomed further effective black participation in state politics, and ensured a similar fate for any party allowing blacks such a role.[39]

The Readjusters, however, left their mark on the state. Among the more controversial of the party's actions was its use of patronage. The party attempted to fill as many state offices as possible with its own adherents. A major reason was the desire to make political capital, but such an approach was

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[38]Moore, Two Paths, pp. 82-92.

[39]Moore discusses the alleged and actual reasons for the Readjuster downfall, ibid., pp. 93-118.

not unique and hardly contemptible. Two other motives were also at work. First, the party wanted men of agreeable philosophy in offices that determined or executed public policy. In addition, many ousted officials had been incompetent or corrupt. Still, in the eyes of the Funders and their later scholarly supporters, any Readjuster attempt to install a new official was an unethical and unconscionable abuse of the spoils system. And no portion of the Readjuster program was so roundly denounced as its replacement of the state's judges.

By coincidence the period of Readjuster strength included several years during which the General Assembly was scheduled to fill various state judgeships. To the session of 1879-1880 fell the task of electing county and corporation court judges. The new choices met with less than universal approval. William L. Royall, a chief Funder lawyer, later charged, "With very few exceptions [the Readjusters] put upon the State a county judiciary that greatly shocked the moral sense of the people."[40] Another observer remarked, "[M]any of the judges of that time, appointed by the Readjuster party for political purposes, were thoroughly incompetent, and many of them were exceedingly stupid."[41] Even a

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[40] Royall, History of Virginia Debt Controversy, p. 62. Royall's strongest example was Thomas B. Claiborne of Franklin County, indicted by his own grand jury for gambling. Ibid., pp. 63-66.

[41] John H. Gwathmey, Legends of Virginia Lawyers: Anecdotes and Whimsical Yarns of the Old Time Bench and Bar (Richmond: Press of the Dietz Printing Company, 1934), pp. 129-30.

leading Readjuster believed that, though some of the county judges were "good and worthy men, and fair judges," others were "both incompetent and unworthy."[42]

Funder supporters also explained why such incompetents served on the bench. According to Charles C. Pearson, "[T]he scarcity of Readjuster lawyers, party exigencies, and the refusal of some Funder lawyers to accept Readjuster appointment led to many unsatisfactory and some scandalous selections."[43] William L. Royall wrote simply that the Readjuster party contained "comparatively few reputable lawyers."[44] For the Funders, this tenet was not the result of an objective analysis of their opponents' legal talents. It was an article of faith established by the fact that the Readjuster position was, in their view, illegal and dishonest. In fact, lawyers were well represented in both factions, although the older and more established attorneys clustered in the Funder camp. In one list of "Prominent Funders," 82 per cent were lawyers. Of the "Prominent Readjusters," 40 per cent were lawyers.[45]

To determine whether the Readjuster appointees were as terrible as the Funders maintained is difficult. James T.

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[42]Elizabeth H. Hancock, ed., Autobiography of John E. Massey (New York: Neale Publishing Company, 1909), p. 216. Massey was an early economic Readjuster, conservative in political and social beliefs, and a bitter enemy of Mahone.

[43]Pearson, Readjuster Movement, p. 150.

[44]Royall, History of Virginia Debt Controversy, p. 62.

[45]Moore, Two Paths, pp. 131-156.

Moore suggests one approach, which is helpful though not conclusive. If the judges were undeniably incompetent, and if the critics were sincere in their outrage, then the first able Funder-controlled legislature would surely have removed all possible blots on the state judiciary. Moore calculates that during their reign the Readjusters placed on the bench ninety-five county judges, thirteen corporation court judges, and five circuit court judges.[46] Of these, the Funder General Assembly of 1883-1884 removed six, while four others resigned under pressure. That almost ten percent of the Readjuster judiciary below the Supreme Court level left the bench in dishonor is a damning indictment. Moore points out, though, that in one removal and one resignation the investigators "admitted finding no cause for punitive action." A second removal was influenced by an irrelevant issue. One judge was denied a public hearing to defend himself.[47]

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[46]The figures, not included in the published book, are from the original dissertation, "Two Paths to the New South: Funders, Readjusters, and the Virginia Debt Controversy, 1870-1883" (unpublished Ph.D. dissertation, University of Virginia, 1972), p. 231, note 50. The Readjusters did not have the opportunity to make major changes at the circuit court level. Mahone's forces tried to surmount this problem by redistricting the judicial circuits, thus turning the judges out of office, but the plan encountered opposition from Massey and others and never emerged from caucus. Hancock, Autobiography of Massey, p. 217.

[47]Moore, Two Paths, pp. 101. Moore also notes that the reputation of the earlier, Funder judges was not so spotless as their supporters imply. The black Petersburg Lancet, February 10, 1883, saw no reason that the old judges should not have been replaced: "The Liberals [Readjusters], not believing in the doctrine that the judiciary had gone to the angels and were so pure from political parties that they could not be influenced by prejudice, they have also to some extent gotten hold of the judiciary, and made needed reforms by putting such men on the bench as are in thorough accord with Liberalism."

The Readjusters also had the opportunity to name a new Supreme Court bench. Mahone and his allies realized the crucial role to be played by the court in determining the debt issue. Decisions by the sitting court concerning the state's contractual obligations under the Funding Act had frustrated Readjuster legislative attempts to lessen the state's burden. Knowing that the term of the first Redeemer Supreme Court was to expire at the end of 1882, Readjuster leaders emphasized the importance of gaining a strong party majority in the 1881 General Assembly elections. The campaign was a success.

The Readjuster victory at the polls did not guarantee a smooth judicial transition. The maneuvering began in early January when N. W. Hazlewood introduced a resolution in the House declaring that, due to age and ill health, R. C. L. Moncure had become incompetent to remain on the court. Hazlewood called upon the General Assembly to consider removing the president. Although Hazlewood's attempt failed, subsequent events proved the wisdom of his resolution. Moncure remained on the bench until his death seven months later, but never again was able to take an active role in the court's work.[48]

In late January the squabbling resumed. The occasion was a House committee report on unexpired judicial terms. A dissenting report by the Funder minority declared that no such

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[48] Virginia, House of Delegates, Journal, 1881-1882, pp. 89-90, 171, 174. Reporter George W. Hansbrough refers to Moncure's lack of participation in his list of judges sitting on the cases reported in 76 Va.

thing existed. The minority argued that the question was one of constitutional interpretation and within the province of the courts. The Supreme Court of Appeals had already ruled that a judge elected to fill a vacancy should serve a full term, not simply complete the unexpired term of his predecessor. Faced with this damaging precedent, the Readjuster majority looked elsewhere. They argued that the constitutional convention had specifically rejected wording similar to the court's later interpretation. Subsequent General Assembly actions had supported the idea that a judge elected to fill a vacancy should serve only the unexpired term of the former judge.[49]

The abstract nature of this controversy had a very concrete political foundation. At issue was the Supreme Court seat of Edward C. Burks, who had been elected in December, 1876, to replace Wood Bouldin. Bouldin, earlier, had replaced William Joynes. If, as the minority argued, each judge was elected for his own term, then Funder Burks could sit for six more years. The majority's belief that election was valid only for the unexpired term of the previous judge meant that Burks's term would end in December, 1882, allowing the election of a fifth Readjuster judge.

The General Assembly voted in late February. Staples and Christian lost their seats to Robert A. Richardson and Benjamin W. Lacy, respectively. Lunsford L. Lewis defeated

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[49]House of Delegates, Journal, 1881-1882, pp. 229-31.

James Keith for the seat previously held by Moncure, and Thomas T. Fauntleroy defeated John W. Riely for that previously occupied by Francis T. Anderson. Voting proceeded along party lines. When the Readjusters moninated Drury A. Hinton to succeed Burks, the Funders offered no candidate and refused to participate in the voting.[50] They believed that Burks was entitled to remain in office, and obviously felt that to take part in the election would compromise their position.

When the new court convened in January, 1883, the first case to confront it was Burks v. Hinton.[51] The situation was reminiscent of the opening of the Redeemer court thirteen years earlier, when that court also had been greeted by a legal question steeped in politics. Perhaps the cases were reminders that the relationship between politics and the courts in the Old Dominion was not so pure. Both the majority and dissenting opinions in Burks referred to the dangerous lack of independence of the Supreme Court from the General Assembly.[52] Politically based or not, the case did present a legal issue and a decision was necessary. That the court ruled for Hinton was hardly surprising, although in a significant dissent Lewis agreed with the position taken by the Funder minority in the House committee report.

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[50] Ibid., pp. 392-96.

[51] 77 Va. 1 (1883). There are discussions of the case in Morris, "Virginia Supreme Court," p. 47, and Nelson, Judicial Review in Virginia, pp. 107-108, 116-20.

[52] 77 Va. 23, 42-43.

Lewis, the new court's president, was a law graduate of the University of Virginia and had served as commonwealth's attorney in Culpeper. For a number of years before his election to the high court he was federal district attorney for the Eastern District of Virginia.[53] Fauntleroy was also a University of Virginia graduate who began practice in his native Winchester in 1847. After serving as commonwealth's attorney he was elected to the General Assembly in 1857. Following wartime service he returned to practice and was again elected to the General Assembly in 1877. A term as Secretary of the Commonwealth preceded his elevation to the high court.[54] Hinton's law studies at the University had been interrupted by Confederate service, after which he studied under William Joynes. After several years of private practice he served as both commonwealth's attorney and corporation counsel for Petersburg.[55]

Robert A. Richardson had read law while serving as a court clerk, passed the bar, and entered private practice. After Confederate service he returned to practice in Smyth County.[56] The fifth member of the court, Benjamin W. Lacy, was the only one with judicial experience, having served

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[53]Tyler, EVB, III, 21-22; Patteson, "Supreme Court of Appeals," p. 416.

[54]Tyler, EVB, III, 22-23; Patteson, "Supreme Court of Appeals," p. 417-18.

[55]Tyler, EVB, III, 23; Patteson, "Supreme Court of Appeals," p. 418.

[56]Moore, Two Paths, p. 149; The Virginia Law Register, I, No. 7 (1895), 544-45.

short terms as both county court and circuit court judge. A Confederate veteran from New Kent County, he also served four terms in the House of Delegates, the last as Speaker.[57]

The contemporary and subsequent criticism that characterized the careers of the Readjuster county judges did not extend to the Supreme Court judges. The political nature of the court change, especially the removal of the entire previous bench, elicited some bitterness,[58] but there were few complaints about the conduct of the judges in office. One lawyer of the time did refer to the Readjuster high court as "all damned rascals, differing only in degree."[59] But even Charles C. Pearson, a close critic of all Readjuster actions, admitted, "The new Supreme Court judges served full terms without discredit."[60] More recent students of the court have noted the political context of the 1883 change without finding any important alteration in the court's quality or integrity worthy of mention.[61]

Their twelve year term kept the Readjuster judges on the bench several years after the controversies that led to their election had died down. They served without incident,

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[57]Tyler, EVB, III, 22; Patteson, "Supreme Court of Appeals," pp. 416-17.

[58]The Virginia Law Journal, VI (1882), published a series of editorials praising the 1870-1882 court and deploring its dissolution. Pp. 190, 641, 753-54.

[59]Gwathmey, Legends of Virginia Lawyers, p. 60.

[60]Pearson, Readjuster Movement, pp. 149-50.

[61]Morris, "Virginia Supreme Court," pp. 45-48, 61-63; Nelson, Judicial Review in Virginia, pp. 107-108, 116-20, 217.

but in 1894 the General Assembly elected a new court. Five men were nominated, and elected unanimously.[62] The new president was James Keith, a Confederate veteran who had studied law at the University of Virginia, practiced for a short time, and been a member of the first Redeemer legislature. In 1870 he was elected a circuit court judge, a position he held until his promotion to the high court.[63] He was the only member of the new court with judicial experience.

Richard H. Cardwell was an immigrant from North Carolina, a Confederate veteran who had come to Virginia in 1869. After reading law privately he entered practice in 1874. He also spent fourteen years in the House of Delegates, eight as Speaker.[64] Another former House member was John A. Buchanan, a veteran from Smyth County and University law graduate. After building a successful practice in Abingdon, he served one term in the General Assembly and two in Congress.[65] John W. Riely, a native of West Virginia, was yet another Confederate veteran. He passed the bar in 1867 and embarked upon a twenty-six year practice in Halifax County. For much of that time he also served as the county commonwealth's attorney.[66] The final

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[62] Senate, Journal, 1893-1894, pp. 132-34.

[63] Tyler, EVB, III, 23-24.

[64] Ibid., p. 24.

[65] Ibid., p. 25.

[66] 98 Va. v; Majorie D. Kirtley, Virginia Supreme Court: Biographies, Chronological History (typescript in Virginia State Library, Richmond), p. 18. The Kirtley work is an uncritical collection of short biographical pieces, with most

member of the court. George M. Harrison, was a Staunton attorney who after wartime service had studied law at the University. Harrison's only public service prior to his election was as a commissioner in chancery.[67]

Archer A. Phlegar had the shortest tenure on the court during this period. He was appointed by Governor J. Hoge Tyler in October, 1900, to replace Riely, who had died two months earlier. Prior to his appointment Phlegar had managed successful public and private careers. He read law after returning from the war and represented several corporations, as well as serving as a railroad company officer. On the public side he served as both a commonwealth's attorney and a state senator.[68] Phlegar's appointment to the court was temporary and, in February, 1901, the General Assembly elected Stafford G. Whittle to finish Riely's unexpired term. Whittle, a former University law student, had behind him more than ten years of private practice and two terms as circuit court judge.[69] He was also the first Supreme Court member since redemption not to have served the Confederacy, having been too

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of the information taken from such sources as Tyler's EVB and Virginia State Bar Association memorials. It is helpful in bringing together this otherwise dispersed material, but the original sources, if available, are recommended.

[67]Tyler, EVB, III, 25.

[68]Ibid., pp. 25-26.

[69]Ibid., pp. 26-27.

young at the time.

The court elected in 1894 served not only through the end of the century but the end of an era as well. As the years passed blacks played less and less active a role in state politics. Official fraud and unofficial intimidation drastically cut the black vote. As actual black influence dwindled, the specter of black rule was invoked as an example of the dangers awaiting any split in the white ranks. Fear that black votes might be sought by some future disgruntled faction, dislike of the restricting necessity to suppress any white disunity, and dissatisfaction with the commonly practiced voting fraud led Virginia's white political leaders to one conclusion--the black man had to be disfranchised.[70]

In 1901 a constitutional convention convened to do just that. As Richard L. Morton writes with approval,

> In the campaign preceding the convention and in the convention itself no attempt was made to conceal the main purpose of that body. The negro had been a failure and a menace in politics. As long as he was in politics the color line was a line of friction and danger to both races. Therefore, he must be removed, not only because he was for the most part an ignorant and irresponsible voter who had usually stood solidly behind the worst elements in State politics, but also because he had been taught . . . to vote as a negro and must therefore be disfranchised because he was a negro.[71]

On May 29, 1902, the delegates, fearing possible defeat if the question of adoption were submitted to the electorate,

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[70] Morton, Negro in Virginia Politics, pp. 127-46.

[71] Ibid., pp. 151-52.

proclaimed their document to be the new constitution of Virginia.[72]

The removal of the black man from politics ended his ability, however slight it had been, to participate in the formulation of the laws defining race relations in the state. The whites, in complete control, now had definite ideas about which direction those relations should take. The era of racial uncertainty which had begun with Redemption came to an end.

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[72]On the proceedings of the convention and the technicalities of disfranchisement in the new constitution, see ibid., pp. 147-61, 171-78.

II. BLACKS IN THE COURTROOM

The black man in a Virginia courtroom was an alien in a strange and confusing world. Most of the faces he saw, the faces of southern justice, were white. To what extent did blacks participate in the legal process? Were there black jurors, witnesses, attorneys, or officials?

In 1885 George Washington Cable wrote,

> Suppose for a moment the tables turned. Suppose the courts of our Southern States, while changing no laws requiring the impaneling of jurymen without distinction as to race, etc., should suddenly begin to draw their thousands of jurymen all black, and well-nigh every one of them counting not only himself, but all his race, better than any white man. Assuming that their average intelligence and morals should be not below that of jurymen as now drawn, would a white man, for all that, choose to be tried in one of those courts? Would he suspect nothing? Could one persuade him that his chances of even justice were all they should be, or all they would be were the court not evading the law in order to sustain an outrageous distinction against him because of the accidents [sic] of his birth? Yet only read white man for black man, and black man for white man, and that . . . has been the practice for years, and is still so today; an actual emasculation, in the case of six million people, both as plaintiff and defendant, of the right of trial by jury.[1]

The racial composition of juries was the most controversial

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[1]George W. Cable, The Silent South Together with The Freedman's Case in Equity and The Convict Lease System (New York: Charles Scribner's Sons, 1907). pp. 19-20.

and litigated aspect of the black's new legal position. Southern blacks had grave doubts about the objectivity of their white neighbors. As Kelly Miller wrote soon after the turn of the century, "The Negro feels that he cannot expect justice from Southern courts when white and black are involved. . . . For this suspicion the jury rather than the judge is responsible."[2] The fact that white jurymen were often of the lower classes did little to assuage black suspicions.[3]

Blacks realized that their chances for justice increased when juries were not all white. They recognized that "one vote on the grand jury might prevent an indictment, and save disgrace and the risk of public trial; while one vote on the

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[2]Kelly Miller, Race Adjustment: Essays on the Negro in America (2d. ed; New York: Neale Publishing Company, 1909), p. 81. Counsel in George v. Pilcher, 69 Va. (28 Gratt.) 299 (1877), explained an unsuccessful attempt to remove the case to a federal court as having been based on the belief that, "as this was a litigation between persons of mixed color involving the title to a large estate, it was eminently proper that it should be tried by a court as free as possible from any prejudice . . . in respect to race or color, which would naturally and probably affect a trial by jury in a State court of Virginia." George v. Pilcher, in Virginia, Supreme Court of Appeals, Records and Briefs, XII, O.S., 1, 2.

[3]Letter from George M. Arnold to Isaiah H. Wears in Herbert Aptheker, ed., A Documentary History of the Negro People in the United States (New York: Citadel Press, 1951), p. 729; W. E. Burghardt DuBois, ed., "Some Notes on Negro Crime, Particularly in Georgia," Report of a Social Study made under the direction of Atlanta University . . ., Atlanta University Publications No. 9 (Atlanta: Atlanta University Press, 1904), p. 56.

petit jury might save a life or a term of imprisonment."[4] The lack of black jurors left many blacks with no confidence in or loyalty to the law. Discussing the causes of black crime generally, W. E. B. DuBois remarked,

> "[I]t certainly seems clear that . . . the presence of intelligent Negroes on juries when Negroes are tried . . . would make quickly and decidedly for the decrease in Negro criminality in the South and in the land."[5]

For most whites the absence of black jurymen was a social and legal necessity. The black demand for representation on juries was an assertion of equality unwelcome in white society. Fully as important, black jurors threatened the otherwise complete control exerted by whites over the legal process. Gunnar Myrdal has noted that one of the dangers of the jury system is that it strengthens the dependence of justice on popular opinion.[6] The authorities depended on such public opinion to

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[4]Wilford H. Smith, "The Negro and the Law," in Booker T. Washington, et al., The Negro Problem (New York: James Pott & Company, 1903), p. 136. But see the pessimistic view in Henry L. Andrews, "Racial Distinctions in the Courts of North Carolina" (unpublished M.A. thesis, Duke University, 1933), pp. 93-101. According to Andrews, black lawyers in North Carolina felt that integrated juries would increase the racial status of the black citizen but would not greatly improve the administration of justice.

[5]DuBois, "Negro Crime in Georgia," p. 59.

[6]Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy, (2 vols.; New York: Harper & Brothers Publishers, 1944), I, 524. See, also, Lewis H. Blair, The Prosperity of the South Dependent upon the Elevation of the Negro (Richmond: Everett Waddey, 1889), p. 56: "[T]he trouble is with the interpretation of the laws by the juries, who merely voice public sentiment, which is superior to the law itself."

serve in place of illegal official discrimination. For example, "since the legislature apparently felt it impolitic to distinguish penalties by race, they made the death penalty discretionary for [certain] crimes, and placed their trust in the judgment of white judges and white juries."[7] Finally, some honest self-delusion may have existed among whites that black parties did not want black jurymen. Henry W. Grady quoted an Atlanta prosecutor, "As to negro jurors, I have never known a negro to allow his lawyer to accept a negro juror. For the State I have accepted a black juror fifty times, to have him rejected by the opposing lawyer by order of his negro client."[8] Given the contrary evidence available, Grady's acceptance of this statement without qualification was, at best, wishful thinking.

Before ratification of the Fourteenth Amendment Virginia blacks had no opportunity to sit on juries. Even free blacks had been prohibited from doing so on the ground that they were not citizens.[9] The war, civil rights amendments, and a new Virginia constitution changed that. According to the Constitution of 1869, "[A]ll citizens of the state are hereby declared to possess equal civil and political rights and

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[7][Kenneth M. Murchison and Arthur J. Schwab,] Note, "Capital Punishment in Virginia," Virginia Law Review, LVIII, No. 1 (1972), 106.

[8]Henry W. Grady, "In Plain Black and White. A Reply to Mr. Cable," The Century Illustrated Monthly Magazine, XXIX (April, 1885), 915-16.

[9]Booth v. Commonwealth, 57 Va. (16 Gratt.) 519 (1861).

public privileges." The statutory qualification for jury service read, "All male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office, under the constitution and laws of this state, shall be liable to serve as jurors."[10]

Having the law on the books, however, did not assure blacks a place on the jury. Throughout the 1870s black members of the General Assembly introduced resolutions to stop the continuation of antebellum exclusion. An 1873 Senate proposal asked for a committee report on legislation necessary "to prevent the exclusion of colored men from service as jurors of this Commonwealth." A similar motion a year later sought legislation "to secure to the colored citizens of this Commonwealth their constitutional and inestimable right to serve as jurors." In 1879 a House resolution called for an inquiry as "to what amendment, if any, of the jury laws can . . . secure more effectually the admission of qualified citizens to jury service without special regard to race or color." The white majority repulsed these and other attempts. One committee responded, for example, that it was "unnecessary to legislate on the subject . . . as colored men are not

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[10]Virginia, Constitution (1869), art. 1, sec. 20; Virginia, General Assembly, Acts and Joint Resolutions, 1870-1871, ch. 57, sec. 1, p. 50. Jury service was not considered a concomitant of freedom during the early years of Reconstruction, and state authorities at first would not allow black jurors. John Preston McConnell, Negroes and Their Treatment in Virginia from 1865 to 1867 (Pulaski, Va.: B. D. Smith & Brothers, 1910), pp. 85-86.

excluded by law from service on juries."[11]

The state judiciary sat at the core of the problem. The duty of compiling lists of potential jurors fell to the judges of the county and corporation courts. These judges were overlooking blacks when the time came to draw up their lists. In November, 1878, a routine case of murder in Patrick County became the focal point of a national legal controversy. Counsel for the black defendants, brothers Lee and Burwell Reynolds, petitioned the federal district court to remove the cases from state jurisdiction. They did so on the ground that the Reynolds' civil rights had been violated because the juries that had indicted and tried the brothers were completely white. To the surprise of almost everyone in the state, the district judge agreed.

Judge Alexander Rives[12] granted removal under a federal statute allowing such action to protect the civil rights of citizens which might otherwise be denied in state courts.[13]

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[11]The attempts cited and responses elicited are in Virginia, General Assembly, Senate, Journal, 1872-1873, pp. 169 and 194 (quoted response); Senate, Journal, 1874, pp. 353 and 355-56; House of Delegates, Journal, 1878-1879, p. 303. See, also, Senate, Journal, 1874, p. 395; House of Delegates, Journal, 1872-1873, pp. 76 and 124; House of Delegates, Journal, 1878-1879, pp. 486 and 487.

[12]In a distinguished and colorful career, Rives served in both houses of the General Assembly before the war, sat on the Virginia Supreme Court of Appeals during Reconstruction, and was appointed to the federal bench in 1871. For favorable comment on his integrity, see John M. Schofield, Forty-Six Years in the Army (New York: Century Co., 1879), p. 396. Less flattering to Rives and his own use of black jurymen is the remembrance in "The Albemarle Bar, IX," Virginia Law Register, VII, N.S., (October, 1921), 445-47.

[13]Revised Statutes, XVIII, sec. 641, 114-15 (1873-1874).

The judge said,

> [E]qual protection can only be had in criminal trials through juries composed of the same persons, and constituted in the same mode as well for negroes as for whites. If a mixed jury is allowable by the State law in all cases, for a stronger reason is it right and permissible for trial of a negro. In the latter case a white panel cannot be imputed to chance; it must be taken as the result of design in derogation of his right to a fair jury for his trial.[14]

While the legal establishment in Virginia was fulminating against this "federal usurpation," Rives produced an even greater surprise for the state judiciary. In February, 1879, he charged his grand jury to look into the actions of state judges regarding their statutory duty to prepare jury lists. The twelve whites and six blacks on the jury returned indictments against five county judges. They charged the judges with violating an 1875 law making it a misdemeanor for any official charged with selecting jurors to exclude any citizen on account of race.[15]

In March Rives gave a similar charge to a second grand jury. He assured the jury that he desired not the punishment of the judges but observance of the law. By doing its duty the jury could "arrest future resort to the Federal courts . . . and leave the State courts in the full and free exercise

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[14] Ex parte Burwell Reynolds and Lee Reynolds, 20 F. Cas. 586, (No. 11,720) (C.C.W.D. Va. 1878).

[15] An Act to Protect All Citizens in Their Civil and Legal Rights (Second Civil Rights Act), Statutes at Large, XVIII, Part 3, sec. 4, ch. 114, 336 (1875).

of their appropriate jurisdiction."[16] The jury returned indictments against nine more judges.

In October, 1879, the United States Supreme Court heard arguments in both the Reynolds and the county judge cases, and in March handed down its decision. In Virginia v. Rives[17] the court granted mandamus ordering Rives to return the Reynolds brothers to state custody. Speaking for the majority, Mr. Justice Strong upheld the constitutionality of the statute but ruled that the facts in the case did not warrant removal. Because the law required the petitioner to set forth the facts of denial of equal rights before trial, Strong ruled that the section applied only in cases of legislation or other official discrimination. It did not apply to the actions of private individuals. Because exclusion of blacks was against the laws of Virginia, the proper remedy for the Reynoldses lay in the state courts. Two other findings by Strong determined the effect of the court's decision in practice. He agreed that excluding blacks from a jury violated the rights of a black defendant, but he also declared that such a defendant had no right to a jury specifically including blacks. In addition, the mere existence of an all-white jury was not proof of deliberate discrimination.

In the second case the state was not so successful in its appeal of Rives's actions. Acknowledging that each state

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[16]Cases of the County Judges of Virginia, 30 F. Cas. 1002 (No. 18,259) (C.C.W.D. Va. 1879).

[17]100 U.S. 313 (1879).

had the right to select its own jurors, Strong added that such a right did not allow a state to disregard the limitations imposed by the federal Constitution. Concerning the question of state action, the justice noted that a state was an abstract presence that operated through the actions of its agents. The law applied, therefore, to state agents acting in their official capacities. The county judges were such agents, and the court refused to grant their petition for habeas corpus.[18]

In March and September, 1880, the citizens of Virginia witnessed an unusual sight. Former slaves, sitting on a federal jury, tried state judges for failing to put blacks on their jury lists. Virginia Attorney General James Field, who had argued both cases for the state before the Supreme Court, told Judge Rives that he disagreed with that court's finding, but accepted its decision as conclusive. Because he could no longer challenge the legality of the indictments, he withdrew from the case rather than present the appearance that the state was trying to justify the judges' violation of federal law. The defendants, of course, had already obtained other counsel. Trial testimony showed that Judge John Hill of Buckingham had placed blacks on grand juries and had consented to black jurymen whenever requested to do so by defendants.

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[18] Ex parte Virgina, 100 U.S. 339 (1879). On the constitutional importance of these decisions, see Andrew C. McLaughlin, A Constitutional History of the United States (New York: Appleton-Century-Crofts, Inc., 1963), pp. 689, 724-25; and Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (Cleveland: Meridian Books, World Publishing Company, 1966), pp. 123-28, 133.

Upon the evidence, Rives directed a verdict of not guilty. Testimony for Judge W. B. Simmons of Botetourt was not so favorable, because witnesses could not remember any blacks on his juries. He was acquitted anyway. Finally, in November, at the request of defense counsel and with the consent of the prosecution, Rives ordered a nol pros in the remaining cases.[19]

The attempt by Judge Rives to increase black participation in the jury box was a failure. Strong's opinion in Virginia v. Rives condemned blacks to theoretical equality but actual inferiority. In Virginia, as elsewhere in the South,

> [W]here there is no discrimination in the laws of the State against negroes on the ground of race or color and where the jurors . . . are customarily all white men, discrimination against such negroes, solely on ground of race or color, will not be presumed, but must be substantiated by positive proof . . . . The effect of the operation of this principle is that practically no negroes are chosen for jury service.
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> [I]t is practically impossible for a negro to prove on what ground he has been excluded. Even though the race element entered into the motive for exclusion and formed the dominant element thereof, the discrimination would be legal under the decisions of the Supreme Court.[20]

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[19]For a complete study of these cases, see Samuel N. Pincus, "Negroes on Juries in Post-Reconstruction Virginia: The Rives Cases" (unpublished M.A. thesis, University of Virginia, 1970).

[20]Charles W. Collins, The Fourteenth Amendment and the States (Boston: Little, Brown, and Company, 1912), p. 75 (Emphasis original). For the South generally, see Gilbert Thomas Stephenson, Race Distinctions in American Law (New York: D. Appleton and Company, 1910), pp. 247-72; Charles S. Mangum, Jr., The Legal Status of the Negro (Chapel Hill: University of North Carolina Press, 1940), pp. 308-35.

While all this legal activity raged to the west and north, the Virginia Supreme Court had little to say concerning black jurors. The Lee Reynolds case came before it in 1880, but by that time the United States Supreme Court had already disposed of the jury question, and the Virginia court reversed Reynolds' conviction on the ground of insufficient evidence.[21] Several days after that decision the court discussed black jurymen for the first time. Albert Mitchell, a black man on trial for murder, had asked the trial judge to allow him a racially mixed jury. The judge had overruled the motion. Without commenting further, the court ruled that the trial judge had not erred in his action.[22]

The question next arose in 1886 when the court considered the felony conviction of Gus Lawrence. He had requested that the trial judge put blacks on the venire list. The judge, although recognizing the right of blacks to serve on juries, declared that he knew of none qualified to sit in this particular case. In addition, he said, because the law made no distinction by color, the defendant had no right to demand a jury specifically including blacks. On appeal, defense counsel W. H. Bolling insisted that it was the trial judge who had made a distinction according to race. He charged that it was indicative of the judge's own "race prejudice" that he presumed the unfitness of blacks to sit in the case. Bolling argued,

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[21]Reynolds v. Commonwealth, 74 Va. (33 Gratt.) 834 (1880).

[22]Mitchell v. Commonwealth, 74 Va. (33 Gratt.) 845 (1880).

> Petitioner insists that in the trial of negroes, a court or judge charged with the responsible duty of selecting a jury to try the accused, if properly imbued with that humane principle of the law that declares 'every man innocent until his guilt is established by competent evidence, beyond every rational doubt,' and impressed with a sense of the responsibility resting upon a court to see that 'justice is impartially administered,' should of his own motion, put negroes upon his list. The law makes every elector a competent juror. . . . What right has any court or judge to substitute anything for it? Especially his own knowledge or acquaintance with men. The law makes no difference nor distinction between white men and negroes as jurors, and when those who are clothed with the administration of the laws make the distinction in the way that was done in this case, then the accused . . . is deprived of the great right guaranteed all citizens by the Constitution of the United States, [and] the constitution and bill of rights of the State of Virginia.[23]

The Supreme Court upheld the trial judge's decision.[24] Citing both Virginia v. Rives and the Albert Mitchell case, Judge Hinton wrote that Lawrence was entitled to trial by a jury of his peers, not to trial by a jury "of any particular color or complexion." Bolling had anticipated Hinton's emphasis on trial by peers. He had argued,

> No one fact is better known and established than that the white man does not consider the negro his peer. In no other relation or position of life is this admitted expressly or by implication when the two races are brought in contact than when the white man sits in the jury box and the negro in the prisoner's.[25]

Bolling's prescience and argument were in vain.

The court's only extended consideration of black jurors

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[23]Lawrence v. Commonwealth, Records and Briefs, XXXIII, O.S., 336, 337.

[24]Lawrence v. Commonwealth, 81 Va. 484 (1886).

[25]Records and Briefs, XXXIII, O.S., 337.

came in Coleman v. Commonwealth,[26] in which the defendant thought that he had not too few fellow blacks on the jury but too many. Burton Coleman, convicted in Louisa County Court of raping a black woman, moved to quash the venire facias because all twenty-four men on the list of proposed jurors were black, a fact he believed hardly accidental. The judge refused to grant the motion on the grounds that both the defendant and the alleged victim were black, and that the "venire was composed of intelligent colored men, qualified in the opinion of the court to serve as jurors."

The Supreme Court agreed with the judge's ruling. President Lewis found no proof that the judge had deliberately called only blacks. That the trial judge had explained his refusal to quash by referring to the color of the parties involved was irrelevant. Lewis saw no evidence that the same reason had been in the judge's mind when he first listed the potential jurors. Only a judicial ostrich could honestly have believed that all twenty-four men whose names appeared on the venire list just happened to have been black, but his head-in-the-sand approach conformed to Strong's ruling that an all-white jury in itself was not proof of racial discrimination. Lewis went one step further, however. In a flight of semantic logic he noted, "And if the fact were established that he 'intentionally summoned' colored men, the result would be the same; for every juror may be said to be intentionally summoned,

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[26]84 Va. 1 (1887).

and no reason is perceived why a colored man, any more or less than a white man, may not be summoned to serve as a juror because of his supposed qualifications for such service, and not because of his color."[27] Just what other qualifications the twenty-four men had in common, besides color, Lewis did not say.

Lewis's opinion was not totally inimicable to black interests. It did affirm the ability of qualified blacks to serve on juries. It did not, however, acknowledge a right for them to do so in any particular case. Allowing only black men on the Coleman venire list provided no truer justice than did allowing only whites on the juries which indicted and tried the Reynolds brothers. In each case the defense was forced to accept, against its expressed wishes, jurors chosen specifically on the basis of race. That Albert Mitchell and Gus Lawrence might have welcomed the jury assigned to him was of no comfort to Coleman. Given the United States Supreme Court's interpretation of the Fourteenth Amendment and the Civil Rights Act, the Virginia Supreme Court's approach to blacks on juries was logical and legal in theory but unrealistic and discriminatory in execution.

The Coleman case also illustrates two other significant points about black jurymen. First, despite obstacles, some

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[27] Ibid., at 4 (Emphasis original). The Kentucky Supreme Court, in ruling that a white defendant could not challenge an all-white jury, said, "Surely . . . it cannot be true that one belonging to the race not excluded, but from which the whole jury was required to be selected, can have been prejudiced by the fact that another race was excluded." Commonwealth v. Wright, 79 Ky. 22, 24 (1880).

blacks did serve on Virginia juries during this period. Second, the bare fact of this presence carries little meaning without a closer look at individual situations. In what types of cases did blacks serve? Why, for example, was Coleman unhappy with a black jury? He probably wanted whites because he was charged with the rape of a black woman, a crime that a black jury would have considered far more serious than a white jury would have.[28] It is likely that in the great majority of cases blacks served on petit juries only when both defendant and victim were black, although exceptions to this custom did occur.

Also significant is whether the blacks who sat on juries carried any weight in the determination of verdicts. One dissenter on a petit jury could avert a guilty verdict, but, in a society whose basic tenet of race relations was black subservience, would a single black have been able to withstand the pressure imposed by eleven whites? Had white officials wanted to allow black jury participation but insure its inefficiency, they might have limited the number of blacks to one per jury. In fact, two or more blacks often served at the

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[28]John Dollard, Caste and Class in a Southern Town (New Haven: Yale University Press, 1937), p. 280, writes that black jurors are harder on black defendants in crimes with black victims than are white jurors because blacks realize the danger of violence within their group. Whites think that blacks have their own standards and therefore hold the defendants to a more lenient standard. Given white ideas concerning the morals of black women, this would be especially true in cases of rape. For another instance of a black's being denied a white panel, see W. W. Scott, A History of Orange County Virginia (Richmond: Everett Waddey Co., 1907), p. 164.

same time. In at least one instance a jury consisted of eight blacks and four whites.[29]

Related to the quantity of black jurors in determining their influence on juries was the quality of those who served. With judges compiling the lists of potential jurors, for "troublesome" blacks to reach the jury box would have been difficult. The system empowered fair judges to pick distinguished blacks, but it also allowed other judges to bar independent-minded blacks from serving. When the commonwealth's attorney of Richmond told the black editor of the Planet that a black man had served on a jury convicting another black, the editor replied, "Yes, and what kind of colored men do you put on it?"[30] Despite these factors, the presence of blacks on juries did at times make a difference. In 1886 a black man named Wilson Steptoe, charged with murder, twice had trials end in hung juries, each time the jury being divided along the color line.[31]

Did blacks ever serve on juries trying white defendants?

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[29]In 1886 Mary Banks was tried for arson by such a jury, but the judge dismissed the case for lack of evidence. Richmond State, April 27, 1886. Four blacks served on the jury trying Stephen Coleman for murder in Chesterfield County in 1881, five on the Staunton jury trying John Douglas in 1888. Ibid., December 5, 1881; Augusta County Argus, March 13, 1888. In an 1883 Spottsylvania case a jury of six whites and six blacks found Wash. Ellis guilty of murder, but the judge set aside the verdict as not in accord with the evidence. Richmond Dispatch, April 7, 1883. In one King George County case, the entire jury trying a black man for assaulting a white officer was black. Local whites later cited the incident in an effort to remove the judge who had presided. Senate, Journal, 1883-1884, pp. 330-32.

[30]Richmond Planet, February 9, 1895.

[31]Roanoke Leader, April 17, 1886.

They did so on grand juries, where decisions were not quite so vital and where individual jurors were less important. Petit juries presented a different set of circumstances. The power of a black juror could be immediate and significant. To give a black man such influence over the life of a white man went totally against the grain of Virginia society. In addition to excluding blacks from petit jury service, another solution was available. As long as the number of blacks summoned as veniremen was relatively small, the defense attorney by judicious use of his challenges could insure that only whites sat on the trial jury. When a white man named Jessie H. Stubbs went on trial in Fredericksburg for the murder of a black man, his counsel waived examination of the venire and accepted the first twelve men, thus excluding the several blacks on the panel.[32]

Throughout this period blacks served, sometimes effectively, on Virginia juries. It should be emphasized, however, that such service was rare,[33] and the examples cited did not

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[32]Fredericksburg Free-Lance, July 9, 1889. In another Fredericksburg case, black men sat on the jury at an inquest into the murder of a black man by a white. The verdict was self-defense. [Warsaw] Northern Neck News, July 15, 1881.

[33]For other examples, see Pincus, "Negroes on Juries," pp. 61, 69; John Walter Wayland, A History of Rockingham County, Virginia (Dayton, Va.: Ruebush-Elkins Co., 1912), p. 240; Charles E. Wynes, Race Relations in Virginia, 1870-1902 (Charlottesville: University of Virginia Press, 1961), pp. 140-41; Petersburg Lancet, January 24, 1885; Staunton Post, April 25, 1895; Richmond State, February 4, March 31, 1881, May 21, 1883. On this subject generally, see Stephenson, Race Distinctions, pp. 269-71; James T. Moore, "To Carry Africa into the War: The Readjuster Movement and the Negro," (unpublished M.A. thesis, University of Virginia, 1968), p. 152. Blacks fared better in the federal courts. Richard L. Morton, The Negro in Virginia

represent the usual practice in the state's courts. The very rarity of such cases led newspapers to note their occurrence. Especially when a case involved a black defendant and all-black jury, whites treated the situation more as an entertainment than a serious trial.[34] Given this atmosphere and the rulings of the Virginia Supreme Court, that any blacks sat in the jury box is surprising. Those who did owed their presence solely to the sense of justice, or the whim, of local judges. A black defendant had little hope of seeing other blacks on his jury, and a black who sought jury service as a right of citizenship had no hope at all.

Although black faces were few and far between in the jury box, they appeared frequently on the witness stand. Blacks testified often, freely, and with credibility. After a short period of uncertainty during the early days of Reconstruction, black testimony never again became an issue of controversy.

Colonial officials spent much of the eighteenth century trying to decide how to treat black witnesses, frequently changing the conditions under which blacks could testify. Finally, in 1785, the law became, "No negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes

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Politics, 1865-1902 (Charlottesville: University of Virginia Press, 1919), pp. 36-37; John W. Wayland, Historic Harrisonburg (Staunton, Va.: McClure Printing Company, 1949), p. 41; George Campbell, White and Black: The Outcome of a Visit to the United States (New York: R. Worthington, 1879), p. 291; Augusta County Argus, June 2, 1891.

[34]See the article on the black jury in a Wythe County housebreaking trial--"the grandest burlesque yet." Richmond Dispatch, January 17, 1876.

or mulattoes, or in civil pleas wherein negroes or mulattoes alone shall be parties." And thus the law remained until after the Civil War.[35]

Even after emancipation white Virginians were not ready to accept black testimony in all cases. In February, 1866, the conservative legislature granted black witnesses only partial recognition:

> Be it enacted by the general assembly That colored persons and Indians shall . . . be admitted as witnesses in the following cases:
> 1st. In all civil cases and proceedings, at law or in equity, in which a colored person or an Indian is a party, or may be directly benefitted or injured by the result.
> 2d. In all criminal proceedings, in which a colored person or an Indian is a party, or which arise out of an injury done, attempted or threatened to the person, property or rights of a colored person or Indian, or in which it is alleged . . . that there is probable cause to believe that the offence was committed by a white person, in conjunction or cooperation with a colored person or Indian.
> 3d. The testimony of colored persons shall, in all cases and proceedings, both at law and in equity, be given ore tenus, and not by deposition; and in suits in equity, and in all other cases in which the deposition of the witness would regularly be part of the record, the court shall . . . certify the facts proved by the witness, or the evidence given by him, as far as credited by the court.[36]

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[35]William W. Hening, The Statutes at Large; Being a Collection of All the Laws of Virginia (Richmond, 1809), III, 298 (1705); IV, 126-28 (1723), 326-27 (1732); V, 245 (1744); VI, 105-107 (1748); XII, 182 (1785); Virginia, Code (1803), ch. 103, sec. 5; Code (1849), ch. 176, sec. 19; Code (1860), ch. 176, sec. 20; John Henderson Russell, The Free Negro in Virginia, 1619-1865 (Baltimore: Johns Hopkins Press, 1913), pp. 116-17.

[36]General Assembly, Acts, 1866-1867, ch. 24, pp. 89-90. For similar provisions in other states, see Theodore Brantner Wilson, The Black Codes of the South (University, Ala.: University of Alabama Press, 1965), pp. 66-67, 73, 99-100, 103, 105, 109, 113. See, also, Stephenson, Race Distinctions, pp. 242-47.

The limitations placed on black testimony were legally suspect and politically dangerous. Barely a month after passage of the Virginia statute, Congress overrode Andrew Johnson's veto of the Civil Rights Act. Among its many clauses, the act provided that all citizens, regardless of color, had the same right to give evidence as was enjoyed by white citizens.[37] In addition, Radical Republicans in Congress were watching southern treatment of the freedmen. The Virginia black witnesses law was discriminatory on its face, and there were abuses even of its limited provisions.[38] Finally, in April, 1867, with the Reconstruction Acts hanging over its head, the General Assembly repealed the 1866 law and enacted a new one providing, "That hereafter colored persons shall be competent to testify in this state as if they were white."[39]

The meaning of the law was clear, and its execution was as straightforward as the wording. A black witness posed less threat to white parties than did a black juror, who was in a position to determine directly the outcome of a trial. Witnesses could be believed at the discretion of the judge and jury. Because every white man felt that he "knew" blacks well, it would be a simple process to determine which facts,

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[37]An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication (First Civil Rights Act), Statutes at Large, XIV, sec. 1, 27-29 (1866).

[38]Alrutheus Ambush Taylor, The Negro in the Reconstruction of Virginia (Washington, D.C.: Association for the Study of Negro Life and History, 1926), p. 25.

[39]General Assembly, Acts, 1866-1867, ch. 62, p. 860.

if any, to believe.

How did Virginia courts look upon black witnesses? Philip A. Bruce presented the belief of many educated Virginians of the period. Bruce, whose "knowledge" of southern blacks many contemporaries considered scholarly and informed, wrote:

> [B]ut the blacks when put upon the stand very frequently diverge so much in their declarations as to the same incident, although they may have been witnesses from exactly the same point of view, that it assumes an opposite character as each one unfolds his story. This is due to no conscious design or even unconscious inclination to affirm what is not true; their inaccuracy is a form of self-deception, not an intentional falsehood, unless their self-interests are involved. It is a notable characteristic of the testimony of negroes that it always includes a great number of trivial and irrelevant details. . . . Their narratives, as a rule, are discursive, circuitous, and incoherent.[40]

Liars when their self-interest was at stake, inaccurate at other times, black witnesses had no place in Bruce's courtroom.

Other writers recounting specific instances did not remember black testimony as having been circuitous or incoherent. They emphasized instead the "native shrewdness" and wit of black witnesses. John H. Gwathmey told of a black witness named Nancy, "smart as a whip." "Every time the lawyer tried to prove a point by Nancy she would evade so skillfully and completely that soon the entire courtroom was in a high state of amusement." A Williamsburg black man named Elijah White was prosecuted over the years by five different commonwealth's

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[40] Philip A. Bruce, The Plantation Negro as a Freeman (New York: G. P. Putnam's Sons, 1889), pp. 149-50.

attorneys but never convicted, "more through the wit of Elijah on the witness stand than from the ability of his attorney."[41]

Attorney Beverley B. Munford also remembered black witnesses for their verbal proficiency. He felt, though , that they tried a bit too much to help the side for which they were testifying. He recalled the black witness who was asked if he had given the whole truth, "to which the witness replied, 'Yes sir, and a leetle de rise thereof."[42]

A common theme runs through the generalizations of Bruce and the anecdotes of Gwathmey and Munford. Whether black witnesses were self-deceiving and incoherent or shrewd and calculating, the one quality they did not possess was honesty. To these men, black testimony was to be enjoyed or ignored, but not believed. Yet, thousands of blacks testified in Virginia courts in the last thirty years of the nineteenth century. Was their time on the witness stand wasted, their evidence ignored by white judges and juries, their presence allowed only to satisfy the letter of the law? The opinions of the Supreme Court of Appeals show otherwise. The judges usually identified black witnesses and sometimes disbelieved them, but they never engaged in the indiscriminate racial mockery displayed by many writers of the period.

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[41]John H. Gwathmey, Legends of Virginia Courthouses (Richmond: Dietz Printing Company, 1933), pp. 18, 59-61. For other examples, see ibid., pp. 78-79, 92-94; Gwathmey, Justice John: Tales from the Courtroom of the Virginia Judge (Richmond: Dietz Printing Company, 1934), pp. 26, 114-15.

[42]Beverley B. Munford, Random Recollections (n.p.: Privately Printed, 1905), pp. 97-98.

In identifying black witnesses by color the Supreme Court judges reflected the practice of the clerks who prepared the records in the lower courts. Although there were some exceptions, the usual custom was to note the color of most black, and some white, witnesses. The judges followed the record in any particular case.[43] In the race-conscious society of nineteenth century Virginia, noting a person's color was common practice. Legal officers did nothing unusual by mentioning the color of trial participants. To be sure, the gratuitous differentiation of witnesses, especially the relegation of some to a supposedly inferior class, raised serious questions about the availability of equal rights. Racial identification, nevertheless, may simply have been for information purposes and not an automatic sign of inferior credibility.

The most noticeable aspect of the judicial opinions is the absence of "darky" dialect. Writers such as Gwathmey and Munford were trying to be humorous, and evidently a goodly dose of picturesque black speech guaranteed a mirthful reception. In such stories, black witnesses appear incapable of speaking standard English. The Virginia Reports, however, reflect no such inability. Black witnesses sound much like

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[43]In a few cases the record or briefs identified a witness by color but the judge omitted the information in his opinion: Lyles v. Commonwealth, Records and Briefs, LIV, O. S., 411, 88 Va. 396 (1891); Benton v. Commonwealth, Records and Briefs, LX, O.S., 73, 84, 89 Va. 570 (1893); Mings v. Commonwealth, Records and Briefs, XLIV, O.S., 1041, 1045, 85 Va. 638 (1889); Jones v. Commonwealth, Records and Briefs, XXXI, O.S., 214, 80 Va. 18 (1885).

their white counterparts. When compiling trial records, the clerks usually paraphrased the testimony of each witness, thus precluding the appearance of any dialect. Even testimony quoted verbatim seldom includes dialect. In its few appearances, dialect is present as poor grammar and vocabulary, not mispronunciation.[44] Being one step further removed from the original testimony, the Supreme Court opinions included even more paraphrasing and less quotation. Given the usual purpose for emphasizing black dialect, its use in official opinions would have ridiculed the testimony involved and rendered it useless. Virginia court records at least allowed black witnesses the dignity of seeing their testimony in print without ridicule.

The more substantive question about black witnesses concerns their credibility. How much weight did judges and juries give to their testimony? The prevailing belief among whites about the black man's supposed lack of honesty had some effect, yet counsel in both civil and criminal cases consistently called black witnesses. They would not have done so if such action weakened their cases. Juries found enough verdicts based on black testimony to show that they did attach some credibility to such witnesses.

Black testimony was important enough that parties sometimes made illegal efforts to influence it. James Lyles and

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[44]Trial records with dialect include Hampton v. Hampton, Records and Briefs, LI, O.S., 437; Muscoe v. Commonwealth, Records and Briefs, LII, O.S., 33; Andrews v. Commonwealth, Records and Briefs, CXVI, O.S., 46.

Margaret Lashley, a black couple charged with the murder of her husband, persuaded a black woman named Mary Darkins to lie to a coroner's jury by threatening her with a fate similar to that of the late Mr. Lashley. The threat succeeded at first, but Darkins subsequently became chief prosecution witness.[45] In Davis v. Franke[46] the defendant introduced Samuel Green, black, to testify that the plaintiff had previously contacted Green to induce him to fabricate testimony. In another civil case a black man named George Williams allegedly attempted to buy a witness for the defense. Williams took the stand to deny the charge.[47] Denial would have done little good for Mary Woodson, a black plaintiff, because two of her own witnesses testified that she had offered to pay them for helpful testimony. As Judge Richard H. Cardwell wrote, "The conduct of the appellee in her efforts to secure testimony to sustain this claim . . . is far from being calculated to give credit to her story, or to the testimony adduced in support of it."[48]

In an unusual 1878 case a scheming white detective and his black henchman discovered the dangers of subornation and perjury. Junius E. Jones was a railroad policeman obsessed

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[45]Lyles v. Commonwealth, 88 Va. 396 (1891).

[46]74 Va. (33 Gratt.) 413 (1880).

[47]Myers and Axtell v. Trice, 86 Va. 835 (1890). The recipient of the alleged bribe, Sam White, was probably also black, but the opinion does not give his race.

[48]Hannah v. Woodson, 2 Va. Dec. 442, 450 (1896). The judge below had in fact found for Woodson.

with catching thieves stealing scrap iron from the railroad. With a few drinks and the promise of more pay later he enlisted the aid of Royall Haxall, a black man who was, in the words of one witness, "a great scoundrel who would betray his color." On the pretext of setting a trap for the thieves, they procured some scrap iron, which later appeared in the yard of a black woman named Sallie Cousins. Jones and Haxall swore out a warrant against Cousins for stealing the scrap. Both appeared as witnesses at Cousins' trial, but Haxall "so contradicted himself and broke down as to cause a general laugh." The case against Cousins was dismissed, and instead Haxall was arrested for the larceny. Although Jones paid his bail, Haxall finally confessed the whole plan. He then was charged with perjury, and both he and Jones with conspiracy, in the attept to frame Cousins. A Manchester Hustings Court jury found both guilty of conspiracy.[49]

Numerous cases occurred in which the jury evidently did not believe, or at least seriously discounted, black testimony. This was frequently true in criminal cases when defense witnesses, often friends or relatives, tried to provide the defendant with an alibi, or to corroborate his version of the crime. In Cunningham v. Commonwealth[50] the jury gave no

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[49]Jones v. Commonwealth, 72 Va. (31 Gratt.) 836 (1878). The Supreme Court ruled that the evidence was insufficient to support the verdict and reversed the decision as it applied to Jones. Haxall had not appealed, and the court ruled that his conviction must stand.

[50]88 Va. 37 (1891).

credence to the testimony of Cunningham's sister and brother-in-law in their effort to prove an alibi for him. In Gaines v. Commonwealth[51] the brother and several friends of George Gaines failed to convince the jury that Gaines's killing of a white storekeeper had occurred as the defendant claimed. And, in Gravely v. Commonwealth, the testimony of Ada Eggleton, trying to explain Gravely's possession of stolen goods, led President L. L. Lewis to remark, "Indeed, the evidence of the witness was so improbable throughout, that the jury were warranted in disbelieving it, as they evidently did."[52]

Blacks also testified for the commonwealth in criminal cases, and their evidence was often instrumental in securing convictions. The prosecution in Lewis v. Commonwealth[53] could never have gained a guilty verdict without the testimony of its black witnesses. Similarly, blacks Charles Jones and Lucy Kinney played a major role in the conviction of Horace Venable when they recounted how he had confessed to the crime in their presence.[54] The Michael family of Brunswick County had mixed success in two 1891 trials. Their testimony for the defense in the trial of John Boden failed to avert conviction, but by switching to the prosecution for the trial

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[51]88 Va. 682 (1892).

[52]Gravely v. Commonwealth, 86 Va. 396, 404 (1889).

[53]81 Va. 416 (1886).

[54]Venable v. Commonwealth, 65 Va. (24 Gratt.) 639 (1873). In Howard v. Commonwealth, 81 Va. 488 (1886), the prosecution used the testimony of James Marshall to prove the authenticity of a confession.

of Frank Hite they joined the winning side. Largely on the Michaels' evidence, the jury convicted Hite.[55] The principal commonwealth witness in the successful prosecution of Woods v. Commonwealth[56] was George Early, an alleged accomplice.

Black witnesses also testified against white defendants. When H. A. Davis, on trial for attempted poisoning, stated that on the night of the crime he had been playing cards with a black man named Baker, the commonwealth called the three local blacks named Baker to prove that none of them had been with Davis that night.[57] In Benton v. Commonwealth[58] the jury believed the testimony of Herbert Wilson, Benton's black accomplice, who had already been convicted of the crime. Similarly, black Augustus Byers was a key witness against his alleged white accomplice in Hey v. Commonwealth.[59]

Blacks also testified in many civil cases, with varying degrees of credibility and importance. At times they were minor witnesses whose testimony drew little comment at either the trial or appellate level.[60] In at least two cases the

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[55]Hite v. Commonwealth, 88 Va. 882 (1892). Although the jury believed the Michaels' story the second time, the Supreme Court expressed little faith in the family's truthfulness on the stand and ordered a new trial.

[56]86 Va. 929 (1890).

[57]Davis v. Commonwealth, 99 Va. 868 (1901).

[58]89 Va. 570 (1893).

[59]73 Va. (32 Gratt.) 946 (1879).

[60]Daingerfield v. Thompson, 74 Va. (33 Gratt.) 136 (1880); Piedmont Electric v. Patteson's Adm'x, 84 Va. 747 (1888); Porter v. Porter, 89 Va. 118 (1892); Chappell v. Trent, 90 Va. 849 (1893); Fidelity & Cas. v. Chambers, 93 Va. 138 (1896).

testimony of blacks faced contradiction by that of other witnesses, some white.[61] In the 1879 case of Markells v. Markells,[62] Adeline Siscoe and two white women agreed about Markell's testamentary intentions, but the court ruled that their testimony was not strong enough to influence construction of the will.

The testimony of Wiley Mason proved much stronger. One day in December, 1890, Mason and another black man, seeing that a train was about to run over a man lying on the tracks, ran eighty yards along the track in an unsuccessful attempt to stop the train. When the victim's administrator brought suit against the railroad, the issue of the engineer's possible negligenee depended upon where he had first tried to reverse his engine. On this point the testimony of the engineer and that of Mason conflicted. A verdict for the administrator showed that the jury accepted the black man's version of the accident. The Supreme Court agreed.[63]

Attorneys did not depend upon the internal consistency of the testimony to be the sole determinant of a black witness's credibility. Whenever possible they introduced "respectable witnesses" to establish the character and reputation of the witness. The record in Mings v. Commonwealth[64]

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[61]Southern Ry. v. Bruce's Adm'r, 97 Va. 92 (1899); Eldred v. Eldred, 97 Va. 606 (1899).

[62]73 Va. (32 Gratt.) 544 (1879).

[63]Seaboard & R.R.R. v. Joyner's Adm'r, 92 Va. 354 (1895).

[64]85 Va. 638 (1889).

showed Eldridge Warren, a black prosecution witness, to be a man of veracity and impartiality. The evidence adduced in Throckmorton v. Throckmorton[65] was not so favorable to Amanda Mason, whose "general reputation . . . for truth and veracity is shown to be 'very poor.'" Similarly, in Hampton v. Hampton[66] a black witness "was proved, by respectable citizens of the neighborhood, to be utterly unworthy of belief on oath." According to the opinion of Judge Cardwell in Hannah v. Woodson, "[I]t is proved in the record that Lewis Daingerfield bears a good character for truth and veracity."[67] Cardwell emphasized that Daingerfield had not been called as a witness despite his truthfulness and probable firsthand knowledge of the event in question, and he thought that plaintiff's failure to call him seriously weakened her case.

The reputation of Sallie Ailstock was doubly important in Womack v. Circle.[68] Ailstock reported to William Womack that Margaret and Charles Circle had hired her and another black woman to burn Womack's wheat. Womack took Ailstock to a justice of the peace, for whom she repeated the story under oath, and the justice issued warrants for the arrest of the Circles. When the county court subsequently dismissed the case, the Circles sued Womack for malicious prosecution. Because a major issue was whether probable cause had existed

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[65] 86 Va. 768 (1890).

[66] 87 Va. 148 (1890).

[67] 2 Va. Dec. 449.

[68] 73 Va. (32 Gratt.) 324 (1879).

for the original prosecution, it was important to determine how much faith Womack and the justice should have placed in Ailstock's testimony. According to witnesses of both races the answer was, not much. As one black witness said, "I knew Sallie Ailstock's general reputation for truth in the neighborhood; it is bad; I would not believe her on oath from that reputation."[69] Disbelieving Ailstock's evidence, and implying that Womack should have done the same, the jury found for the plaintiffs. In his opinion reversing the lower court, Judge Anderson remarked that the evidence contained no reason to suspect that Ailstock's testimony before the justice had been untrustworthy. Judge Staples, however, charged that "the only evidence against the accused [Circle] was that of the colored woman, who merely undertook to retail what another colored woman had told her; and upon this illegal and untrustworthy testimony, disgraceful to all the parties concerned, a respectable and virtuous lady is convicted."[70]

In several cases, black testimony was so pivotal, or so controversial, that the Supreme Court judges added their own interpretation and comments. In Todd v. Sykes[71] both sides in a controversy over real estate fraud called black witnesses, and the character of Lou Clark drew disparaging remarks from Judge Cardwell. Still, he was willing to accept the word of

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[69]Womack v. Circle, Records and Briefs, XVIII, O.S., 129, 151.

[70]73 Va. (32 Gratt.) 347.

[71]97 Va. 143 (1889).

other blacks: "True, some of the plaintiff's witnesses are from lower walks of life; some of them colored, but it appears that they were intimates of Mrs. Todd and the defendant, with whom she talked freely with reference to her matters, and that the worst of them compare favorably as to character with many introduced on behalf of defendant."[72]

Such distinction between good and bad black witnesses also marked the opinion of Judge Staples in the black divorce case of Francis v. Francis.[73] Staples believed that the plaintiff's witnesses had spoken "in a manner carrying entire conviction of the truth of the testimony." He did not regard the defendant so favorably: "He does not hesitate to make the most reckless assertions or denials, utterly inconsistent with his previous conduct . . . and the whole tenor of the evidence. His deposition shows that he is either ignorant or regardless of the obligations of an oath."[74]

Davis v. Strange's Executor[75] pitted the testimony of a black woman against that of a white lawyer with surprising results. The brief for appellee contrasted them: "A gentleman of character, grown old in the honorable pursuit of his profession, . . . his whole deposition shows its own conclusive truthfulness. But the eavesdropping colored witness, Polly Davis, was the reliance to make out the theory of fraudulent

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[72] Ibid., at 158.

[73] 72 Va. (31 Gratt.) 283 (1879).

[74] Ibid., at 289.

[75] 86 Va. 793 (1890).

promises."[76] Judge Fauntleroy saw it differently, calling Davis a wholly disinterested and impartial witness. "This statement of Polly Davis," he wrote, "has the verisimilitude of consistency, congruity, and truth."[77]

In two cases the high court judges considered the testimony and character of black witnesses at length. Latham v. Latham[78] was a divorce case in which both sides summoned former house servants to testify on such delicate matters as adultery and family relations. A split court affirmed the lower court's decision for the husband, and Judges Staples and Anderson spent much of their opinions debating the merits of the various witnesses. Staples, writing for the majority, dismissed completely the story of Eliza Patterson, "a young mulatto woman" who testified on behalf of the wife that the husband had invited her to have sexual relations with him. Staples noted that no other evidence existed to support this charge and that the testimony of three witnesses contradicted it.

Judge Anderson admitted that judging the credibility of former servants caused problems, but not enough to invalidate their evidence. He wrote,

> I think the testimony of a witness in her position ought to be received by the courts with great caution, because, in their ignorance and weakness, they are liable to be influenced improperly. The

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[76]Davis v. Strange's Ex'r, Records and Briefs, XLVI, O. S., 496, 529-30 (Emphasis original).

[77]86 Va. 804.

[78]71 Va. (30 Gratt.) 307 (1878).

> court should look to the capacity of the witness, the intrinsic character of the testimony, its reasonableness and consistency with itself and the established facts of the case, and the influences which may have been actually exerted, or which would likely have operated on the witness. In this case the witness does not appear to be deficient in capacity, and her testimony is not unreasonable or inconsistent with itself or the established facts of the record.[79]

Anderson's remarks about improper influence referred to charges made by each side that the other had attempted to tamper with Patterson's testimony. Anderson dismissed the allegations against the wife and believed those against the husband. He accepted Patterson's testimony as being "without prejudice or partiality," and accorded it more credibility than that of the husband's white relatives.

Having little use for the husband's witnesses in general, Anderson was especially scornful of Edmonia Washington, the black former cook, who contradicted on cross-examination something she had previously said during the direct examination. That Washington's story was contrary to the evidence of other witnesses and unlikely under the circumstances did little to enhance her credibility. Referring to "this unscrupulous servant-woman," Anderson warned, "If the character of our wives or sisters or daughters are to be tested by such a witness, there would be no security to the most exalted character."[80] He discarded her testimony as unworthy of belief, and also hinted at collusion regarding her testimony between

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[79] Ibid., at 381.

[80] Ibid., at 368.

Washington and Mr. Latham.

The most extensive discussion of a black witness concerned Fannie Coles in Thomas' Administrator v. Lewis.[81] At stake was an estate of more than $200,000 and at issue was whether Thomas on his death-bed had given to his mulatto child Bettie a gift of most of the estate. The sole witness was Coles, Bettie Lewis' companion and likewise the illegitimate daughter of a black mother and rich white father. Time and again the opposing brief attacked her background, morality, and credibility, and found her testimony itself unbelievable. It pointed out inconsistencies in her facts and hinted darkly of "careful coaching." The brief protested,

> Her origin, her rearing, her condition of life, and her relations to the complainant, are surely not such as entitle her to full credit as a witness. Herself a pariah of mixed blood, reared under the ban of racial ostracism . . ., a dependent parasite and hanger-on of Bettie Lewis . . ., how can her evidence be depended on by this court, acting with its customary caution and judicial prudence, in determining an issue involving over $200,000, where her friend, host, and patron is vitally concerned?[82]

This virulent attack upon Coles challenged her testimony as much on the ground of her relationship with Bettie Lewis as on her race. Even so, that she was legally black was not assailed so much as that she was of mixed blood. Most important, it made the extraordinary argument that the court should

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[81] 89 Va. 1 (1892).

[82] Ibid., at 10-11. The appellant's argument is reprinted in the case report at 3-35. The full briefs are at Thomas' Ad'r v. Lewis, Records and Briefs, LIX, O.S., 140.

dismiss the uncontradicted evidence of the only witness solely on the basis of her alleged character, when that character itself was unimpeached. Counsel realized their weakness in not having produced a witness to impeach Coles, a fact mentioned by the trial judge, and tried to explain it by alleging, "As to general reputation, her testimony shows that her life had probably been spent too remote from respectable people to be either assailed or defended by reliable witnesses."[83] This poor argument was appellant's only hope to avoid in the Supreme Court the thinking shown by the judge of the Richmond Chancery Court. As counsel remarked peevishly, "The court below attributes to her the utmost credit, solely on the general presumption of innocence and truth."[84]

The attempt was unsuccessful. Judge Fauntleroy, writing for the majority, repeatedly emphasized that no witness had challenged either Coles's credibility or her testimony. He referred to her as an educated and intellectual woman whose evidence was "clear, consistent, [and] convincing." Waxing metaphoric, he remarked, "She was subjected to the ordeal of four hundred and thirty-three searching questions and answers, and to a cross-examination, of many days, by a powerful array of practiced, skillful, able, and accomplished counsel for contestants--a fiery furnace of trial and a labyrinth of entanglement, through which she (nor any other human intelligence) could not have passed successfully, without the panoply of

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[83] 89 Va. 15.

[84] Ibid.

conscious truth and the thread of absolute consistency."[85] Fauntleroy professed no understanding of appellant's contention that her testimony should be dismissed:

> Why should this witness not be believed? Why should a court of justice, in the teeth of her clear, consistent, convincing, and uncontradicted testimony, gratuitously brand her as a perjured conspirator . . . without a particle of evidence of either an uncontradicted or credible witness or a circumstance[?] . . . She is wholly unimpeached, in any of the ways known to the law; and her character for truth is as fair as that of any other witness in the cause.[86]

These cases illustrate the position of the black witness in Virginia during the years 1870-1902. No legal or practical conditions impeded his testimony. White jurymen, attorneys, and judges accepted such testimony as normal and probably credible unless proved otherwise. There is no reason to believe that evidence presented by a black was discounted solely because of its source. In direct confrontation a white's version of events probably carried greater weight than a black's, but juries and judges were usually willing to let supporting testimony and circumstances be the determining factors.[87] Challenges to black witnesses came on an

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[85] Ibid., at 45.

[86] Ibid., at 51-52. Even Judge Lacy, whose dissenting opinion reflected his strong disbelief that the gift had taken place, avoided the intemperate and legally suspect condemnation of Coles's testimony asked for by appellant's counsel. He limited himself to the remark, "These circumstances stand not conclusively disproving the evidence of the single witness, but they do not render it any more probable." Ibid., at 84.

[87] An important exception to this attitude lay in the large number of blacks convicted of crimes on the basis of weak or conflicting evidence. Such verdicts, however, may well have been the result of a desire to punish allegedly felonious blacks independent of the actual testimony involved.

individual basis, never on the mere fact of their color. The opinions of the Supreme Court, especially, show scrupulous adherence to this practice. That it was necessary to impeach the character of specific witnesses shows that being black in itself did not discredit them.[88]

During the years 1870-1902 a small but growing number of black attorneys practiced in the courts of Virginia at all levels. From a handful in the 1870's the number grew to thirty-eight by 1890 and fifty-three by 1900.[89] These attorneys differed widely in training, ability, and success, but all provided a much needed black presence in the courtroom.

Throughout most of this period the process of admission to the bar was quite simple. A candidate, possessing a certificate from his local court attesting to his proper age and honest demeanor, submitted himself to examination by any two Supreme or circuit court judges. If satisfied with his knowledge, they issued him a license to practice in all courts

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[88]Within the larger category of race, social class did have some effect on credibility, thus Fauntleroy's comment on Fannie Coles's education and intelligence. Giles B. Jackson, black Richmond attorney, once argued to a jury, "Now I admits dat dey is seben witnesses agin me, while I ain't got but five. But my witnesses is all high-class, respectable colored folks, en de others is just low-down no-count niggers." John H. Gwathmey, Legends of Virginia Lawyers: Anecdotes and Whimsical Yarns of the Old Time Bench and Bar (Richmond: Press of the Dietz Printing Company, Publishers, 1934), p. 80. Whether Jackson or Gwathmey supplied most of the dialect is not known.

[89]U.S., Department of Commerce, Bureau of the Census, Report on Population of the United States at the Eleventh Census: 1890, Part II, p. 618; Occupations at the Twelfth Census, pp. 402-403. There were a total of 1,649 attorneys in the state in 1890 and 2,025 in 1900.

of the state.[90] The state judiciary obviously could reject anyone for any reason. How many black men failed their examinations is impossible to determine, but the number who did qualify indicates that the judges were not completely unreasonable.

Robert P. Brooks, a Richmond native and graduate of the Howard University law course, was the first black lawyer in Richmond. In January, 1876, he was admitted to practice in the Henrico County Court and, upon being introduced by Commonwealth's Attorney E. C. Cabell, in Richmond Hustings Court. Within a month Brooks had successfully defended a black man named Sykes in Richmond Police Court.[91] Shortly thereafter, again on a motion by Cabell, the hustings court admitted William C. Roane, another Richmond native who had been practicing in the District of Columbia. Roane was also the first black attorney admitted to practice in the Supreme Court of Appeals.[92] A third black man, Henry B. Fry, qualified in

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[90]General Assembly, Acts and Joint Resolutions, 1874, ch. 215, p. 249.

[91]Charles L. Perdue, Jr., Thomas E. Barden, and Robert K. Phillips, eds., Weevils in the Wheat: Interviews with Virginia Ex-Slaves (Charlottesville: University Press of Virginia, 1976), pp. 196-97; Richmond Daily Dispatch, January 12, 13, 1876. The article on the Sykes case carried the headline, "Victory for the Colored Champion." Richmond Daily Dispatch, February 8, 1876.

[92]Richmond Daily Dispatch, February 26, 1876. In 1881 Roane, in turn, made the motion to admit D. W. Lewis of Prince William County, who was identified by the Richmond State, December 9, 1881, as the second black man to be so admitted. Evidently Brooks did not apply for admission to the Supreme Court bar. Roane later left practice to accept a position in the post office, and died in 1884 at the age of thirty-three. Petersburg Lancet, August 9, 1884.

Richmond Hustings Court in February, 1876,[93] but he soon left the city. A Richmond directory of 1881 listed as the third black attorney in the city, in addition to Brooks and Roane, Edwin A. Randolph. A graduate of Yale University Law School, Randolph served on the city council and was still practicing in Richmond in November, 1899.[94]

In the two decades following 1880 the number of black attorneys increased, and they spread to several of the state's larger cities. Their legal training varied, though a surprising number were law school graduates. Howard produced Brooks, Roane, James H. Hayes, and George Lewis of Richmond, James A. Fields of Warwick, Alfred W. Harris and Scott Wood of Petersburg, R. G. L. Paige of Norfolk, and R. D. Ruffin of Dinwiddie. O. Arthur Neal of Newport News was a law graduate of Shaw University in North Carolina, and James A. Chiles of Richmond was a member of the Ann Arbor law class of 1889.[95] Others learned their law less formally. Paige and Harris studied privately before going to Howard. William H. Brisby of New Kent County taught himself to read and write, read widely in law, and served forty years as a justice of the peace. William

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[93]Richmond Daily Dispatch, February 17, 1876.

[94]Chataigne's Directory of Richmond, Virginia (Richmond: Baughman Brothers, Publishers and Proprietors, 1881), pp. 450-51; Luther Porter Jackson, Negro Office-Holders in Virginia, 1865-1895 (Norfolk, Va.: Guide Quality Press, 1945), p. 58; Richmond Planet, November 18, 1899.

[95]Jackson, Negro Office-Holders, pp. 16-17 (Fields), 20 (Harris), 32-33 (Paige), 36 (Ruffin), 57 (Hayes); Perdue, Weevils in the Wheat, pp. 196-97 (Lewis); Augusta County Argus, February 23, 1892 (Wood); Richmond Planet, December 13, 1890 (Chiles), February 19, 1898 (Neal).

W. Evans, born a slave, became a "self-made lawyer." Nathaniel J. Lewis and A. L. Toliver read law under the famous black Richmond attorney Giles B. Jackson. Finally, there were those who attended Junius E. Byrd's annual School of Law and Oratory, an 1895 advertisement for which noted that some students had already been admitted to the Virginia bar.[96]

Most black attorneys opened practice in the cities and larger towns, especially Richmond, Norfolk-Portsmouth, the Hampton-Newport News area, and Petersburg. Rural areas and small towns did not generate enough black legal business to support black attorneys, and these men depended almost entirely on black clients. According to Luther P. Jackson, Richard G. L. Paige of Norfolk "enjoyed an extensive law practice among both races,"[97] but he must be regarded as an exception. Even many blacks, for a variety of reasons, preferred to use white attorneys.[98] Thus, most black lawyers conducted a

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[96]Jackson, Negro Office-Holders, pp. 6 (Brisby), 15 (Evans); Richmond Planet, January 5, 1895 (Lewis), July 14, 1900 (Toliver), October 5, 1895 (Byrd's school). R. C. O. Benjamin, the first black lawyer in Staunton, had a fascinating background. Born in the West Indies, he studied at Oxford, became a United States citizen, worked as an editor and teacher, read law, was first admitted to the bar in Tennessee, and practiced law throughout the South. Richmond State, July 25, 1883; William J. Simmons, Men of Mark: Eminent, Progressive, and Rising (Cleveland: G. M. Rewell & Co., 1887), pp. 991-94.

[97]Jackson, Negro Office-Holders, pp. 32-33

[98]White attorneys may have seemed more skillful and certainly carried more influence with white judges and juries. Dollard, Caste and Class, pp. 261-62, suggests another reason. A black in southern society could always use white friends, especially an influential attorney. By giving such a man his legal business, the black encouraged the development of a protective relationship. Even John Mitchell, editor of the Planet

general practice, usually minor criminal cases and odds and ends such as divorce actions. A few handled larger civil causes within the black community. Two black attorneys represented the public. John C. Asbury served as commonwealth's attorney for Norfolk County, and James A. Fields held the same office in Warwick County from 1887 until 1891.[99] Fields was among the most successful lawyers and prosperous men in Warwick, amassing an estate worth more than $25,000.[100]

The existence of black attorneys presented a difficulty to southern whites. Members of the bar were social and political leaders, admired for their knowledge and intelligence. At the least, lawyers were to be treated with respect. Blacks occupied a position at the far end of the social spectrum, supposedly inferior in ability and intelligence. The cardinal rule of southern society was that they be treated as such. Thus, in discussing an important murder trial, a Virginia newspaper listed counsel as "Mr. Frank Gilmer" for the prosecution and "Mr. Randolph Rose . . . and J. H. Hayes, the colored lawyer," for the defense.[101] The reporter could not

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and a militant black in his time, hired George D. Wise, a prominent white attorney, along with black George W. Lewis, to represent him in a minor civil suit. Richmond Planet, November 17, 1900.

[99]Jackson, Negro Office-Holders, pp. 16-17, 65; Chataigne's Virginia Gazetteer and Classified Business Directory, 1890-91 (Richmond: J. H. Chataigne, Publisher, 1890), p. 43.

[100]Fields's brother George was also a successful lawyer in the Newport News area. Richmond Planet, March 17, 1900.

[101]Charlottesville Chronicle, February 14, 1890.

bring himself to identify Hayes, a member of the bar, as "Mr."

White attorneys accepted their black colleagues without undue trauma. In 1886, the Richmond Dispatch declared, "No lawyer objects to practicing law in a court where negro lawyers practice." The Dispatch at the time was defending Virginia against a charge of racism, and so was trying to portray an Eden of racial harmony, but no evidence exists that it was wrong on this point.[102] Once blacks became members of the bar they were accorded its privileges. During proceedings against a white man for criminal assault on a black girl, "lawyer J. Thomas Hewin, [black,] was ordered out of the court room, but upon insisting upon his rights as a member of the bar, was permitted to remain."[103] White and black attorneys worked together with no stigma attached to the white lawyers by their profession or community. Of course, such arrangements, with the whites acting as senior or consulting counsel, did not threaten the social order.

By the mid-1890's many attorneys had become dissatisfied with the old system of two-judge examining panels. Too many incompetent and unethical men were sneaking into the profession. One committee complained, "In the larger cities the presence of the shyster of both colors is becoming more

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[102]Richmond Dispatch, October 13, 1886. As Charles Wynes points out, the small number of black attorneys may have accounted for much of this attitude. Race Relations in Virginia, p. 141.

[103]Richmond Planet, February 16, 1901.

offensive to the profession in each succeeding year."[104] In January, 1896, therefore, the General Assembly passed an act limiting the licensing power to the judges of the Supreme Court of Appeals and leaving to that court the power to determine details of the new system. The rules promulgated by the court required two letters of recommendation from attorneys practicing before the Supreme Court before the candidate could receive the necessary certificate of honest demeanor from his local court. The Supreme Court administered the examination at specific times, in writing. The judges could also require an oral examination of any candidate whose written test left them uncertain.[105]

Because the final decision on all applicants was now in the hands of only five judges, enforcing a consistent standard of quality was easier. It was also easier to exclude those whom the five judges considered unsuitable for the profession, for whatever reasons. Whether the judges consciously excluded blacks, or whether inherent prejudice kept them from making objective decisions despite a desire to be fair, is unknown. Perhaps the quality of black candidates suddenly dropped. Whatever the reason, after the new act became effective in July, 1896, no blacks passed the test for four

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[104] Virginia State Bar Association, Report of the Sixth Annual Meeting (Richmond, 1894), Report of the Committee on Legal Education and Admission to the Bar, p. 50.

[105] General Assembly, Acts and Joint Resolutions, 1895-1896, ch. 41, pp. 49-50; Supreme Court of Appeals, Rules and Regulations for Licensing Persons to Practice Law, 93 Va. v-vi.

years. The Planet complained that many whites had succeeded, but that of "quite a few" black applicants all had failed.[106] The occasion for the Planet's story was the July, 1900, acceptance of A. L. Toliver, who at last had passed. That same month a Boston-educated black man, J. Thomas Hewin, also passed.[107]

Black attorneys practiced mostly in the local courts of the commonwealth. For a small group, however, the sphere of practice extended to a higher tribunal. These were the black attorneys who served as counsel in cases before the Supreme Court of Appeals--Giles B. Jackson and James H. Hayes of Richmond, and the Lynchburg firm of Armistead and Goldsberry.

Giles B. Jackson appears in the pages of John Gwathmey as a dialect-spouting caricature with much "native shrewdness" but little legal knowledge. Jackson, according to Gwathmey, "got most of his legal knowledge from consultation with prominent white lawyers who were always glad to help him on points of law."[108] Jackson may well have put on an entertaining show for his white observers,[109] but he must have been

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[106]Richmond Planet, July 14, 1900.

[107]Augusta County Argus, July 17, 1900.

[108]Gwathmey, Legends of Virginia Lawyers, pp. 75-80; Justice John, pp. 15-16, 136; Legends of Virginia Courthouses, pp. 116-18.

[109]A conservative Republican, he was more popular politically with Richmond's whites than with many of his fellow blacks. Work Projects Administration, Writers' Program, The Negro in Virginia (New York: Sponsored by the Hampton Institute, Hastings House, Publishers, 1940), pp. 297-98; Taylor, Negro in Reconstruction of Virginia, p. 270.

a competent lawyer as well. He instructed A. L. Toliver well enough in the law that Toliver was able to pass the examination given by the Supreme Court.[110] He had a large practice in the Richmond courts and was especially interested in black business. He served as Grand Attorney for the Grand Fountain of the United Order of True Reformers and was on the board of directors of the True Reformers' bank. It was as attorney for the Grand Fountain that he argued before the Supreme Court of Appeals, against Armistead and Goldsberry.

R. P. Armistead and N. T. Goldsberry had faced the True Reformers before. In December, 1896, the heirs of Mary E. Ross hired them to sue the True Reformers for non-payment of an insurance policy. Two white lawyers represented the True Reformers. After a "great legal battle" in which the black attorneys fought hard and showed much legal knowledge, the trial judge gave instructions for the plaintiffs on all points.[111] According to one source, Armistead and Goldsberry held the respect of the white lawyers of Lynchburg, who often visited and associated with them.[112] They also were willing to take up controversial issues. When a white man attacked a black girl and escaped without punishment, the city's blacks hired the firm to investigate the case. The two lawyers successfully

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[110] Richmond Planet, July 14, 1900. Jackson also instructed Nathaniel J. Lewis, who passed an examination under the old two judge system. Ibid., January 5, 1895.

[111] Ibid., December 19, 1896. The qualitative descriptions are those of the Planet.

[112] Ibid.

moved toward further prosecution of the man, but the girl's family, from fear or ignorance, refused to cooperate.[113] And, in 1899, Armistead had the courage, or temerity, to sue the Norfolk and Western Railroad for $10,000 for discrimination. He lost.[114]

Grand Fountain U.O.T.R. v. Wilson[115] was another Lynchburg insurance case brought by Armistead and Goldsberry against the True Reformers, and again the two lawyers had won below, but this time the True Reformers appealed to the Supreme Court. The petition on appeal lists Wise & Wise and Giles B. Jackson as counsel, so it is difficult to determine how much of the work is Jackson's, but the case report names him alone. The "Note" by Armistead and Goldsberry is capably done, citing many cases from various jurisdictions and other authority. The petition and arguments[116] by the black attorneys in this case show that they were, at the least, professionally competent.

While Jackson, Armistead, and Goldsberry argued a civil case in which both parties were black, James H. Hayes appeared before the Supreme Court in a much more difficult position--representing a black man convicted of murdering a white

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[113] Ibid., March 27, 1897.

[114] Augusta County Argus, March 7, 1899; Charlottesville Weekly Chronicle, March 30, 1899. Armistead had been in the company of several white lawyers when the agent ejected him from the waiting room.

[115] 96 Va. 594 (1899).

[116] Grand Fountain v. Wilson, Records and Briefs, LXXXV, O.S., 261-79.

policeman. Hayes, a Howard law graduate and sometime member of the Richmond City Council,[117] achieved a measure of notoriety with his spirited defense of William Muscoe, accused of murdering Charlottesville policeman G. T. Seal in 1888. After a guilty verdict in Charlottesville Corporation Court, Hayes appealed to the Supreme Court, which reversed the decision on the ground of prejudicial instructions to the jury.[118]

Within a month of the court's ruling Hayes was back in Charlottesville for the retrial. It was not an easy time for Hayes. As he later stated in the appeal of this second trial, he was called a liar and son of a bitch by one witness, "simply because this attorney had in the pursuit of his honored calling chosen to place himself in front in defense of the life of one more unfortunate of his own race and color."[119] The local newspaper, according to the black Richmond Planet, "heaped abuse and calumny" upon him, but the Planet itself held a different opinion: "Mr. Hayes fought manfully and skilfully . . . and won for himself a name of which he and his race need be proud."[120]

Despite Hayes's skill the verdict again went against Muscoe. In the new appeal, in which he was joined by white

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[117]Hayes was valedictorian of his class, after first having read law under Robert P. Brooks. Jackson, Negro Office-Holders, p. 57; Petersburg Lancet, June 6, 1885.

[118]Muscoe v. Commonwealth, 86 Va. 443 (1890).

[119]Muscoe v. Commonwealth, in Supreme Court of Appeals, Records and Briefs, LII, O.S., 33, 38.

[120]Richmond Planet, February 22, 1890.

attorney Samuel M. Page, Hayes raised such points as the necessity for change of venue and the validity of the venire facias that had summoned the jury. Unfortunately for Muscoe, the court found no reversible errors.[121] Although of little comfort to Muscoe in the end, Hayes proved that a black attorney could act with skill and courage in defending a fellow black in a hostile environment.

Among trial participants the judge holds a unique position. He serves not only as arbiter but as the very symbol of the law. No black judges served in Virginia during this period, but a surprising number of blacks sat as justices of the peace. With jurisdiction over petty civil and criminal offenses, justices occupied the lowest rung of the judicial ladder. Still, they did have the power to make decisions according to the law, with the authority of the commonwealth behind them. Blacks were able to attain the post of justice for two reasons. First, unlike higher judges who were chosen by the General Assembly, they were elected locally. In addition, their power was limited geographically as well as substantively, so that any black who became a justice probably was in an area where most of the parties coming before him also would be black.[122]

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[121] Muscoe v. Commonwealth, 87 Va. 460 (1891).

[122] According to Philip A. Bruce, whites "warmly opposed" the election of black justices because blacks allegedly were "peculiarly deficient" in the qualities needed to fill these local posts. Plantation Negro as Freeman, p. 70.

Although black justices were not common throughout the state in the period 1870-1902, they were far from rare, especially in certain areas. Luther P. Jackson found seventy-one for the years between 1865 and 1895, and he cautions that his listing is not complete. A brief survey of other sources has disclosed eight others, and a thorough search would probably reveal more.[123] Some of Jackson's group may have served only during Reconstruction, but most no doubt served afterwards. One directory, for example, lists twenty-five blacks holding the office in 1888.[124] The seventy-nine identified justices came from twenty-seven counties in the state, but most were located in a five-county area on the Peninsula and in the southside counties of Surry and Sussex. Twenty-one of the counties had black majorities and five others had

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[123]Jackson, Negro Office-Holders, pp. 12, 13, 30, 59, 61-67. In addition to those justices cited below, other references include Richmond Planet, July 17, 1900 (Cornelius Harris of Richmond and Newport News); Charles H. Corey, A History of the Richmond Theological Seminary, with Reminiscences of Thirty Years' Work among the Colored People of the South (Richmond: J. W. Randolph Company, 1895), p. 152 (Guy Powell of Franklin); John Newton Harman, Sr., ed., Annals of Tazewell County, Virginia (2 vols.; Richmond: W. C. Hill Company, 1925), II, 108-109 (C. D. Shell of Tazewell); Chataigne's Virginia Gazetteer and Classified Business Directory, 1888-89 (Richmond: J. H. Chataigne & Co., Publishers, 1887), pp. 248 (Coleman Robinson of Manchester), 273 (William H. Moore of Petersburg); Chataigne's Gazetteer and Classified Business Directory, 1893-94 (Richmond: J. H. Chataigne, Compiler and Publisher, 1893), p. 466 (R. H. Williams of Elizabeth City County).

[124]Chataigne's Virginia Gazetteer, 1888-89, Chataigne uses the title magistrate.

substantial black communities.[125]

Although the numbers are readily ascertainable, the quality of the black justices is much more difficult to determine. Again, Jackson's piecemeal listing yeilds a few clues but frustrates efforts to make any but the broadest generalizations. A few of the justices were lawyers, but the overwhelming majority were not. Many were leaders of their communities as artisans, merchants, landowners, or professionals. Most of those described by Jackson were solid, respected, and respectable citizens.[126]

Unfortunately, contemporary sources took note of black justices only in negative situations. Lewis Robinson of Henrico County was fined in 1873 for charging illegal fees.[127] Another Richmond area justice, William Howlett of Manchester, held a hearing which, if a newspaper account is correct, was something less than just.[128] The most unflattering picture of black magistrates comes from a Democratic political circular

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[125]A partial survey along political lines yields similar results. Of 25 black justices serving in 1888, 23 came from counties in which the 1886 Republican vote had been at least twice that of the Democrats. All figures, ibid. These tabulations only point out significant trends. Due to the lack of a complete list of justices, they should not be considered definitive statistics.

[126]Sometimes Jackson's descriptions are more mystifying than helpful, such as the cryptic remark that Jesse W. Dungee "made an unusual record as justice of the peace." Negro Office-Holders, p. 13.

[127]Richmond Dispatch, Janury 8, 9, 1873.

[128]Ibid., January 24, 1876.

allegedly describing the situation in Danville in 1883:

> The police court of the town is another scene of perpetual mockery and disgrace. There the most active justice is a young negro named Jones, who first became famous by seducing a girl under promise of marriage. . . . This court . . . is now practically open from morning till night, and nothing but actual observation can convey the least idea of the travesty of its transactions. Malice and partiality, whenever there is a motive, and ignorance, in its absence, are the rules of decision. . . . White men are arrested for the most frivolous of acts by negro policemen . . . and tried, fined and lectured and imprisoned by a negro justice.[129]

Given the political purpose and inflammatory intent of the circular, the accuracy of its description is questionable.[130]

The judges of the Supreme Court referred to their lower-rank colleagues in only one case. Discussing the action taken by a white Botetourt County justice, Judge Anderson remarked, "If many of the justices of the peace in this Commonwealth have been selected from the lower grades of society, without regard to race or qualification, moral or intellectual, it is a most lamentable fact, and a gross reflection upon the character of their electors, and augurs badly for the future of our commonwealth."[131] Surprisingly, Anderson's opinion supported the justice's action.

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[129] Danville Circular, reprinted in U.S., Congress, Senate, Alleged Outrages in Virginia, S. Rept. 579, Reports of Committees of the Senate of the United States, 48th Cong., 1st sess., 1883-1884, VI, vii-viii (Emphasis original).

[130] See the discussion in Wynes, Race Relations in Virginia, pp. 29-31. Danville had four black policemen and several black magistrates at the time. Note that some municipal magistrates carried the title "judge," but their jurisdiction was equivalent to that of justice of the peace.

[131] Womack v. Circle, 73 Va. (32 Gratt.) 324, 339 (1872).

Judge Staples dissented from Anderson's ruling, but he agreed with his colleague's low view of local magistrates:

> What else could be expected in a land where men are being elected to that office without respect to race, color, education or qualification? . . . There are in many counties of Virginia today persons filling the office of justice of the peace, both white and black, utterly and notoriously incapacitated [to hold the position].[132]

The judges were writing in 1872, when the political changes of Reconstruction were still a source of bewilderment and ill feeling among conservative Virginians. In any event, as Judge Anderson noted, the issue was not legal but political, and for the next thirty years Virginia's black citizens continued to elect a small but respectable number of their own to serve as justices of the peace.

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[132] Ibid., at 345-46.

III. RACIAL IDENTITY AND CITIZENSHIP

A society that divided its citizens into two classes, black and white, first had to decide a basic question--which of its citizens belonged in each group. The problem was determining the status of the mulatto, a person having both white and black blood. Although scientists might find it difficult to decide where on the continuum of ancestry a black became a mulatto or a mulatto became white, legislators and judges faced no such uncertainty. Unencumbered by the need for absolute scientific truth, but impelled by the obligation to deal with practical situations, these toilers in the field of legal reality found a convenient solution. They decreed artificial standards and let the bloodlines fall where they might. Some lawmakers decided that a mulatto with any trace of black blood was legally black. Others felt that a mulatto should have at least one black grandparent to so qualify. Whatever the formulation, the goal was to provide a framework that placed each citizen on one side or the other of the black-white line.[1]

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[1] For a survey of state statutes and cases on this question, see Charles S. Mangum, Jr., The Legal Status of the Negro (Chapel Hill: University of North Carolina Press, 1940), pp. 1-17. The discussion in Gilbert T. Stephenson, Race Distinctions in American Law (New York: D. Appleton and Company, 1910), pp. 12-20, is superficial.

Since early colonial times mulattoes with any "commonly" recognizable trace of black blood were considered blacks in Virginia. A 1787 law specifically defined a mulatto as a person with at least one black grandparent. This one-fourth blood formula remained in effect throughout the antebellum period. The state code of 1803 provided, "Every person other than a negro, [who has at least one Negro grandparent,] shall be deemed a mulatto." The 1849 code simplified the section and added a new element: "Every person who has one-fourth or more of negro blood shall be deemed a mulatto, and the word 'negro' in any other section of this, or in any future statute, shall be construed to mean mulatto as well as negro."[2] After the Civil War the General Assembly retained the one-fourth standard but again altered the wording: "Be it enacted . . . that every person having one-fourth or more of negro blood, shall be deemed a colored person."[3]

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[2]James Curtis Ballagh, A History of Slavery in Virginia (Baltimore: Johns Hopkins Press, 1902), pp. 58-61; Virginia, Code (1803), ch. 103, sec. 10, p. 187; Code (1849), ch. 103, sec. 3, p. 458. Note that the one-fourth blood rule provided a specific, easily traceable, and relatively short run genealogical yardstick. "It would appear that the lawmakers of the early national period feared that a declaration to the effect that the possession of any Negro ancestry, however remote, made a man a mulatto might bring embarrassment on certain supposedly white citizens. No doubt, it was also believed that it would be exceedingly difficult, if not impossible, to enforce a more drastic Law." James Hugo Johnston, Race Relations in Virginia and Miscegenation in the South, 1776-1860 (Amherst: University of Massachusetts Press, 1970), pp. 193-94.

[3]Virginia, General Assembly, Acts, 1865-1866, ch. 17, sec. 1, p. 84. This act remained in force for the remainder of the nineteenth century. As one woman lamented, "My mother was half-white; my father was a white man; and I have just enough Negro blood in me to ruin me." William Taylor Thom,

The first case after the war in which the Supreme Court considered the one-fourth rule was McPherson v. Commonwealth[4] in 1877. Rowena McPherson and George Stewart were convicted in Manchester Hustings Court for living in illicit intercourse. The two were married, and the question was whether the marriage was miscegenous and therefore unlawful. Stewart was a white man, but whether McPherson was black or white under the law was a matter of controversy. After a verdict for the state both defendants appealed.

McPherson's father, President Moncure noted, was a white man. Her mother was the child of a white man and a brown-skinned woman who claimed to be half-Indian. Summing up the significance of these facts, Moncure emphasized the strictness of the color formula:

> It thus appears that less than one-fourth of her blood is negro blood. If it be but one drop less, she is not a negro. Besides having certainly derived at least three-fourths of her blood from the white race, she derived a portion of the residue from her great-grandmother, who was a brown skin woman, and, of course, not a full-blooded African or negro, whose skin is black, and never brown. It was said in the family that the said brown skin woman was a half-Indian--a fact which is confirmed by the color of her skin. If any part of the said residue of her blood, however small, was derived from any other source than the African or negro race, then Rowena McPherson cannot be a negro.[5]

"The Negroes of Litwalton, Virginia: A Social Study of the 'Oyster Negro,'" Bulletin of the Department of Labor, VI, No. 37 (1901), 1141.

[4]69 Va. (28 Gratt.) 939 (1877).

[5]Ibid., at 940.

The facts showed that McPherson was not a black woman within the meaning of the law, and thus her marriage to Stewart was legal.

In Jones v. Commonwealth[6] the court considered another miscegenation case involving a question of racial identity. The defendant was Isaac Jones, a black man sentenced to the penitentiary for feloniously marrying Martha A. Gray, a white woman. In his majority opinion for the Supreme Court, Judge Fauntleroy found the evidence concerning the wife's race uncertain. Martha Ann Gray had been raised by white families after being taken from the county poorhouse as a young girl. Her mother was white, and Martha herself passed for white. The mother, however, also had given birth to a mulatto child. The prosecutor stated that he knew the mother's location but had not called her because she was living a respectable life. This was totally unacceptable to Fauntleroy. Jones's guilt rested on the determination of his wife's color, yet the prosecution had failed to call her mother to testify on that subject. Perhaps, suggested the judge, she might have testified that Martha also was mulatto, as was another of her children. The court reversed the conviction.

After retrial and a new conviction, Jones and Gray again appeared before the court.[7] This time, in addition to the controversy over actual color, Jones raised the intriguing question of whether he was a Negro even in theory. He admitted

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[6]79 Va. 213 (1884).

[7]Jones v. Commonwealth, 80 Va. 538 (1885).

being a mulatto, but asserted that under Virginia law a mulatto was not a Negro and not within the purview of the miscegenation statute, which only prohibited marriage between a white and a Negro.

Jones's counsel, George G. Junkin, based his ingenious argument on the series of subtle changes that the wording of the relevant statutes had undergone. He asserted that the early laws of the state had distinguished between Negroes and mulattoes. When the General Assembly passed a miscegenation act in 1847-1848, it mentioned both classes.[8] The Code of 1849, however, introduced a rule of construction that the word "negro" in statutes henceforth was to mean mulattoes as well as Negroes. It was the next word change, in an 1866 act, upon which Junkin constructed his interpretation. That act did away with the former definition of mulatto, plus the rule of construction concerning statutory use of the word "negro." Junkin continued, "It is submitted that all colored persons are not negroes--that the only law that ever existed including mulatto under the term negro has been repealed." He argued that the rule of construction had been added so that statutes concerning Negroes would apply also to mulattoes without the necessity of using both terms. The repeal of the statute enumerating the rule made it again necessary to use both words if a law were to apply to both groups.[9]

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[8]"Any white person who shall intermarry with a negro or mulatto. . . ." General Assembly, Acts, 1847-1848, ch. 8, sec. 4, p. 111.

[9]Junkins's argument is printed at 80 Va. 538-540.

Junkin wisely refused to risk his case solely on this theoretical argument. He also made the more practical objection that the prosecution had failed to show the amount of black blood in Isaac Jones. Even if the court should rule that the word "Negro" did include colored persons, therefore, there was no proof that Jones was a legally defined colored person.

Judge Lacy spent little time pondering Junkin's first argument. He cited McPherson, especially Moncure's pronouncement that if the defendant had but one drop less than one-fourth black blood, she was not a Negro. That statement, and the opinion as a whole, demonstrated that the term "negro" was "identical in signification with 'colored person.'" Junkin's imaginative effort to prove that a colored person was not a Negro failed.

Still remaining was the alternative claim that the state had not proved that Jones was a colored person. The only evidence was that his mother was a yellow woman. That fact indicated to the court that the defendant had some white blood. The possibility existed that his mother was more than one-half white. If his father was a white man, then Jones would not be a black man. It was necessary for the prosecution to prove that Jones had the required amount of black blood, which it had not done. Lacy declared, "[I]f every accused person is to be presumed to be innocent until his guilt is proved, this person must be presumed not to be a negro until he is

proved to be such."[10] The court remanded the case against Jones and Gray for a second time.

Controversies over race were not limited to criminal prosecutions for miscegenation. In the civil case of Scott v. Raub,[11] Sarah Raub asserted that her parents were black, while her uncle Robert Scott argued that they were white. This situation arose because of an 1866 act recognizing the marital relationship of black couples and legitimizing their children.[12] Sarah was the daughter of James Scott, a free black, and Ann Settles, a slave. She claimed to be the legitimate daughter of James and entitled to his estate. Her uncle maintained that both James and Ann had less than one-fourth black blood and therefore were not mulattoes under the one-fourth definition. Because James Scott was legally a white man, the 1866 act did not apply to him, it could not validate his marriage, and it could not legitimize his daughter.

Judge Lacy rejected this reasoning and felt the whole discussion of degree of black blood to be "unprofitable." He

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[10] Ibid., at 544-45.

[11] 88 Va. 721 (1892).

[12] "That where colored persons, before the passage of this act, shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, they shall be deemed husband and wife, . . . and all their children shall be deemed legitimate, . . . And when the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate." General Assembly, Acts, 1865-1866, ch. 18, pp. 85-86. A full discussion of this act may be found in chapter IV.

quoted the Virginia Constitution that the children of a slave or slaves who were recognized by the father as his children were capable of inheriting the father's estate.[13] Because Ann was a slave the proportion of black blood was immaterial. In addition, Lacy continued, the 1860 Code definition of "Negro" applied only to free blacks, not slaves. Ann was a slave and therefore her offspring also were slaves. The one-fourth rule could not be used to deny Sarah's legitimacy.

Even disregarding the mother's slavery, Lacy ruled, the 1866 act applied according to the evidence in the case. The facts showed that "[t]hese parties were both classed as colored persons, socially speaking, associated with colored persons, attended and joined a church established and attended by colored persons generally, and the law should be liberally construed."[14] The act was meant to include all colored persons, regardless of degree of color. Admitting that there was no clear proof about the degree of color of Settles and Scott, Lacy based his opinion on the fact that James Scott had acted as a black man, for example, not voting until blacks were given the franchise, and that Ann Settles always had passed as black and was never questioned about her race.[15]

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[13] "The children of parents, one or both of whom were slaves at and during the period of cohabitation, and who were recognized by the father as his children, and whose mother was recognized by such father as his wife, . . . shall be as capable of inheriting any estate whereof such father may have died seized or possessed, as though they had been born in lawful wedlock." Virginia Constitution (1869), art 11, sec. 9.

[14] 88 Va. 728.

[15] James Hugo Johnston mentions that many mulattoes, although legally white, refused to pass into the white community.

Eubank v. Boughton,[16] decided in 1900, showed the practical difficulty and theoretical absurdity of classifying people by race. George Boughton asserted that he, his wife, and their children were white, and that his son was entitled to attend the white public school. The school trustees declared that certain information convinced them Boughton's son was black. The circuit court ruled that the boy was white and should be admitted to the white school. The Supreme Court reversed on procedural grounds, ruling that the courts did not have jurisdiction in the matter.

President Keith's opinion did not discuss the substantive merits of the case, but the trial record revealed the problems caused by the law's need to place young Boughton in an arbitrary category. Two generations of Boughton kin testified about their race, and a mathematician would have been helpful to keep track of the fractions. To complicate matters further, other witnesses challenged the family's calculations. Tom Prince, the young scholar's grandfather, claimed to be seven-eights white, but his name appeared among the blacks on the voting books. The family's assertion that the other

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They did so for various social reasons, such as family ties. Race Relations in Virginia, pp. 215-16. See also Alfred Holt Stone, Studies in the American Race Problem (New York: Doubleday, Page, & Company, 1908), p. 408: "[T]he pronounced voluntary identification of themselves with Negroes is largely sentimental on the part of most mulattoes who do so." It is impossible to estimate the number of mulattoes in this category. Stone may also be overemphasizing the voluntariness involved, because southern whites often considered anyone with a trace of black blood to be black.

[16] 98 Va. 499 (1900).

grandfather also was seven-eights white brought disagreement from a neighborhood observer. Church membership, voting records, marriage license--all signifying race--found their way into the record. And all simply added to the confusion.[17] The law provided a precise definition of a black person, but the application of that definition in the real world was sometimes far less precise.

Once the legislature had set the definition of black person, there was little leeway within which the Supreme Court could work. Still, these cases illuminate the judges' reading of the one-fourth rule. Especially important was the effort to read the rule as literally as possible, thus easing its consequences. President Moncure's "one drop less" formulation set the pattern, and the court adhered to it rigorously. The importance of the formulation was enhanced because the judges interpreted mulatto skin color as evidence of white blood. A person with two known white grandparents and one brown merited doubts, in his or her favor, about racial identity. Because the brown-skinned grandparent possibly had more than one-half white blood, and because the fourth grandparent might have been white, a presumption existed that the person might be legally white. In criminal cases the court was strict in requiring the state to prove race. In McPherson and both Jones cases the court reversed convictons on the ground that

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[17]Eubank v. Boughton, in Virginia, Supreme Court of Appeals, Records and Briefs, XCVI, O.S., 341, 347-48.

the prosecuton had not sufficiently proved degree of color.[18]

That the judges did not try to preserve white purity by forcing uncertain cases to the black side of the line does not mean that the court looked benignly upon the results of miscegenation, or that it wished to gather many brown sheep into the white flock. The court's reading and application of the statutes were simply strict and accurate renditions. Yet the judges must have realized that their rulings provided an opportunity for some mulattoes to cross that most important line of demarcation. The judges may have been unhappy with the results but, if so, they did not allow such feeling to alter their scrupulously exact reading of the law.

Another aspect of the racial identity cases was the reliance that the court placed on skin color. The judges were quite definite about their knowledge of racial shading, as in Moncure's statement regarding the "full-blooded African or negro, whose skin is black, and never brown." One example of this questionable form of judicial notice occurred in an 1871 murder case, Smith v. Commonwealth.[19] Newton Smith was convicted of first degree murder in the death of the infant daughter of a white woman named Harriet Ferguson. Smith, a mulatto, was the acknowledged father of the baby. Ferguson

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[18]In contrast, the Alabama Supreme Court held that, in a prosecution for miscegenation, the state could present the black party to the jury, "in order that they might determine by inspection whether he was a negro." Linton v. State, 88 Ala. 216, 218 (1889).

[19]62 Va. (21 Gratt.) 809 (1871).

delivered the infant to Smith, who said his mother would raise it. One week later the body of a female mulatto child was found drowned in a pond. Sentenced to hang, Smith appealed to the Supreme Court. One important issue was whether the body was actually that of Harriet Ferguson's child.

Judge Christian, speaking for the court, agreed that a new trial should be granted. The state had failed to establish the corpus delicti. Despite obvious assumptions and Smith's inability to produce his child, no evidence existed that the baby entrusted to him was dead. This argument depended on the fact that the body in the pond was not identified as the Ferguson baby. Several facts tended to show that the two babies were not identical. There was a discrepancy between the clothing found on the body and that which the Ferguson baby had been wearing when last seen alive. Moreover, Christian wrote,

> [t]he child delivered to the prisoner is described as a bright mulatto. It must have been at three days old almost white, the father being a mulatto and the mother white. So young a child, of such parents, would hardly be described as a mulatto. Yet this is the description given of the child found in the pond near the river--not a bright mulatto, as the child born of Harriet Ferguson was, and must have been, but simply a mulatto.[20]

Racial identity was not so much a legal as a social problem, and the Supreme Court avoided discussion of extra-legal consequences. Perhaps it was because popular social and scientific ideas were so imprecise that the court hewed strictly

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[20] Ibid., at 815 (Emphasis original).

to the letter of the law. The judges evidently shared the commonly held notions regarding mulatto skin color. Although seemingly superficial, skin color did furnish ground for reversal of several criminal convictions. At the least, mulatto Virginians coming before the Supreme Court for determination of their legal racial identity could expect a fair and objective decision. Such an opportunity, on so sensitive a subject at that time and place, was significant.

II

Emancipation did not erase the memory of slavery. For the rest of the nineteenth century remnants of the peculiar institution rattled around the Virginia court system. The Supreme Court heard numerous contract and estate cases dating from before emancipation, when blacks were more likely to have been part of the property than among the parties. As late as 1901 a controversy between the executor and heirs of a long-deceased master stood as a reminder to the court that black Virginians had once been chattel slaves.[21] The judges seldom discussed slavery, but in one opinion Judge Staples showed that unfavorable references to the past did not meet his favor:

> We are now told that public policy requires the courts to annul any and every contract entered into during [the war], based upon the sale of property thus recognized and sanctioned for

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[21]Scott v. Porter, 99 Va. 553 (1901).

> generations by the sentiments, the laws and the tastes of the people of Virginia. The proposition involves . . . an admission derogatory to our whole previous history. . . . [B]ecause it has been destroyed by paramount force, we are expected not only to give it up without a murmer, but to surrender all our previous convictions, to yield our faith and consciences to the keeping of others, and henceforth to believe that slavery was wrong in itself--a curse upon our country--a moral leprosy which corrupted the life-blood of the nation. The proposition now enhanced means this, or it amounts to nothing.[22]

The freedmen's new citizenship, shadowed by memories of the past, did not end all legal distinctions between the races even in the present. By statute and court decision, the black citizen was not quite the same as the white citizen. White authorities declared that, although the law sometimes made distinctions, it never discriminated. Blacks could not marry whites, but neither could whites marry blacks. The law thus treated both races equally. This argument, which lived a suprisingly long and full life, was specious.[23] Even if one granted its theoretical validity, the actual result was to remind both races that blacks were different under the law. Such acknowledgement was especially damaging because it reinforced, instead of mitigating, already current beliefs about the black's social inferiority.

Some distinctions, such as restrictions on black and

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[22]Henderlite v. Thurman, 63 Va. (22 Gratt.) 466, 477 (1872).

[23]See Stephenson, Race Distinctions, pp. 2-4, 348-62, on the difference between distinction and discrimination. Although arguing that distinctions were neither illegal nor harmful, Stephenson acknowledged that they could easily become discriminatory in practice.

interracial gambling, were vestiges of the old slave system.[24] A law against conspiracy to incite either the white or black community to "insurrection" against the other was a legacy of the fears of Reconstruction.[25] Other laws served more contemporary functions. Prohibitions against racial intermarriage reflected the fear of miscegenation that increased after emancipation.[26] Segregation in the public schools was a forerunner of the extensive separation of the races in public and private facilities that would occur after the turn of the century.[27]

A number of cases heard by the Supreme Court referred to the special status of black citizens that was required or allowed by the law. Most concerned either the prohibitions against miscegenation or the legal reconstruction of black families necessitated by the absence of formal marital relations under slavery.[28] One case dealt with a building

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[24]Virginia, Code (1873), ch. 194, sec. 6, p. 1213. Even among those antebellum practices supposedly ended after emancipation, some apparently survived. The Code of 1860, for example, decreed that, "A notice . . . may be served . . . by delivering such copy . . . to . . . any white person found there." Ch. 167, sec. 1, p. 703. The 1873 Code, ch. 163, sec. 1, p. 1079, called for the same formulation with the word "white" omitted. Yet in the late 1880's deputies apparently were including "white" in their returns of service. Stotz v. Collins, 83 Va. 423, 424 (1887); Finney v. Clark, 86 Va. 354, 355 (1889).

[25]Virginia, Code (1873), ch. 186, sec. 4, p. 1188.

[26]See chapter IV.

[27]Virginia, Code (1873), ch. 78, sec. 58, p. 694.

[28]See chapter IV.

association whose charter prohibited loans to blacks.[29] Another dealt with a dispute over the race of a student refused admission to the white public schools.[30] In all these cases race distinction went unquestioned. No one debated the legality or justness of such distinction.

Ironically, Kinnaird v. Miller's ex'or,[31] the only case in which the court confronted the issue of discrimination, included no black parties. Samuel Miller died in 1869, leaving a large estate. His will, made in 1859, left a substantial bequest to establish a school for white children in Albemarle County. The will received challenges from several parties on various grounds, but before the Supreme Court only one issue remained. Miller's heirs-at-law contested the validity of the bequest on the ground that it violated the Fourteenth Amendment. The question before the court was whether the section of the state code governing gifts for educational purposes abridged the privileges and immunities of black citizens. The Code of 1860, in effect at Miller's death, referred to the "education of white persons" within the state.[32]

The Supreme Court did not think that the Fourteenth Amendment invalidated Miller's bequest. President Moncure

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[29]Chesapeake Classified Bldg. Ass'n v. Coleman, 94 Va. 433 (1897).

[30]Eubank v. Boughton, 98 Va. 499 (1900). See a similar case in Augusta County Argus, March 9, 1897.

[31]66 Va. (25 Gratt.) 107 (1874).

[32]Virginia, Code (1860), ch. 80, sec. 2, p. 419.

pointed out that both the law and the will had been drafted before the ratification of the amendment, and he thought that they remained valid even after the amendment had taken effect. He wrote,

> What privilege or immunity . . . does that law or its continued enforcement abridge? How can it injure any colored citizens . . . in the state, that a gift for the education of white persons only is authorized by law to be made and enforced? Have such citizens any privilege or immunity in regard to gifts, &c., for their education? . . . [I]f the legislature deem it proper to authorize a gift for the education of white persons only to be made and enforced, how can it benefit colored persons to have such a law declared to be void?[33]

In fact, in the interval between Miller's death and the court decision, the General Assembly had rectified the situation by enacting similar provisions regarding educational gifts to black persons.[34] Such legislative action, not judicial intrusion, was the proper solution. Moncure also noted that all parties to the suit were white and in no danger of having their privileges and immunities abridged. Under these conditions, the court would not "go out of its way to declare a law to be unconstitutional."

The Kinnaird opinion demonstrated the court's uncomprehending and artless approach to the new issue of black civil rights. The judges were not anxious to uphold a challenge, to a law no longer offensive, from a party less interested in civil rights than in recovering a sizable estate. Still,

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[33]66 Va. (25 Gratt.) 118-19.

[34]General Assembly, Acts and Joint Resolutions, 1872-1873, ch. 265, p. 243.

Moncure argued that the new legislation, though welcome, was irrelevant, and that the old provisions were constitutional as they stood. But the Code of 1860 section was absolutely discriminatory. It denied to blacks the opportunity to enjoy, in any comparable way, a right given to whites. Moncure's failure to see this as an abridgement of the black citizen's privileges and immunities was a strikingly insensitive reaction to the social and legal challenges of a new day.

IV. FAMILY RELATIONS

One important effect of the black Virginian's new citizenship was that the law regulated, more strongly than before, his domestic relations. Before the war the nature of sexual activity among blacks was of little concern to the authorities. Relations between blacks and whites evoked greater interest but little more official response, especially when the man was white and the woman his slave. After emancipation the law became more involved in both these areas. Because blacks were now full citizens with all requisite rights and duties, they were newly concerned with such matters as inheritance and legitimacy. Voluntary black-white relations posed an even greater social problem. The legislature took the lead in dealing with questions of black family relations, but the courts interpreted and applied the law.

Legal marriage was not a novel situation for all Virginia blacks. During the antebellum period free blacks married among themselves according to the requirements of law. It was also common in the nineteenth century for free blacks to marry slaves, sometimes to avoid the requirement that manumitted slaves leave the state within one year. These marriages, and marriages between two slaves, often included such legal forms as a minister and formal ceremony. A slave had no legal capacity to enter into any contract, including

marriage. Masters often acceded to such unions, however, and all parties sought to invest the ceremony with some moral force.[1] Upon emancipation the legal validity of slave marriages became a matter of concern.

Although no such cases reached the Supreme Court of Virginia, the Special Court of Appeals dealt with the question in Colston v. Quander.[2] In 1842 Lewis Quander a free black, married Susan Pierson, a slave. The marriage took place at the house of Susan's master and was conducted by a white minister. Afterwards, the couple lived together and had several children. Quander recognized Susan as his wife until his death in May, 1864. He died intestate and his wife ultimately took possession of his land. John H. Colston, Lewis Quander's half-brother, brought an action of ejectment to recover the land. The Circuit Court of Fairfax County found for the defendant, and Colston appealed on the ground that the marriage was invalid.

Judge G. A. Wingfield agreed that slaves could not legally marry. He continued, "Yet they undoubtedly had the mental capacity to do a moral act, and might, and certainly did marry, with the consent of their masters, and their relation of husband and wife was recognized and respected, and in

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[1]The definitive work on slave marriage and family relations is Herbert G. Gutman, The Black Family in Slavery and Freedom, 1750-1925 (New York: Pantheon Books, 1976). See also John Henderson Russell, The Free Negro in Virginia, 1619-1865 (Baltimore: Johns Hopkins Press, 1913), pp. 131-132, 135-36.

[2]1 Virginia Law Journal 689 (1877).

Virginia so far from there being any policy prohibiting such marriage, . . . they were countenanced and encouraged by the white people. . . ."[3] Lewis and Susan Quander had been married by an ordained minister with the consent of her master. The question was whether the subsequent emancipation and recognition had legalized the marriage. Wingfield noted that in other situations where one party lacked the capacity to marry, as in cases of lunacy or infancy, the marriage was also void. But ratification after the proper capacity had been obtained was sufficient to legalize the union without need to remarry. If lunatics and infants could marry with subsequent ratification, why could not Susan Quander? The judge found no reason for any distinction. He said, "So in the case of the slave, the former void marriage is made good by ratification and assent after having attained the legal capacity, by being made free."[4]

The problem was to determine exactly when Susan Quander became free. The Quanders lived in the section of Virginia controlled by the Federal army after 1861 and under the civil jurisdiction of the Alexandria government. The Alexandria Constitution of April 7, 1864, abolished slavery in the areas under its authority, and therefore Susan Quander became free at that time. For the next month, until his death, she and Lewis cohabited as, and acknowledged each other to be, man and wife. This acknowledgement ratified the previous marriage

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[3] Ibid., at 691.

[4] Ibid., at 693.

ceremony. Thus, Wingfield concluded, the Quanders had been legally husband and wife from the date of her emancipation in April, 1864.

Wingfield's opinion drew a qualified dissent from the editor of The Virginia Law Journal.[5] The editor thought the presence of the minister irrelevant, and believed that the couple needed to be joined merely in the manner customary to their time and class. Although there were many mock marriages in antebellum Virginia, usually the slave couple simply began to cohabit without ceremony.[6] The editor felt that a major factor in determining the validity of a slave marriage ought to be the motives and character of the cohabitation. He continued, "It seems to the writer that this ought to be a question of fact in each case; subject, however, to this principle, that the law favors marriage, and the circumstances being ambiguous, such an interpretation ought to be put upon them as will consist with a moral rather than an illicit connection between the parties."[7]

Some aspects of Wingfield's opinion nevertheless troubled the editor. He was especially uncertain whether the theory of

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[5]"Slave Marriages," The Virginia Law Journal, I (November, 1877), 641-652.

[6]Ceremonies ranged from the customary Christian service to a short pronouncement by the master or another slave. Charles L. Perdue, Jr., Thomas E. Barden, and Robert K. Phillips, eds., Weevils in the Wheat: Interviews with Virginia Ex-Slaves (Charlottesville: University Press of Virginia, 1976). On the significance of marriage rituals, see Gutman, Black Family, pp. 269-84.

[7]"Slave Marriages," p. 650.

subsequent ratification could be used in Virginia when the original ceremony did not meet all other legal requirements. In Colston, not only had Susan Quander lacked the legal capacity to marry, but the marriage itself had not met all the requirements of law, e.g., an official license. He believed that such a union would be valid in a jurisdiction where consent of the parties was sufficient for marriage, but that in Virginia all legal forms first had to be observed. Subsequent ratification might compensate for an original lack of capacity, but it could not overcome a failure to fulfill other requirements.

To avoid such problems, southern legislatures early attempted to settle the question of slave marriages by statute. Three methods were used to legalize such unions. Some states required that the former slaves remarry. A second group did not call for a new ceremony but insisted that the couples appear before officials so that notice could be taken. The final method was to declare the marriages legal by statute.[8] The Virginia General Assembly used the third approach. On February 27, 1866, it passed an act providing,

> That where colored persons, before the passage of this act, shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, they shall be deemed husband and wife, and

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[8]Gilbert Thomas Stephenson, Race Distinctions in American Law (New York: D. Appleton and Company, 1910), pp. 67-74. Charles S. Mangum, Jr., The Legal Status of the Negro (Chapel Hill: University of North Carolina Press, 1940), pp. 251-52.

> be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner as if they had been duly married by law; and all their children shall be deemed legitimate, whether born before or after the passage of this act. And when the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate.[9]

According to Freedmen's Bureau officials, "[T]he freed people . . . joyfully availed themselves of [the act's] provisions to sanction their union, and the pride and security felt by them in this privilege . . . tended to their moral elevation."[10]

Ironically, the first case involving the statute that reached the Supreme Court, in 1879, concerned a couple already separated and quarreling over alimony.[11] In 1852 Robert

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[9]Virginia, General Assembly, Acts, 1865-1866, ch. 18, pp. 85-86. In a similar vein see Virginia, Constitution (1869), art. 11, sec. 9: "The children of parents, one or both of whom were slaves at and during the period of cohabitation, and who were recognized by the father as his children, and whose mother was recognized by such father as his wife, and was cohabited with as such, shall be as capable of inheriting any estate whereof such father may have died seized or possessed, as though they had been born in lawful wedlock."

[10]U.S., Congress, Senate, Letter of the Secretary of War Communicating . . . Reports of the Assistant Commissioners of Freedmen, and a Synopsis of Laws Respecting Persons of Color in the Late Slave States, Ex. Doc. 6, 39th Cong., 2d sess., p. 162. Gutman, Black Family, pp. 412-17, cites statistics to show the strong desire of former slaves to legalize their marriages. Immediately following the war, Bureau and military officials conducted many black marriages and also certified as married older couples who had been living as such. The state later accepted these marriages and assumed control of the records. Letter of the Secretary of War, p. 163; John Preston McConnell, Negroes and Their Treatment in Virginia from 1865 to 1867 (Pulaski, Va.: B.D. Smith & Brothers, 1910), pp. 103-05; General Assembly, Acts, 1866-1867, ch. 127, pp. 951-52.

[11]Francis v. Francis, 72 Va. (31 Gratt.) 283 (1879).

Francis, a free black man, proposed to a free black woman that she live with him as his wife. The woman, Emma Jane, moved into his house, took his name, and bore him ten children. She later said that during this period their relationship was that of husband and wife, and that he agreed to such a relationship. In November, 1868, he left her and two surviving children, and later married another woman. In 1872 Emma Jane Francis brought a suit in equity charging that his desertion had been without cause. She asked for separate maintenance for herself and the children. Robert Francis denied that he had consented to live in the relationship of husband and wife, but the Corporation Court of Norfolk ruled that the couple had agreed to cohabit as such, and were doing so at the passage of the act of February, 1886. The court ordered $25 per month alimony. Francis filed an appeal which was continued by his estate after his death.

The appellants contended that the 1866 act applied only to slaves emancipated by the war, a class originally incapable of legal marriage. In this case both parties were free blacks who could have married legally before the war. Speaking for the Supreme Court, Judge Staples agreed that the General Assembly probably had been thinking of the emancipated slaves when it passed the act, but he could not say that the legislators had intended the act to refer to that group alone. The statute specified "colored persons," with no restrictions. A broad interpretation of the law was best. Staples wrote, "This very case . . . vindicates the wisdom and propriety of extending

this provision to all classes of colored persons."[12]

The couple need not have made an explicit agreement of marriage to qualify within the meaning of the statute. A court could infer an understanding from the actions of the parties. In the present case the evidence was conflicting, but the circumstances showed at least an implied understanding of marriage. The couple lived together for sixteen years and were the parents of ten children. Robert Francis spoke of Emma Jane as his wife and "in every respect he conducted himself as if he had been the husband by the rites of matrimony duly solemnized." His actions for more than fifteen years contradicted his denial that the relationship had been a marriage.

The court also interpreted the 1866 marriage act in the 1884 case of Fitchett v. Smith's Adm'r.[13] Both parties to the alleged marriage were dead before the courts had to decide what the legal nature of their relationship had been. In the latter part of 1863 Seth Scott left his home in Northampton County to enlist in the United States Army, leaving behind his pregnant sweetheart Leah Jacob. Several months later Leah, a former slave, gave birth to their child Ibby Jane Smith. Scott never returned to see his daughter but died while in the army in May, 1865. Leah Jacob died soon thereafter, and Ibby Jane herself lived only sixteen years. The young girl died intestate, leaving $1,200 that the federal

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[12] Ibid., at 287.

[13] 78 Va. 524 (1884).

government had paid her for her father's service.

Leah Jacob's sisters brought suit to determine the disposition of the estate. They declared that Ibby Jane was illegitimate and that they, as the maternal kin, were entitled to the entire amount. Scott's relatives asserted that the 1866 act had made the girl legitimate, and that as legal paternal kin they should receive half the estate. The circuit court ruled that the act legitimized Ibby Jane, and ordered that each side of the family receive half the estate. Plaintiffs appealed.

Judge Fauntleroy thought that the evidence showed the case to be within the letter and spirit of the statute. There was sufficient proof that the parents had cohabited as husband and wife, and that they, and the community in general, had so regarded their relationship. While in the army Scott had expressed concern for mother and child and declared his plans to marry Leah upon his return. The facts showed the required cohabitation, agreement by the couple, and recongition of the child by the father to qualify Ibby Jane as legitimate.

Smith v. Perry, Adm'r,[14] decided in 1885, also determined the legitimacy of a deceased child. Allen Smith and Mary Bell were former slaves who were living as husband and wife at the passage of the February, 1866, act. Prior to that time Mary Bell had given birth to a boy, Edmond, who lived with them and was recognized as a son by both parents. After his death the maternal relatives asserted that Edmond was a bastard,

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[14] 80 Va. 563 (1885).

the son of Randall Austin, and that they were entitled to his entire estate. Allen Smith claimed to be the legal father and sole heir. The Circuit Court of Wythe County ruled that Edmond was a bastard and awarded his estate to the maternal kin.

On appeal, Smith reasserted that he and Mary Bell had expressly agreed to live as husband and wife. They acknowledged the boy as their son, and he lived in Smith's house and called him father. The appellees argued that the 1866 act was intended to validate de facto black marriages and to legitimize children born before the act but after the parents had taken "upon themselves the form of marriage." The law could not legitimize children born before the parents had undergone some type of formal ceremony. In addition, the act could not supersede Virginia statutes regarding bastardy, which now applied to both races.

The interpretation of the 1866 act given by counsel for the appellees was obviously incorrect. Nothing in the wording of the statute required any sort of ceremony. The only condition explicitly called for was agreement between the parties, and an informed reading of the text leads to the conclusion that the legislature consciously avoided more specific requirements. Judge Lacy was not swayed by counsel's argument. He wrote,

> Under the act . . . children of the colored persons coming within its provisions are deemed by law legitimate, whether born before or after the passage of the act. . . . The act is made to apply to such persons . . . from reasons of public policy too obvious to need review at this day, the status

> of the slave having been changed to that of citizen by the law, recognizing the logic of events, the marriage relation as existing among those people was respected and brought within the sanction of the law; and the act . . . making the issue of such marriage legitimate, in its beneficence, reached back into the past and legitimatized their children, born before the passage of the act, and thus before the marriage was legal.[15]

Lacy felt that the act should be construed liberally to extend its effects. To require a formal ceremony, or to apply the law to only some of the children, would "convert the law into a hollow mockery so far as the great body of the colored people are concerned."

Lacy agreed that the laws concerning bastards applied to both races, but he found nothing in the case to show that Edmond was legally a bastard. The 1866 act validated the couple's marriage from the moment of its inception. Edmond Smith was born during the marriage of his parents, and Allen Smith recognized him as a son. By Virginia law, a bastard was a child born out of wedlock or born in wedlock when procreation by the husband was impossible. There was no assertion that Allen Smith was incapable of procreation at the relevant time. The court reversed the lower court decree designating Edmond Smith a bastard and ordered that Allen Smith receive the estate.

The court's final review of black marriages came in 1892 in Scott v. Raub.[16] James Scott, a free black man, hired a slave named Ann Settles as a domestic servant in 1861. In the words of the court, "soon after cohabitation was had," and in

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[15] Ibid., at 567.

[16] 88 Va. 721 (1892).

1862 Ann gave birth to a daughter, Sarah. The mother died two years later. Scott reared the girl in his house and acknowledged her as his daughter. Upon Scott's death in 1888, Sarah (now Sarah Raub) filed for partition of the land that her father had held jointly with his brother. Her uncle, arguing that the girl was illegitimate, denied that she had any right to the land. The Albemarle County Circuit Court ruled for Raub on the ground that the parental relationship had satisfied the requirements of the 1866 act and that Scott had recongized Sarah as his daughter. Robert Scott appealed on the ground that both his brother and sister-in-law had less than one-fourth black blood and therefore were not colored persons within the meaning of the statute.

The Supreme Court, again speaking through Lacy, rejected Scott's argument. The court thought that the facts did place the parents under the act of 1866, and also under Article Eleven of the state constitution legitimizing children born during the slavery of their parents.[17] Lacy stressed that Ann Settles had been a slave and thus was included under the constitutional provision regardless of the composition of her blood. Lacy also continued to construe the term "colored persons" in the 1866 act liberally. The act was intended to apply to all classes of blacks, and the parents here were "classed as colored persons, socially speaking." They associated with blacks and followed the laws applicable to them. The statute applied to colored persons "irrespective of the

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[17]See note 9, above.

degree of their color."

Lacy's liberal construction of the term "colored persons" was obviously correct. To have denied Sarah Raub her interest would have defeated the spirit of the act. Lacy's finding that James was a black man also avoided the problem that would have arisen had he found James to have been legally white. Because the constitution required only that one of the parents have been a slave, a master who had cohabited with his slave might have tried to legitimize his half-black children by recognizing them after the adoption of the constitution. The court probably would have rejected such an interpretation as causing serious social problems and as being against the intent of the act.[18]

These cases indicated the court's willingness, even eagerness, to extend the constitutional and statutory mandate of

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[18]This question did arise in other states. The Texas Constitution (1869), art. 12, sec. 27, was more specific than the Virginia provision, requiring that "both of [the couple], by the law of bondage, [have been] precluded from the rights of matrimony." Despite this, the Texas Supreme Court held in Honey v. Clark, 37 Texas 686 (1873), that a black-white cohabitation was validated by the constitution. The court later specifically overruled the case, however. Clements v. Crawford, 42 Texas 601 (1875). Kinard v. State, 57 Miss. 132 (1879), held that an interracial cohabitation was not validated by the relevant constitutional provision, despite the latter's wording that, "All persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held . . . as married." Mississippi, Constitution (1869), art. 12, sec. 22. The Mississippi court looked to the obvious purpose of the provision and ignored the actual wording. In Florida and Louisiana the validating statutes included prior black-white marriges. Mangum, Legal Status, p. 252.

legitimacy to as many black families as possible. This eagerness was due in part to the prevailing attitude about the sexual proclivities of blacks. Many whites believed that blacks felt no moral restraint on their actions. A natural "sexual animal" no longer hampered by the discipline of slavery, the black man henceforth would descend into a morass of licentiousness and illegitimacy. Children, under no ethical guidance or control, would perpetuate the problem and respond with criminal as well as immoral conduct.[19] A strong family structure could mitigate the effects of such evil influences.[20]

The Supreme Court judges may have had such considerations in mind when deciding the black marriage cases. Yet they must have noticed that the facts in many instances refuted the prevailing beliefs. The parties in these cases showed that blacks did understand the moral and legal responsibilities of marriage. Parental devotion was common. Lacy recognized the care given by Allen Smith to his reputed son and emphasized the importance of such efforts in determining legal parentage. Seth Scott, separated from home by distance and the army, expressed concern and tenderness for his absent wife and the daughter he had never seen.

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[19]An excellent expression of his attitude is the section on black family life and morality in Philip A. Bruce, The Plantation Negro as a Freeman (New York: G. P. Putnam's Sons, 1889), pp. 1-28.

[20]Authorities sometimes gave black couples charged with cohabitation the opportunity to marry legally in lieu of punishment. Richmond Planet, December 13, 1890; Augusta County Argus, December 22, 1896.

Blacks not covered by the 1866 act understood the necessity of legal marriage. They used the services of both white and black ministers. Richard McIlwaine, noted Virginia clergyman, performed numerous marriages among the black population in Prince Edward County, usually at no charge. The groom in one ceremony was James Bland, a black state senator.[21] The law also recongized marriages performed by qualified black ministers.

Elements within the black community also exerted strong moral influence. The black churches played the leading role in this effort. In Francis v. Francis Judge Staples noted,

> One circumstance worthy of observation is that the appellee had been excluded from the Baptist church for some time previous to February, 1866, in consequence of her connection with the appellant. When the act . . . was passed . . . legalizing that connection, as was supposed, the appellee was restored . . . as a regular member in good standing.[22]

Similarly, the record in a murder case showed that an unfaithful wife and her lover "were summoned before the church of which they were members, . . . and upon refusal [to abandon their course], were each turned out of the church."[23]

White charges of black sexual immorality were not

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[21]Richard McIlwaine, Memories of Three Score Years and Ten (New York: Neale Publishing Company, 1908), pp. 232-33.

[22]72 Va. (31 Gratt.) 288.

[23]Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 673 (1874). See also Payne v. Tancil, 98 Va. 262 (1900), in which a prominent black citizen brought an action for defamation against a minister who publicly had accused him of sleeping with a married woman. Richmond Dispatch, June 11, 1899; Richmond Planet, August 26, September 9, 1899.

completely unfounded. When W. E. B. DuBois studied the black community in Farmville in the late 1890's, he set the rate of illegitimate births at fifteen per cent.[24] DuBois attributed much of this relatively high figure to a lack of moral instruction during slavery and to poor economic conditions after emancipation. The cases and other material, however, refute the contemporary belief of some whites that the freedmen were wallowing in a slough of depravity.

The Francis case also raised the issue of the termination of black marriages. Robert Francis deserted his wife and married another woman, but some doubt existed about the validity of the first marriage. The courts ruled that marriage legal, but Francis' death before the final appeal mooted the question of divorce. Philip A. Bruce contended that divorce was uncommon among blacks, asserting, "So leniently are violations of the marriage oaths regarded by the negroes, that divorce is a remedy to which they rarely have recourse." Government statistics, however, point to a different finding. Of 2,635 divorces granted in Virginia between 1867 and 1886, 781 went to black parties.[25] Black attorney Giles B. Jackson, whose practice was almost exclusively black, was considered

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[24]W. E. Burghardt DuBois, "The Negroes of Farmville, Virginia: A Social Study," Bulletin of the Department of Labor, III, No. 14 (1898), 11-12.

[25]Bruce, Plantation Negro, p. 21; U.S., Commissioner of Labor, First Special Report: Marriage and Divorce in the United States, 1867 to 1886 (Washington, D.C.: Government Printing Office, 1897), p. 132.

the most successful divorce lawyer in Richmond.[26]

Bruce also claimed that the authorities "almost always winked at" black bigamy, but during the years 1870-1883 the state penitentiary received twenty-two blacks convicted of that crime.[27] Many second marriages evidently were the result of ignorance or mistake. At least six black men and women received gubernatorial pardons because their guilt was "only technical," and not willful violation of the law.[28] Others had been married originally under the 1866 marriage act, and thought that subsequent desertion or separation negated the need for legal divorce.[29]

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[26]Richmond Planet, December 14, 1895.

[27]Bruce, Plantation Negro, p. 22; Virginia, Board of Directors of the Virginia Penitentiary, Reports (published annually). For local prosecutions, see Richmond Daily Dispatch, January 8, 1873; Roanoke Leader, January 24, 1885; Augusta County Argus, September 3, 1889.

[28]Virginia, House of Delegates, Journal, 1876-1877, Communication from the Governor . . . Transmitting . . . List of Pardons [hereafter cited as Governor's Pardon Report], H. Doc. 5, p. 2 (Moses Massenburg); House of Delegates, Journal, 1877-1878, Governor's Pardon Report, H. Doc. 3, p. 9 (Jeremiah Veny); Senate, Journal, 1883-1884, Governor's Pardon Report, S. Doc. 15, p. 9 (J. R. Turner); Senate, Journal, 1887-1888, Governor's Pardon Report, S. Doc. 23, p. 14 (Mary Cooke); House of Delegates, Journal, 1891-1892, Governor's Pardon Report, H. Doc. 5, p. 17 (W. Lewis Thornton); Senate, Journal, 1899-1900, Governor's Pardon Report, S. Doc. 5, pp. 19-20 (George W. Moore).

[29]Virginia, Senate, Journal, 1872-1873, Governor's Pardon Report, S. Doc. 20, p. 3 (Melvina Harrison); House of Delegates, Journal, 1875-1876, Governor's Pardon Report, H. Doc. 5, p. 1 (Hannah Jackson); House of Delegates, Journal, 1876-1877, Govvernor's Pardon Report, H. Doc. 5, p. 5 (Jordan Payne). After passage of the 1866 marriage act Freedmen's Bureau agents sometimes had to decide which of two prewar relationships took precedence when two persons claimed a third as spouse. U.S.,

The legal status of black couples was of less concern to white authorities than was the question of voluntary interracial sexual relations. In a society that based its social structure on the alleged inferiority of the black, miscegenation was a feared and hated act.[30] Not only did it raise uncomfortable ideas about social equality, but it also led to a supposed "mongrelization" of the races. It was therefore necessary to discourage interracial cohabitation in every possible way.

Statutory prohibitions against miscegenation began in early colonial Virginia, and an accretion of laws was successful in preventing racial intermarriage in the state.[31] The laws were not so successful against illicit intercourse. As one observer has written, "What was on the rise and almost wholly unchecked, . . . was sexual intermixture of white men and Negro women outside marriage with the result of an increasing community of mulattoes in the state."[32] Public

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Congress, House, Report of Bureau of Refugees, Freedmen, &c., Ex. Doc. 120, 39th Cong., 1st sess., p. 45; Gutman, Black Family, pp. 418-25.

[30]Miscegenation may mean either intermarriage or illicit intercourse between races. See, generally, Stephenson, Race Distinctions, pp. 78-101; Mangum, Legal Status, pp. 236-73.

[31]Frank F. Arness, "The Evolution of the Virginia Anti-miscegenation Laws" (unpublished M.A. thesis, Old Dominion College, 1966); Walter Wadlington, "The Loving Case; Virginia's Anti-Miscegenation Statute in Historical Perspective," Virginia Law Review, LII, No. 7 (1966), 1189-1223.

[32]Arness, "Evolution," p. 23. On miscegenation during slavery, see, also, Perdue, Weevils in the Wheat.

policy implicitly accepted this situation so long as the male was white and any offspring took the mother's slave status. Numerous white women sued for divorce on the ground of their husbands' adultery with slaves. There were also instances, contrary to southern mythology, in which the husband sued the wife because of her dalliance with a black man. In addition, testimony in antebellum cases of interracial rape showed that some white victims had encouraged, or consented to, the act.[33]

After the war the miscegenation section of the Code of 1860 remained in effect.[34] This section made interracial marriage a misdemeanor punishable by not more than one year in jail and $100 fine. Only the white member of the couple was subject to prosecution.[35] In 1878 intermarriage became a felony punishable by two to five years in the penitentiary, and the new provision applied to blacks as well as whites.[36] Several related statutes made this antimiscegenation law more effective. Any person who performed an interracial marriage

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[33]Jame Hugo Johnston, Race Relations in Virginia and Miscegenation in the South, 1776-1860 (Amherst: University of Massachusetts Press, 1970), pp. 183, 237-48, 250-68.

[34]Virginia, Code (1860), ch. 196, sec. 8, p. 804.

[35]Texas courts upheld a similar statute challenged as unconstitutional because it discriminated against whites. Frasher v. State, 3 Tex. Ct. App. R. 263 (1877); Francois v. State, 9 Tex. Ct. App. R. 144 (1880). The local federal court at first held the statute unconstitutional, but later reversed itself. Both decisions are reported in Ex parte Francois, 9 F. Cas. 699 (No. 5,047) (C.C.W.D. Texas 1879). See also Lawrence D. Rice, The Negro in Texas, 1874-1900 (Baton Rouge: Louisiana State University Press, 1971), pp. 148-50.

[36]General Assembly, Acts and Joint Resolutions, 1877-1878, ch. 311, ch. vii, sec. 8, p. 303.

was liable to a fine of $200.[37] After 1878, state law specifically provided that an interracial couple who left the state to marry and then returned to live as husband and wife were as guilty as if they had married within Virginia.[38] Because interracial marriages were void, a black and white couple living as husband and wife also faced prosecution under the general statute prohibiting lewd and lascivious cohabitation. Virginia law did not, however, differentiate between interracial and intraracial nonmarital sex offenses.[39]

The Virginia Supreme Court interpreted and applied these laws in a group of cases beginning in 1877. In McPherson v. Commonwealth[40] the court reversed the convictions of a Manchester couple, George Stewart and Rowena McPherson. Stewart, a white man, and McPherson, alleged to be black, were found guilty in Manchester Hustings Court of living in "illicit intercourse." President Moncure, for the Supreme Court, cited

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[37]Virginia, Code (1873), ch. 192, sec. 9, p. 1208; Code (1887), sec. 3789, p. 899. Alrutheus Ambus Taylor reports the conviction of a black minister for this crime. The Negro in the Reconstruction of Virginia (Washington, D.C.: Association for the Study of Negro Life and History, 1926), p. 60.

[38]General Assembly, Acts and Joint Resolutions, 1877-1878, ch. 311, ch. vii, sec. 3, p. 302.

[39]In Alabama two whites or two blacks guilty of adultery were subject to imprisonment for not more than six months for a first conviction. If the couple were racially mixed, the penalty increased to two to seven years. The Alabama Supreme Court found no discrimination, saying that the color was an element of the offense, not the punishment. Ellis v. State, 42 Ala. 525 (1868).

[40]69 Va. (28 Gratt.) 939 (1877).

proof that the couple was married and declared that the question was whether the marriage was illegal due to McPherson's race. Moncure ruled that the evidence showed she was not black.

Appeal did not end so favorably for William H. Scott, the defendant in Scott v. Commonwealth.[41] He was fined $75 for lewdly and lasciviously cohabiting with Retta Jackson. On appeal, the Supreme Court disagreed with the defense contention that the evidence was insufficient to support the verdict. Judge Fauntleroy wrote, "[I]t was proven . . . that the appellant, Scott, a white man, admitted that Jackson, a colored woman, was his wife; that they lived together; that he . . . admitted that Jackson's daughter was his child; . . . and that he familiarly associated with the woman, Jackson, and was reported to live with her as man and wife."[42]

Jones v. Commonwealth,[43] decided in 1884, also depended upon the determination of one partner's race. Isaac Jones, a black man, was sentenced to two years in the penitentiary for marrying Martha Auther (alias Martha A. Gray), a white woman. Fauntleroy again delivered the Supreme Court's decision, noting

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[41] 77 Va. 344 (1883).

[42] Ibid., at 346 (Emphasis original). Jones v. Commonwealth, 80 Va. 18 (1885), also involved a white man convicted of lewd and lascivious cohabitation with a black woman, but Judge Fauntleroy's opinion nowhere mentioned the color of the parties. The court reversed the conviction on the ground of insufficient evidence. For racial identification of the parties, see Jones v. Commonwealth, in Virginia, Supreme Court of Appeals, Records and Briefs, XXXI, O.S., 214.

[43] 79 Va. 213 (1884).

that the alleged offense transgressed the social, as well as the criminal, laws of Virginia. The judge observed, "He stands thus convicted of a crime, not only against the law of Virginia, but against the just sensibilities of her civilization."[44]

The evidence showed that Jones and Gray had obtained a license and married, but some question remained concerning the race of the parties. Although the prosecution did show that Jones was black and the man who had obtained the license, the identity and race of the woman were "vague and uncertain." The marriage register described Martha Ann Gray as black and having been born in Tazewell County. The commonwealth proved only that a girl named Martha Gray had been born in Botetourt of a white mother, but the prosecutor did not call the mother to testify. Fauntleroy thought this a fatal flaw. Perhaps, he mused, the mother would have testified that Martha was black (The mother had borne one previous mulatto child.) or that the woman in question was not her child. The court remanded the case for a new trial.

At the second trial Jones was again found guilty, and again appealed.[45] His counsel made two arguments--that the antimiscegenation statute applied only to full-blooded blacks, and that there was no proof of Jones's race. The court, through Judge Lacy, rejected the first argument, but felt

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[44] Ibid., at 216.

[45] Jones v. Commonwealth, 80 Va. 538 (1885).

that the second argument carried more weight. That the defendant be black was an essential element of the crime, and it was the commonwealth's duty to prove the man's race. That it failed to do. There was evidence that Jones had some white blood, and presumption of innocence extended to the presumption that he possessed enough white blood to be considered white. The prosecution failed to rebut that presumption. The court again ordered a new trial.

In a second group of cases the court dealt with interracial couples who married outside the state. A wealthy Richmonder named William O. George fathered two children by his slave Caroline Jackson and then moved the three to Philadelphia before the war. In April, 1869, he allegedly married the woman in Pennsylvania. In August of that year George died intestate, and Caroline and the two children claimed the estate as the deceased's legitimate family. George's other relatives disputed their claim. The relatives charged that there had been no marriage and that, if there had been, it conferred no title to Virginia property. The Richmond Chancery Court ordered trial on the issue of whether there had been a marriage, and a jury found that there had been none.

The Supreme Court set aside the verdict and ordered a new trial on procedural grounds.[46] Unfortunately, Judge Burks did not discuss in his opinion the contention that such

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[46]George v. Pilcher, 69 Va. (28 Gratt.) 299 (1877).

a marriage would not confer title to Virginia property. It is also notable that the parties to the alleged marriage were not both Virginia residents who had left the state solely to marry. Caroline Jackson had lived in Pennsylvania for fifteen years before the marriage and remained there afterwards.

In Kinney v. Commonwealth,[47] however, the court dealt with a case of obvious evasion. Andrew Kinney was fined $500 in Augusta County Court for lewdly associating and cohabiting with Mahala Miller. In fact, Kinney and Miller had legally married and were living as husband and wife. The problem was that Kinney was black and Miller white, and the marriage had taken place in Washington, D.C. The couple, both Virginia residents, had gone to Washington in 1874, married, and returned to Virginia. Kinney asked the court to instruct the jury that the marriage was a bar to prosecution. Instead, the court instructed that the marriage was actually a "vain and futile attempt to evade the laws of Virginia and override her well-known public policy." The question on appeal was whether the marriage was a bar to prosecution.

Had the parties been married in Virginia, Judge Christian remarked, statute law would have rendered the marriage void. The couple had gone to Washington solely to marry and had not changed domicile. Christian agreed with Kinney's counsel that the authority of local laws was confined to marriages consummated within the particular jurisdiction, and that a marriage

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[47] 71 Va. (30 Gratt.) 858 (1878).

valid where celebrated was valid anywhere. He added, however, that there were exceptions to this general rule as strong as the rule itself, such as where the marriage was positively prohibited by law for reasons of policy. Christian found more specific application of this doctrine in the southern states. He cited cases holding that interracial marriages legal in the state of celebration were nevertheless void in the state of domicile, and that temporarily leaving the domicile to marry in evasion of miscegenation laws was no bar to prosecution.

This doctrine, in fact, was now statutory law in Virginia. Although the statute[48] had passed after Kinney's marriage, that marriage was still void as being "contrary to the declared public law, founded upon motives of public policy." This policy, more than a century old, included laws declaring interracial marriages void and providing severe criminal penalties for "such unnatural alliances." These laws would be meaningless if a short trip to a neighboring jurisdiction furnished a legal opportunity for evasion. If the couple wished to live as husband and wife they should change their residence to a state allowing such marriages.

Having disposed of the legal points, Christian ended with an exposition of the importance of such laws. His comments reflected clearly the thoughts of the men who legislated and and enforced the miscegenation statutes. He wrote,

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[48]See above, note 38.

> Every well organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the state. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent--all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.[49]

The same month that the Supreme Court handed down the decision against Andrew Kinney, another Virginia black man named Edmund Kinney traveled to Washington and there married Mary S. Hall. The bride was white. The newlyweds returned to Hanover County and lived as husband and wife. They were convicted for feloniously leaving the state to marry and cohabiting upon their return, and sentenced to five years hard labor. Kinney petitioned the United States District Court for a writ of habeas corpus, asserting that the state law was contrary to the United States Constitution. The case was heard by Judge Robert W. Hughes in Richmond in May, 1879.[50]

Hughes ruled that the Fourteenth Amendment did not support Kinney's assertion. It prohibited the states from abridging the privileges of citizens of the United States, but it did not restrain a state from abridging the privileges of its

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[49] 71 Va. (30 Gratt.) 869.

[50] Ex parte Kinney, 14 F. Cas. 602 (No. 7,825) (C.C.E.D. Va. 1879). Kinney's counsel was Lunsford L. Lewis, federal district attorney for the Eastern District of Virginia and soon to become president of the Virginia Supreme Court of Appeals.

own citizens. Under this theory, citizenship rights were divided into two classes, state and federal. State rights were those that would be held by citizens of the state even without the presence of the federal government, and this class included control of domestic relations.

The amendment also prohibited a state from denying to any person the equal protection of the laws. This provision, Hughes continued, did not mean that the privileges must be equal, only that the protection must be equal. He stated,

> It establishes equality between all persons in their right to protection, but does not confer equality in the privileges they are to enjoy. It provides that whatever privileges the constitution and laws of the United States confer upon a citizen as a citizen of the United States shall be enjoyed without abridgement; and it provides that all persons within a state . . . shall be equally protected by the laws in whatever privileges, whether equal or not equal, they may have from the United States or from the state.[51]

In fact, Hughes thought it unnecessary to use his interpretation in this case because the law applied to both races and therefore was not discriminatory.[52]

Having dispatched the issue of the constitutionality of antimiscegenation laws, Hughes turned to the problem of interstate travel to evade such laws. If a legally married

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[51] Ibid., at 605.

[52] Compare the more farsighted interpretation of the Civil Rights Act of 1866 given by Judge B. F. Saffold of the Supreme Court of Alabama: "The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other." Burns v. State, 48 Ala. 195, 197 (1872). The court ruled that the Alabama antimiscegenation statutes were unconstitutional, but the case was later overruled in Green v. State, 58 Ala. 190 (1877).

interracial couple came to Virginia in good faith, there would arise the question of whether they could claim the protection of the privileges and immunities clause of article IV of the United States Constitution. Hughes thought that in such a case the out-of-state citizen would have the right of transit, but could not transfer a special privilege available in his former state to enjoy a legal right not otherwise available in Virginia. The constitutional section referred to privileges held in the new state, not in the old one.

Again, Hughes found such theorizing unnecessary because the defendant stood in an even weaker position. Kinney and Hall were Virginia citizens who had gone to Washington to evade state law. A positive statute dealing with evasion determined the validity of the marriage within Virginia. To sustain his point that the law of domicile determined the legality of the contract, Hughes cited Kinney v. Commonwealth, decided by "our own Court of Appeals." The judge said that the "full faith and credit" section of article IV called for recognition of the validity of an act in some other state, not automatic validation of that act in the second state. Hughes concluded that the Virginia law did not violate the Constitution or laws of the United States, and therefore that he did not have jurisdiction to grant the habeas corpus.[53]

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[53]Several years later John C. Tinsley, black, and his white lover also went to Washington to marry and then returned to Virginia. The Henrico County Court fined them $100, and the Supreme Court of Appeals refused to grant a writ of error. The United States Supreme Court granted the writ but affirmed the conviction. Petersburg Lancet, January 27, 1883; Virginia, Attorney-General, Annual Report, 1883, p. 3.

The final major case involving miscegenation raised a different question. Greenhow v. James' Ex'or[54] dealt not with the crime of the interracial parents but with the legal rights of their children. Dade Hooe, the father, was a white man who, with his brother George, received a legacy from their aunt Mary James in 1830. After several intervening life estates, the remainder ultimately was to go to the children of the surviving brother. Dade survived and upon his death in 1881 his children claimed the James estate. Because their mother was black, some question existed about their legitimacy. Hooe and Hannah Greenhow had lived together forty years and produced eleven children. The couple had traveled to Washington in 1875, married, and returned to Virginia. Hooe recognized the children as his, and the purpose of the marriage obviously was to legitimize them. The children filed a bill in Fredericksburg Circuit Court against the executor of the James estate. The executor asked for direction by the court, which ruled against the children.

On appeal the plaintiffs argued that they were legitimate under the provisions of chapter 119 of the Code of 1873. The sixth section of that chapter stipulated, "If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after the marriage, shall be

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[54]80 Va. 636 (1885); Petersburg Lancet, May 23, 1885.

deemed legitimate." Section seven read, "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." The children claimed that their father had subsequently married their mother and recognized them, thereby legitimizing them. In addition, they were also the issue of a marriage deemed null in law, and thus legitimate by statute.

Judge Hinton, speaking for a divided court, disagreed. Under the ordinary meaning of "issue of marriage," he said, the Greenhow children did not fall in that class because they had been born before the marriage. If the term were broadened to include the prior born, the question remained whether the offspring of an interracial couple living in Virginia could be legitimized by a subsequent marriage in another state. Hinton thought not. He reviewed the authorities, by now familiar, which held that foreign marriages were not valid if positively prohibited by the law of the state of domicile. The home state determined the parties' capacity to marry, and any incapacity lay in abeyance only so long as they remained out of state. Upon their return, the incapacity again took effect. Hinton also thought that section seven did not apply to a marriage rendered absolutely void by statute.

Judges Lacy and Fauntleroy concurred, but President Lewis noted a dissent. Judge Richardson also dissented and delivered an opinion notable for its compassionate spirit and humane interpretation of the law. Richardson thought

that the plaintiffs' claim was valid. The purpose of the relevant sections of chapter 119, he pointed out, was to alleviate the common law principle that out-of-wedlock children must remain bastards forever. The language of section seven was comprehensive, and he could find no reason to assume that it did not apply in the present case. He acknowledged that originally the statute had not applied to blacks because of their slave status. Now, however, they were no longer slaves, and the statute remained unchanged. Richardson said,

> The law was on the statute book irrespective of the black man, and many years before the negro attained to his present status. The law has stood still; but in the meantime, the negro has grown into its gracious protection; he has been clothed with citizenship; he is, in the language of the statute, a man, and while the idea of amalgamation is repugnant to the white race, and intermarriage between the races is prohibited under heavy penalties by the law, yet the dominant white race has not yet struck, nor will it likely ever strike at the natural legal rights of unoffending children through the sins of their parents.[55]

In the judge's view, Hooe had tried to save his children from the "curse of bastardy," and had succeeded. The children were entitled to the James estate.[56]

Richardson also discussed the legislature's intent in passing the antimiscegenation law and decided that deterrence rather than punishment was the purpose. Noting that bigamy

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[55]80 Va. 648.

[56]Wadlington, "The Loving Case," pp. 1198-99, 1207; and D. W. Woodbridge, "'The Issue of Marriages Deemed Null in Law . . . Shall Nevertheless Be Legitimate,'" Virginia Law Review, XXX, No. 2 (1944), 354-55, support Richardson's interpretation.

brought a longer prison term than did miscegenation, he said,

> This is singular legislative leniency in favor of intermarriage between white persons and negroes, especially in view of the abhorrence in which the amalgamation of the two races is held. Doubtless the legislature was guided more by the purpose of stamping with disapprobation what in its judgment could, at most, be of but rare occurrence, than by the importance of fixing a heavy penalty to an offence so revolting as to need little, if anything, other than the restraints of social and moral sensibility.[57]

While Richardson pointed to the leniencey of the penalty to show that punishment was not the major purpose behind the legislation, John B. Minor went a step further. The renowned professor of law at the University of Virginia declared that the penalty was too harsh. He wrote,

> It is an axiom in penal legislation that the measure of punishment is the mischievousness of the act sought to be prevented, and not its heinousness, much less the repugnance and disgust with which the legislator may regard it.
>
> Are marriages of this sort so frequent; is the tendency to contract them so strong; are the mischiefs likely to arise from them so great as to demand a mode of repression marked by such extraordinary severity? They are, no doubt, very adverse to the sentiments and tastes prevailing amongst us, and tending as they do to degrade one or both of the parties, they are fairly the subjects of moderate prohibition; but surely the aversion to them, which may possibly have dictated the law in question, of itself obviates the need of highly penal measures in order to prevent so frequent a recurrence of the act as would be worthy of legislative consideration. Meanwhile the law can hardly escape severe animadversions, both at home and abroad.[58]

Whether the penalty was lenient, or not lenient enough,

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[57] 80 Va. 646.

[58] John B. Minor, Exposition of the Law of Crimes and Punishments (Richmond: By the Author, 1894), p. 179.

Richardson and Minor were correct that the law served more of a symbolic than penal function. Most noticeable about these statutes is the indifference with which they were sometimes enforced. Having the law on the books was a sign of official disapproval and a relatively successful deterrent. These purposes having been served, the legal system showed no great zeal to ferret out and punish all those guilty of the crime. From 1878 to 1901 the penitentiary received only seven persons convicted of miscegenation.[59]

A lack of guilty parties does not explain the absence of more convictions. Sources provide numerous instances of intermarriage. In his 1898 study of Farmville, W. E. B. DuBois wrote, "Curiously enough, there are in the vicinity of the town two cases of intermarriage of colored men and white women, which are undistrubed, despite the law."[60] A. A. Taylor discovered that in Buckingham County there were at least four couples in which the wife was white and the husband black. R. T. Coleman, a prosperous black farmer in Cumberland County, had three white wives during his lifetime. The third marriage took place out of state and upon his return Coleman set his wife up in a separate house nearby.

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[59]Virginia, Board of Directors of the Virginia Penitentiary, Reports (published annually), show one black and one white arriving in 1878-1879 and one black in 1879-1880. The first couple was probably Edmund Kinney and his white wife Mary S. Hall. Two more prisoners arrived in 1886-1887 and two in 1889-1890. The last four are not identified by race, but the 1886-1887 couple were a black man named Evans and his white wife, Allen, each sentenced to serve three years. Richmond Dispatch, March 9, 1887.

[60]DuBois, "Negroes of Farmville," p. 12.

Taylor suggests that the growing economic status of many black men sometimes outweighed the legal and social bans against intermarriage, leading poor white women to marry wealthy blacks.[61]

Despite Taylor's own examples to the contrary, Taylor and another leading scholar of black life in postwar Virginia, Charles E. Wynes, perceive less toleration of intermarriage than the view presented here suggests.[62] Certainly, the examples cited do not mean that white Virginians commonly accepted such liaisons. Contemporary commentators and newspaper articles railed vehemently against miscegenation in any form, and many interracial couples suffered separation or worse at both private and public hands. Still, the small number of convictions, when compared with the number of reported marriages, leads to the belief that the officers of the law were not so zealous as they might have been.

To some extent, authorities prosecuted interracial couples for lewd and lascivious cohabitation instead of intermarriage. Cohabitation was probably easier to prove at trial, and convictions were more frequent. These convictions indicate that

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[61]Taylor, Negro in Reconstruction of Virginia, pp. 54-62. Taylor also gives several examples of miscegenation attempts that failed due to white opposition, violent and otherwise. The story of Abram Brown, a black minister, supports Taylor's economic thesis. Brown's white wife allegedly married him for his money and was dissatisfied to find that he had none. The wife and several men assaulted and severely beat Brown. Augusta County Argus, August 1, 1899.

[62]Taylor, Negro in Reconstruction of Virginia, pp. 54-62. Charles E. Wynes, Race Relations in Virginia, 1870-1902 (Charlottesville: University of Virginia Press, 1961), pp. 92-94.

that the authorities may not have been so tolerant of interracial sex as the lack of intermarriage convictions suggests. They do not rebut the argument that the treatment of those breaking this most sacred southern taboo was relatively lenient. Cohabitation was a misdemeanor not calling for imprisonment.[63] The color of the parties was irrelevant. Had officials thought of the cohabitation law as a more effective substitute for the antimiscegenation statute, they probably would have called for a harsher punishment or made special provision for interracial cohabitation. There also remain the earlier examples of interracial couples who lived together without being prosecuted under any statute.

Many Virginians were unhappy either with the statutes or their enforcement. In 1882, for example, white and black members of the House of Delegates exchanged bills on the subject. White delegate Littleton Owens presented a bill "to suppress miscegenation in the state," while black delegate Armistead Green presented one to repeal the antimiscegenation statutes already in force. Neither was successful.[64] Blacks were bitter at the hypocrisy behind the white antimiscegenation stance and angry at the often discriminatory enforcement of the law. Discussing a black prostitute and her white client, the Planet argued,

> It was a pity that the miscegenation laws of Virginia cannot be made to apply to a case of this

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[63]Inability to pay the fine could lead to a short jail term. Augusta County Argus, August 3, 1897, May 10, 1898.

[64]Virginia, House of Delegates, Journal, 1881-1882, pp. 137, 333.

> description. In fact, although it was shown that [the man] had been guilty of adultery and fornication, he was not punished. Had he married [the women], both would have been given a term in the Virginia penitentiary.[65]

Once past the duty of enforcing the specific antimiscegenation statutes, the Supreme Court accepted the facts of southern life without undue condemnation. In the case of Newton Smith, a black man accused of killing his alleged daughter borne by a white woman, Judge Christian's opinion said nothing to vilify the original liaison.[66] Several estate cases involving the children of interracial couples, usually white men and their former slaves, similarly drew little extraneous comment.[67] In Burdine v. Burdine's Ex'or,[68] the court treated with indifference allegations of sexual relations between a planter and his former slave. It also refused to consider a charge that the true consideration for a contract was "future illicit association and cohabitation."

The court could not always ignore the miscegenation

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[65]Richmond Planet, June 16, 1900. See, also, ibid., January 12, 1895; Petersburg Lancet, May 19, 1883.

[66]Smith v. Commonwealth, 62 Va. (21 Gratt.) 809 (1871). O'Boyle v. Commonwealth, 100 Va. 785 (1901), concerned the murder of a black woman by her white lover. The trial record made clear the interracial relationship, but President Keith's opinion did not give the color of the defendant. O'Boyle v. Commonwealth, Records and Briefs, CXX, O.S., 36.

[67]For example, Riddell v. Johnson's Ex'r, 67 Va. (26 Gratt.) 152 (1875); Thomas v. Turner's Adm'r, 87 Va. 1 (1890).

[68]98 Va. 515 (1900).

present in such cases. Their own feelings, or perhaps social requirements, led the judges to remark on the evil nature of such relationships. Yet such condemnation seems to have been almost stylized, a formula to be enunciated and then set aside while attending to the actual business at hand. Thus, in Davis v. Strange's Ex'or, Judge Fauntleroy wrote, "It is the fact--the status--of this relation of parent and child, and the family recognition and association, which obtained between the appellant and her father and his household, which it is important to state and remark: however revolting to the moral sense and offensive against public policy."[69] Having branded the relationship revolting and offensive, Fauntleroy proceeded to emphasize the love and devotion actually involved.

Not all members of the court ignored miscegenous relationships. Judge Richardson, whose dissenting opinion in Greenhow was so sympathetic towards innocent mulatto children, could be harsh in his judgment of those guilty of miscegenation. The case of East v. Garrett involved the construction of a will, a condition of which was that the testator's son die leaving legitimate children. In fact, the son, Edward P. East, left only illegitimate mulatto children. Richardson wrote,

> It is true that the testator seems to have been quite irregular in his life, and was the father only of children born out of wedlock; but

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[69] 86 Va. 793, 795 (1890). See, also, Thomas' Adm'r v. Lewis, 89 Va. 1, 44-45 (1892).

> it is also true that his children, though unlawfully begotten, were born of women of his own race. Edward P. East . . . seems to have been less fastidious in his tastes, and to have preferred illicit life, open shame, and to be the father of illegitimate children by a negro mistress. To say that such a course of life was not offensive to the testator, his own sins to the contrary, notwithstanding, is to falsify all experience and to fix upon the white race a stigma not deserved by the great majority of that race.[70]

The Supreme Court's attitude toward miscegenation was a mixture of disgust at the practice but recognition of social realitites, condemnation of the practitioners but sympathy for the offspring. In all these postures the court seems to have reflected the attitude of society in general. White Virginians feared racial amalgamation, but they understood that the process had been proceeding for more than two and one-half centuries. Perhaps, so long as all agreed that miscegenation was evil and strong social prohibitions remained in force, they were willing to tolerate some trespasses of the law.

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[70]84 Va. 523, 543-44 (1888).

V. DECEDENTS' ESTATES

Upon the death of a property owner his holdings pass to others. The law allows him, within certain limitations, to choose who should receive title to his property. If he elects not to choose, or fails to name his choices in proper legal form, the state will choose for him under the laws of intestate succession. The legal problems in such cases sometimes encompass broad questions of public policy, and sometimes descend to the narrowest of technicalities. Most fascinating about these cases, however, is the glimpse they provide into the social life of a period. No other area of the law so frequently lays open the intimacies of family relations.

Free blacks in Virginia enjoyed the right to dispose of and receive property by bequest throughout the antebellum period. As early as 1660 a free black received property through a will.[1] The bequeathing of his estate by a property owner to spouse and children was a common occurrence among the state's more prosperous free blacks.[2] Property also passed to heirs through intestate succession.[3] In addition, white men sometimes

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[1]John Henderson Russell, The Free Negro in Virginia, 1619-1865 (Baltimore: Johns Hopkins Press, 1913), p. 89.

[2]Luther Porter Jackson, Free Negro Labor and Property Holding in Virginia, 1830-1860 (New York: D. Appleton-Century Company, Inc., 1942), pp. 118-21, 140-44, 164-66.

[3]Ibid., p. 151.

made bequests to free blacks. Luther P. Jackson found that the total number of such bequests was relatively small, not more than forty during the years from 1830 to 1860. The estates involved, however, were often larger than the free blacks could have obtained by other means.[4] There was no restriction on the inheritance rights of free blacks. In fact, a series of acts beginning in 1832 that limited the right of free blacks to acquire slaves explicitly excepted acquisition by inheritance.[5]

Emancipation of the slaves led to only one significant legal question involving wills. The issue concerned bequests to emancipated slaves, and the Supreme Court considered it in two major cases. The problem first reached the court in Johns v. Scott,[6] decided in 1873. Joseph Glasgow died in 1856, leaving a widow and child. He willed his slaves to his wife for life, and upon her death to the daughter for her life. After the death of the daughter, the slaves were to be set free, "it being my intention . . . that all my slaves, together with all their future increase, shall be emancipated and forever discharged from slavery, whenever my wife and daughter Elizabeth have ceased to live." Glasgow also ordered that $3,000 be invested to accumulate interest until the

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[4] Ibid., pp. 121-27. The two common reasons for white bequests were manumission and concubinage.

[5] Ibid., p. 23; Russell, Free Negro, p. 94.

[6] 64 Va. (23 Gratt.) 704 (1873).

slaves were ready for freedom, at which time the money was to be used to remove the freed slaves from the state. They were also to share any excess principal or interest.

The slaves remained with Mrs. Glasgow until the end of the war, when they left. She died in 1868, and in 1869 twenty blacks filed a bill in the Circuit Court of Rockbridge County against the daughter, Elizabeth Johns. Some of the blacks had been slaves of Glasgow, while othere were born after his death. The blacks asked that the daughter, as administratrix of both her parents, be required to pay them the legacy of $3,000 plus interest. Alternatively, they asked that she be required to put the money into the hands of a receiver until her death. The defendant answered that the plaintiffs had been emancipated by the war, not by the will, and therefore did not meet the description of the legatees. The circuit court directed the defendant to pay $5,716.84 from Mrs. Glasgow's estate to a receiver, and the defendant appealed.

Judge Bouldin, for the Supreme Court, declared that only one question was important: Did the plaintiffs answer the description and character of the legatees as set down by the testator? Because none of the appellees had been named in the will, they had to prove that they were "plainly described" therein. Bouldin analyzed the description in Glasgow's will:

> Who were the persons, or rather class of persons intended to be provided for by the testator in this case? . . .[They were] <u>his slaves</u> remaining such down to the death of the survivor of his wife and daughter, and in their service; and <u>then</u>, and not until <u>then</u>, to be <u>emancipated by and under his last will</u>. . . . They were to be <u>his freedmen</u>, made such at that remote period in the future, <u>by</u>

his will, and claiming their rights to freedom thereunder.[7]

Bouldin pointed out that the appellees could not claim the legacy on the ground that they had served as slaves until the death of the surviving wife or daughter, and then been emancipated by the will. Not only was the daughter still alive, but the former slaves claimed their freedom not under the will but under "another and higher power." These facts were contrary to the terms of the will.

The appellees contended that they were still within the spirit of the bequest. They asserted that Glasgow's intention had been to provide support for them when they became free, and that the method of emancipation was irrelevant. Bouldin again disagreed. He did not believe that Glasgow had intended the bequest to be interpreted in favor of the slaves and against "the prime objects of his affection and bounty." He reiterated that the inducement for the bequest had been Glasgow's desire to free his slaves by his own will. Had Glasgow foreseen that they would be emancipated by some other power, he would not have provided for them. The court reversed the lower decree.

In Johns the judges faced the formidable task of extrapolating the general intentions of the testator from a short, formal document. They applied those intentions to circumstances unforeseen at the time of the making of the will. Allowing for these factors, it is nevertheless difficult to

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[7] Ibid., at 712-13 (Emphasis original).

accept fully Bouldin's reasoning. The defendants' strongest point was that the claimants had never fulfilled the requirement that they serve as slaves until both the wife and daughter died. Bouldin put as much, or more, emphasis on his contention that the testator's desire was to free his slaves solely by the will. This interpretation followed closely the letter of the will, but whether it accommodated the spirit is questionable.

Four years later, in deciding a similar case,[8] the judges found it necessary to distinguish Johns. John A. Simmerman died in 1853. His will gave his wife Margaret a life estate in eight of his slaves, identified by name. Among the slaves were Martha and her children Mary, Charles, and Adam. Upon Margaret's death Martha, and her children, were to receive their freedom. The will also ordered the executor to pay $1,000 each to Martha and her three children. As Simmerman stated in the will, "My intention is that the amount devised to my slaves above mentioned shall be paid to them at the death of my wife, at which time they are to be free."

The slaves stayed with Margaret through the war and for two years afterward. At that time the relationship became more formal. The former slaves rented parts of the land under contract. When Margaret died in 1875, Martha, Mary, Adam, and Charles, the two sons now holding the surname Songer, brought suit in equity in the Circuit Court of Wythe County

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[8]Simmerman v. Songer, 70 Va. (29 Gratt.) 9 (1877).

against Simmerman's executor, and against his daughter Mary Ann, to recover their legacies. Adding some spice to the proceedings, they stated that Martha was the daughter of Simmerman's brother Samuel, and that the children were the offspring of Martha and John Simmerman and had always been recognized as such.

The defendants replied that the bequest contained the implied condition that the legatees serve the widow as slaves until her death. The war had emancipated the slaves ten years earlier than the will intended. Even if the claimants were entitled to the bequest, they had already taken more than their share out of the estate. In the old woman's later years, Margaret's daughter contended,

> [she had] lost . . . her mind for all purposes of business, becoming . . . an unresisting prey for the plundering schemes and practices of those around her, and especially of her late domestics and servants, and most especially of the plaintiff, Martha, and her children and son-in-law. These latter . . . fairly rioted in the spoil; pretending to remain in her service and take care of her during her life as contemplated in said will, they in fact took possession of her property and of herself and appropriated both to their own use . . . as if both had in fact belonged to them, except only that they allowed the poor old woman food, clothes and lodging--all of the very plainest.[9]

The lower court held for the plaintiffs, and the defense appealed.

Judge Staples delivered the opinion of the Supreme Court. Having decided that "it is apparent it was the purpose of the testator that . . . these, his favorite slaves, shall have

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[9] Ibid., at 13-14.

their freedom, and the legacies bequeathed them," Staples set to work distinguishing the case from Johns v. Scott so that Simmerman's purpose could be fulfilled. The Johns decision, said Staples, had been based on the ground that the legatees were not named in the will, leading to the presumption that the testator had intended to provide only for a class, not for any individual's benefit. The claimants had to match, as a class, a certain character and description. Staples noted that Bouldin had stressed the peculiar language of Glasgow's will, quoting the phrase that the legatees were to be his slaves "emancipated by him under his own will." The claimants had won their freedom through another power, and the event upon which the legacy depended (the death of the daughter) had not occurred. In the present case, the will named the legatees, and they corresponded fully with the description therein.

Referring again to the "peculiar circumstances" of Johns, Staples asserted that the character of the legatees was the essence of the bequest. The testator intended that the slaves be freed after his daughter's death. He wanted their service to compensate the daughter for the money that he had set aside for them out of his estate. It seemed reasonable to Staples, as it had to Bouldin, to believe that if Glasgow had known the legatees would cease serving his daughter and assert their freedom without the will, he would not have provided for them. Staples recalled that the money was to be used to remove the freed slaves from the state, and that they were to receive

only the remainder left after the costs of removal. The unforeseen emancipation and the freedmen's decision to stay in Virginia thus defeated the intent of the testator. Staples here overlooked the fact that the law had required manumitted slaves to leave the state. The removal provision may just as well have been the result, not the purpose, of emancipation.

The facts in Simmerman were quite different, in Staples' view. The legatees were specifically named as individuals, not as a class. That Simmerman had not emancipated all his slaves, only the four named, was also notable. Staples wrote, "It is apparent that personal affection, or some other equally potent consideration, influenced the testator in making these bequests. This feeling of the testator was fully shared in by his widow; for she is proved to have entertained a strong affection for them. . . ."[10] The role played by personal affection put the case in a different category from Johns, a category in which an error in description or change of situation would not have altered the testator's plans.

Staples found another distinction between the two cases. At his death Simmerman was quite wealthy, and he left the majority of his estate to his daughter. His wife also received a considerable bequest. The loss of the slaves' services for a few years was not so detrimental to the widow's position that he would have withheld "a bounty he obviously considered necessary to the comfort and security of the legatees." In fact, Staples noted, the freedmen has remained until Mrs.

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[10] Ibid., at 21.

Simmerman's death, "one of them certainly active precisely in the same capacity as before emancipation." The services of the entire group had been satisfactory to her.

Finally, Staples dealt with defendants' argument that the plaintiffs had exercised an evil influence over Mrs. Simmerman and appropriated the property to their own use. He pointed out that the widow had received absolute title to the property. The issue was whether she had retained her capacity to act without undue influence by the plaintiffs. Staples found no evidence that she had been of unsound mind or subject to undue influence or coercion:

> There is no doubt that Mrs. Simmerman often permitted her affections to control her judgment in bestowment of gifts upon others, and that she was for many years before and after the war surrounded by a crowd of worthless and improvident people, who profited greatly by her kindness and ill-judged liberality. But the appellees were not the only persons in her employ. There were others living upon her land, both white and black; all, no doubt, partaking of her bounty.[11]

The distinctions between these two cases assigned by Staples were valid. Simmerman's will specified the legatees by name, while Glasgow's did not. More important, the Simmerman slaves remained with the widow until her death. But were the cases truly so different that the distinctions explained the contrary results? In each case the court construed the testator's intent, and speculated how the testator would have acted under changed circumstances. Bouldin's interpretation of Glasgow's will seems more to have followed his conclusion

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[11] Ibid., at 25.

than led to it. Glasgow probably intended to free his slaves and provide them with support to start their new lives. Anxious not to deprive his immediate family of a valuable portion of his estate, he postponed emancipation until his wife and daughter had received the full benefit of their service. But the freedom and money were not payment for that service. Had Glasgow desired only that the slaves serve his wife and daughter, he need not have emancipated them at all.

Judge Staples took a more realistic view of Simmerman's intentions. The facts surrounding the will strongly suggest that Simmerman, like Glasgow, wanted to free some of his slaves and provide a financial start for them. Staples realized this and used the principle of personal affection to bring about the testator's desire. He referred to the facts in Johns to distinguish that case and let the court decide for Martha and her children. Despite his repeated references to the "peculiar circumstances" of the earlier case, however, an enlightened interpretation of Glasgow's intent might have produced a different result had the Simmerman court decided Johns also.

Ten years later the court decided Allen v. Patton,[12] which also involved emancipated slaves who had failed to serve the time specified in a legacy. Julius Allen's will, written in 1862, left to William S. Patton fifteen named slaves for seven years. After that period the slaves and their increase were to be freed. Upon emancipation the slaves were to receive

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[12] 83 Va. 255 (1887).

$3,000 from the estate and an agent was to take them to a free state and purchase land for them. The will cleared probate in March, 1865, with Patton as executor. In 1884 Robert Allen and other survivors and heirs of the slaves filed a bill in Danville Circuit Court to recover the $3,000. Patton answered that there had been no surplus in the estate and that he had used more than $3,000 of his own money to pay off Allen's debts. The circuit court dismissed the bill and the plaintiffs appealed.

Speaking for the Supreme Court, Judge Richardson declared that the claim was contrary to the clear terms of the will. There had been no surplus in the estate after debts. The only question was whether the $3,000 could be charged to the land devised to Patton. The court could not order such a charge unless the will clearly showed such an intent by the testator. The will specified that Patton pay the money out of the estate's surplus. It said nothing about taking the funds out of the estate as a whole or out of the property left to Patton himself. There having been no surplus, the legacy failed.[13]

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[13]Hume's Ex'ors v. Taliaferro, 3 Va. L. J. 309 (1879), decided in the Special Court of Appeals, also involved a prewar will complicated by later changes in both the status of the black legatees and the value of the estate. Emancipation and bad investments intervened. The court ruled that the surviving legatee was entitled to his house and firewood, also left to him by the will, but that emancipation had relieved the executors of the duty to provide him general support. See, also, the narrative of Hannah Bailey, daughter of a slave freed before the war, whose family was unable to obtain money and land supposedly willed to them by the old master. The master's descendants, refusing to let the blacks see the will, asserted that emancipation had destroyed the legacy. Charles L. Perdue, Jr., Thomas E. Barden, and Robert K. Phillips, eds., Weevils in the Wheat: Interviews with Virginia Ex-Slaves (Charlottesville: University Press of Virginia, 1976), p. 18.

Another attempt to secure a legacy from an antebellum will came in Jones's Administrator v. Jones's Administrator,[14] decided forty years after the death of the testator. The will of Philip H. Jones, admitted to probate in 1856, contained two codicils dealing with his slave Bob. The first made him a free man and gave him an annuity of $50, and the second reiterated these provisions in different language. It was the language that became the crux of the case. In the first codicil Jones wrote,

> I intended to give my negro man Bob his freedom, but in writing the foregoing will it escaped me. . . . I wish my brother to make suitable provision for him. If he should not be willing to accept his freedom, I wish my brother . . . to dispose of him at my death in such a way as to secure to him a good and humane master, and to be paid annually a part of his earnings. He shall have the privilege of accepting his freedom at any period of his life.[15]

By the time of the second codicil Bob had become disabled, and Jones left him the annuity for life and, in addition, "I have given him his freedom, whether he accepts it or not." Evidently, neither Jones's brother nor his executor recognized the codicil, because Bob remained in slavery until the end of the war. In 1878 Bob Jones filed a petition claiming his annuity. Upon Bob's death in 1890, his administrator renewed the claim, but the circuit court dismissed the petition.

Because a slave could not take a legacy, Bob's right to the money depended upon whether the will had emancipated him.

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[14] 92 Va. 590 (1896).

[15] Ibid., at 593.

The appellees contended that the wording had only given Bob the right to choose freedom. This, they asserted, was illegal and invalidated the will. Judge Buchanan not only construed the will at hand but also questioned the antebellum precedents upon which the appellees based their arguments.

Buchanan noted that Jones had possessed the power to free Bob or to keep him in slavery, but not to assign him some intermediate status.[16] If the will freed him, any limiting conditions were void. That Jones had intended to emancipate Bob was obvious to Buchanan. The slave was to have his freedom, and, if he chose not to take it, he was to be "disposed of" to a good master and to be paid his earnings. The codicil also allowed Bob to accept freedom at any time. Buchanan stressed the codicil's language that Bob was to "labor as a slave," not that he was to be one. Neither the brother nor the executor acquired any property rights in Bob. Because the first codicil declared Jones's intention to free Bob, and because the second codicil declared that the testator had made good his intent, there could be no doubt that this was a valid

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[16]"Wills also frequently contained legacies for emancipated slaves, but a will which attempted to provide for care, tuition, and wages for a slave and issue, intending to create a condition midway between slavery and freedom, would not be sustained." James Curtis Ballagh, A History of Slavery in Virginia (Baltimore: Johns Hopkins Press, 1902), p. 122. Note that under the antebellum rule, limitations invalidated emancipation, but Buchanan sought an emancipation clause and then invalidated the limitations. On the changing attitude of antebellum Virginia judges toward emancipation, see Helen Tunnicliff Catterall, ed., Judicial Cases Concerning American Slavery and the Negro (5 vols.; Washington, D.C.: Carnegie Institution of Washington, 1926), I, 71-75; and Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975), pp. 67-75, 80-81, 203-206.

manumission.

Buchanan did not think that this case fit under the line of precedent cited by the appellees. He decided to look at those cases anyway, however, and did not like what he saw. Appellees relied specifically on Bailey v. Poindexter's ex'or and Williamson v. Coalter's ex'ors,[17] both decided in 1858. In those cases a divided court held that a slave was not legally competent to choose between slavery and freedom, and that a will allowing such a choice was invalid. Judge Moncure dissented both times, arguing that no reason existed to deny a slave this ability because the master, not the slave, executed the manumission. Buchanan, after distinguishing the 1858 cases, remarked, "We would not consider those decisions as precluding us from a re-examination of that question." In Bailey and Williamson, he noted, a bare majority had decided the cases, and the decisions were in conflict with still earlier cases. In addition, he said that the cited opinions were "so contrary to reason and to justice that we would hesitate long before we would hold that a slave could not elect to be free when that right was given him by his owner."[18]

Why did Buchanan challenge Bailey and Williamson? He had already distinguished the present case, so that they constituted no obstacle to whatever he wished to decide. Nor was it likely that the question ever would arise again, because

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[17] 55 Va. (14 Gratt.) 132 (1858); 55 Va. (14 Gratt.) 394 (1858), respectively.

[18] 92 Va. 594.

slavery had been dead for more than thirty years. Perhaps a rule "so contrary to reason and to justice" offended the court. Perhaps, as the Planet noted, the opinion "show[ed] conclusively that times have changed and people with it [sic]."[19] The court decreed that Jones's administrator should receive the legacy.

The four previous cases dealt with emancipative wills containing provisions that came to fruition after the war.[20] Occasional white generosity to former slaves continued after the war as well. Most of the cases that reached the Supreme Court concerned former slaves with special relationships to their masters. The cases throw light on an often neglected aspect of postwar southern society, and the opinions reflect the personal and professional reactions of the judges.

In several cases the blacks were not parties to the action. Their bequests stood safe as the testator's relatives and friends wrangled over other provisions. In Riddell

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[19]Richmond Planet, February 22, 1896.

[20]Three other cases involved prewar wills with former slaves among the legatees, but in none did the freedmen take part in the litigation. In Sharpe's Ex'r v. Rockwood, 78 Va. 24 (1883), the black legatee received her sizable inheritance ($10,000) before the war. In Crouch v. Davis' Ex'r, 64 Va. (23 Gratt.) 62 (1873), an 1859 will freed a slave and her four children. They were to receive $20,000 in various increments, but the war complicated payment. Debts and bad investments caused the executor further problems, although the former slaves did receive some money after the war. In Wine v. Markwood, 72 Va. (31 Gratt.) 43 (1878), the will emancipated three named slaves and created a trust for them. The opinion gives no more information about their legacy.

v. Johnson's ex'or,[21] for example, the controversy was between the testator's next of kin and his lawyer. John H. Johnson, by an 1867 will, left part of his land to various persons, "and the remainder of the tract . . ., his executor was to hold for the benefit of those to whom he had given the lots of land; all of whom were persons of colour, and most of them were reputed to be his children."[22] By a codicil four months later Johnson gave them additional property, and also gave his lawyer Thomas Bocock the rights to all debts owed Johnson. When one of the blacks, reputed to be his natural son, questioned Johnson about this, the old man said,

> Before you were free it was nothing but freedom; then the state set you free, then you want money; now, you must work for money as I did. My estate is going to be sued; they are going to sue you. . . . I leave [the money] to [Bocock] to defend you.[23]

Johnson thought his former slaves too acquisitive, but he was also determined to protect them in their inheritance. He provided for Bocock so that the lawyer would defend the will. In fact, it was the bequest to Bocock that drew the challenge of Johnson's next of kin. The Circuit Court of Appomattox County upheld the codicil.

Judge Anderson's Supreme Court opinion noted the testator's relationships with his varous legitimate and illegitimate relatives. The evidence showed Johnson's deep hostility

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[21] 67 Va. (26 Gratt.) 152 (1875).

[22] Ibid., at 170.

[23] Ibid., at 169-70.

toward his lawful kin, and his desire that they receive nothing. His feelings toward his illegitimate children were more friendly, and those offspring received portions of the estate. He thought, however, that he had provided sufficiently for them. Who, then, was left, but the lawyer? Johnson did not keep his intentions secret. Anderson wrote, "The woman who waited on him and nursed him, his reputed wife, as well as his natural children, had every opportunity to [influence him against Bocock]."[24] Some tried, but he refused to alter his will. The court affirmed the lawyer's right to his legacy. Evidently, there was never any doubt that Johnson's former slaves, and possible relations, could also take their inheritance. His legal white relations, whom the testator had not cared for, took nothing.[25]

In East v. Garrett,[26] Dr. Southey S. Satchell willed to his former slave, Isaac Satchell, a life estate in farm land worth $2,500, plus livestock, tools, and a stack of grain. Lucy Ewell received $100, and Caleb Satchell received a dairy, a cow and calf, and $500. The record noted, "[T]he Isaac Satchell, Lucy Ewell, and Caleb Satchell mentioned . . . are colored people, who were formerly favorite slaves of the testator, who remained with the testator after their emancipation

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[24] Ibid., at 182.

[25] Thomas v. Turner's Adm'r, 87 Va. 1 (1890), also concerned a former slave who received an estate by will. The litigation concerned payment to her attorney.

[26] 84 Va. 523 (1888).

up to the date of his death, and that for those servants, and particularly the first named, the testator had great regard and affection."[27]

Dr. Satchell's other bequests, however, did not descend so smoothly. A bachelor, he had two illegitimate white children, and each received a part of the estate. The land given to the son, Edward P. East, was to revert to the daughter if East died leaving no legitimate child. East lived with a black woman and fathered at least two children by her, but he had no legitimate offspring. When East died, Satchell's daughter and East's half-brother went to court to determine who would get his land.

The Supreme Court stressed East's relationship with his mistress in its attempt to determine Satchell's intent. If the Court's interpretation was correct, the case provides an example of a testator's using his will to force a change in his heir's lifestyle. Satchell disapproved of East's relationship with a black woman and wanted him to enter a more respectable and legal marriage. To encourage this he specified that East's children should share in the estate only if they were legitimate. This attempted coercion, however, proved fruitless.

The question of legitimacy was especially important in cases of intestacy. According to Virginia law, a bastard could inherit only from the mother. He or she did not exist

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[27] Ibid., at 527.

so far as the distribution of the father's estate was concerned.[28] Because most property was in the hands of males, this prohibition had enormous effect. A bastard inherited nothing unless his father specifically provided for him by will. In the absence of a will the children's only alternative was to prove that they were legitimate. In two cases that reached the Supreme Court the claimants asserted that they were the offspring of interracial marriages performed out of the state. In three other cases the problem concerned the validity of black marriages.

In George v. Pilcher,[29] William O. George of Richmond fathered two children by his former slave and then moved the woman and children to Philadelphia before the war. When he died intestate in 1869 the three asserted that George and the woman had married in Philadelphia four months before his death. George's other relatives denied that there had been a marriage, or, if there had been, that it conferred valid title to Virginia property. The Chancery Court of Richmond held a trial to determine whether there had been a marriage, and the jury found for the white relatives. The Supreme Court set aside the verdict in 1877 and ordered a new trial. Unfortunately, the decision turned on a procedural point of evidence, and the court did not discuss the question of legitimacy.

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[28] Virginia, Code (1873), ch. 119, pp. 916-19.

[29] 69 Va. (28 Gratt.) 299 (1877).

Greenhow v. James' Ex'or[30] presented the more complicated problem of an interracial couple living in Virginia who went to the District of Columbia to marry and then returned to the state. The estate involved dated back to 1830, when Mary James willed a legacy to her two nephews for life, ultimately to the children of the survivor. At Dade Hooe's death in 1881 he was the survivor, and his children were in line to receive the remainder of the estate. In 1865 he and his mate of more than thirty years, a black woman named Hannah Greenhow, had traveled to Washington to marry legally in the District of Columbia. According to the court, the purpose of the marriage was to legitimize their eleven children. The court, with two dissents, ruled that the marriage was invalid and that the children could not take the James estate.[31]

Sarah E. Raub, the plaintiff in Scott v. Raub,[32] was the daughter of a free black man and a slave woman. She claimed her father's estate, one-half of the land which he had held jointly with his brother. The brother contended that Sarah was illegitimate and that he was the sole surviving heir. Sarah's father had hired her mother as a domestic, and Sarah was born in 1862. Although her mother died soon afterward, Sarah remained with her father and was recognized as his daughter by him. Citing the state constitution and a state statute concerning the legitimacy of black children, Judge Lacy affirmed

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[30] 80 Va. 636 (1885); Petersburg Lancet, May 23, 1885.

[31] For a full discussion of this case, see chapter IV.

[32] 88 Va. 721 (1892).

a lower court ruling that Sarah was the legitimate daughter of her father and entitled to his estate.[33]

Under litigation in Fitchett v. Smith's Adm'r[34] was the estate of a sixteen year old girl who had died without children. Her maternal relatives declared that she was a bastard and that they were therefore entitled to her entire estate. Her paternal kin asserted that she was the legitmate offspring of a marriage validated by the relevant act, and that they should share in the money. The court ruled that her parents' relationship met the requirements of the letter and spirit of the statute, and that the girl was legitimate.

A similar question arose in Smith v. Perry, Adm'r.[35] Allen Smith declared that he was the legal father of the deceased Edmond Smith, but Edmond's maternal relatives argued that Edmond was a bastard. The elder Smith lived with Edmond's mother Mary Bell and raised the child as his own, both as required by the legitimacy act. The defendants asserted, however, that Edmond was the son of Randall Austin and therefore was illegitimate despite the statute. At trial they presented a number of witnesses who testified that Austin was the father. Although the trial judge found against Allen Smith, the Supreme Court reversed the decision.

The statute, Judge Lacy said, legitimized children born

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[33]Virginia, Constitution (1869), art. 11, sec. 9; General Assembly, Acts, 1865-1866, ch. 18, pp. 85-86.

[34]78 Va. 524 (1884).

[35]80 Va. 563 (1885).

to black couples cohabitating at the time of the act and children acknowledged by the father if the parents were no longer living together. Lacy admitted that the laws of bastardy applied in such cases, but he said that bastardy must be proved positively. According to Virginia law, a bastard was a child who either was born out of wedlock to parents who did not subsequently marry or who was born in wedlock when procreation by the father was impossible. Edmond Smith was born in wedlock and there was no proof that Allen Smith could not have been the father.

Lacy noted that numerous witnesses had testified about Randall Austin's paternity. He also noted,

> It is abundandy proved . . . that Allen Smith and Mary Bell were colored persons, living together as husband and wife when the act of February, 1866 was passed; that Edmond Smith was the child of the woman, at least, born before that time, and living with the parties as their child, claimed to be their child by both parents, taking the father's name, and growing up in the household as their child, . . . recognized as such, living and dying as such, being called son by the father, and calling the husband of his mother father.[36]

Austin, on the other hand, had done nothing for the boy. Such statements by Lacy laid the foundation for a policy decision based on the justice of the situation. Concluded Lacy, "In giving full force and effect to this law, so wise and humane, and so beneficent, it is the duty of the court to so construe the law as to advance the remedy and extend the relief, rather than to curtail either."[37] Lacy declared that Allen Smith was

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[36] Ibid., at 570-71.

[37] Ibid., at 571-72.

his son's heir at law, entitled to the estate.

One final case, Thomas' Adm'r v. Lewis,[38] included many factors already encountered in this chapter--illegitimacy, interracial cohabitation, family affection, social customs, and judicial interpretation. William Thomas died intestate in January, 1889, leaving an estate worth more than $200,000. Thomas felt a strong dislike for his legal relatives and tried to avoid the intestate succession laws in the days before his death. His reasons for doing so, and the Supreme Court's interpretation of his motives, make the case one of the most interesting of the postwar period.

Thomas never married but lived for some time with a half-black woman, his former slave. The couple had two daughters, of whom Bettie Thomas Lewis was the survivor. Thomas treated the girl as his daughter, showed great affection for her, and received in return her love and respect. They lived together on a farm near Richmond for twenty years, and she nursed him tenderly in his last illness. After his death, Bettie claimed that he had made her a gift causa mortis, in expectation of imminent death, of much of his personal property shortly before he died. Her sole witness to the act was another young woman of mixed blood, Fannie Coles, who had been her friend and companion for several years. Thomas's legal relatives asserted that Bettie's claim was fraudulent and that they were entitled to the property. The Richmond Chancery Court

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[38] 89 Va. 1 (1892).

found for Bettie, and the defendants appealed.

The appellants based their argument[39] on two grounds--that the facts alleged by Bettie were not ture, and that, even if true, they did not support a valid gift causa mortis. To refute the facts, they tried to prove that Thomas had not intended to make such a gift. At trial, the defendants adduced testimony that Thomas had planned to leave several parcels of land in trust for Bettie so that she would be comfortable but would not have control over the property. Dr. McGuire, Thomas's friend and physician and a witness for Bettie, admitted on cross-examination that Thomas had wanted Bettie to have a trustee. He recalled Thomas's belief that "her color, her education, her social condition--all would make it unwise for him to leave her a large sum of money."[40] In fact, Thomas had planned to make a will and arranged to meet the lawyer. Unfortunately, death intervened.

The appellants also tried to impeach the character and veracity of Fannie Coles. They argued,

> In this case the allegations relied on are testified to by only one witness (Fannie Coles), whose testimony is certainly not beyond suspicion of bias and falsehood. Her origin, her rearing, her condition in life, and her relations to the complainant, are surely not such as entitle her to full credit as a witness. Herself a pariah of mixed blood, reared under the ban of social ostracism, . . . a dependent parasite and hanger-on

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[39]Appellant's argument appears on pp. 3-35 of the report. The complete briefs and record are at Thomas's Adm'r v. Lewis, in Supreme Court of Appeals, Records and Briefs, LIX, O.S., 140.

[40]89 Va. 3.

of Bettie Lewis. . . .[41]

Surely such a person should not be believed as the sole witness to such an important transaction!

Judge Fauntleroy delivered the majority opinion for the divided court, and his emphasis as he recited the facts left little doubt where he stood. After the death of his older daughter, Thomas had directed all his affection toward Bettie. She presided over his house as "a devoted and dutiful daughter," while he cared for her with "lavish parental love." When ill, he demanded that she alone nurse him. He provided her with a companion. Thomas had even, Fauntleroy thought it worthy of mention, often taken the two girls to Saratoga Springs where all had eaten at the same table. The judge believed, "There is, in the record, very much more testimony . . . attesting the life-long, avowed, and unwavering solicitude and purpose of this isolated old man . . . to provide for amply at his death, his devoted and faithful daughter Bettie--the only light of his long life."[42] On the other hand, Thomas's legal relatives never visited him and communicated only through letters asking for money. Fauntleroy could not believe that Thomas wanted his estate to go to such relatives instead of to Bettie, "to whom he owed the undivided obligation of a father," and whose own life had been "an unvarying demonstration of dutiful devotion and filial confidence and affection."

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[41] Ibid., at 10-11.

[42] Ibid., at 43.

Having used such language to describe Bettie's relationship with her father, Fauntleroy would hardly accept the idea that Bettie and Fannie Coles were guilty of collusion and fraud. The latter, in fact, had withstood a lenthy cross-examination by skillful attorneys without being impeached. "Why should this witness not be believed?" he asked. "Why should a court of justice, in the teeth of her clear, consistent, convincing, and uncontradicted testimony, gratuitously brand her as a perjured conspirator with Bettie Thomas Lewis, without a particle of evidence?"[43] The trial showed no blot on her moral character or veracity, and the evidence of other witnesses corroborated much of her testimony.

To determine Thomas's actions and motives in his final days was difficult. He had seen the lawyer and allegedly arranged an appointment to draw up a will. On the night before his death he told Dr. McGuire, who had often urged him to provide for Bettie by will, that everything was fine and that the doctor would be satisfied with what he had done. But what had he done? He had not completed conveyance of the land to trustees for Bettie. He had not yet made the will. To Fauntleroy the meaning was clear: "He meant--and could only mean--that he 'had done' that ample provision for his daughter that he always assured Dr. McGuire he intended to make--not by will, but by giving and delivering to her, on his deathbed, the bulk of his personal property, which was

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[43] Ibid., at 51 (Emphasis original).

just as effectual and just as legal as a will."[44]

In a dissenting opinion, Judge Lacy interpreted the facts differently. In his view the case concerned an alleged gift by Thomas "in disregard of all of his heirs and distributees, his next of kin, a few minutes before his death, to a colored woman living in his house, who claims to be the result of illicit intercourse with a colored slave woman."[45] This interpretation of the evidence completely disregarded large portions of the testimony of Dr. McGuire and others about Thomas's feelings toward Bettie and toward his legal relatives. Lacy believed instead that the circumstances rendered suspicious the testimony of Fannie Coles.

Lacy was on more convincing ground when he discussed the legal point involved. He declared that, even if Bettie Lewis were telling the truth, the gift would have been invalid under Virginia law. Gifts without a deed or will failed if they did not meet certain technical requirements. The facts in this case showed that the alleged transfer had not met one of the requirements, delivery of the personalty. Lacy was correct that the evidence failed to satisfy the provisions of the gift statute. Fauntleroy, and President Lewis in a concurring opinion, declared that the gift section did not apply to gifts causa mortis. The two sides disagreed even about the meaning of one of their recent decisions, which had interpreted the

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[44] Ibid., at 55 (Emphasis original).

[45] Ibid., at 71.

relevant statute. Lacy's reading of the Code appears to have been more accurate, although the issue was uncertain enough that the majority position was also tenable.

Fauntleroy emphasized the facts of this case, decided which decision would be more just, and only then related the facts to the law. Lacy first declared that the law did not support Bettie Lewis, and then challenged the credibility of her evidence. It is difficult to know whether Fauntleroy let the equities of the case help him interpret the law, or whether he purposely stressed the facts to bolster what he knew was a weak legal position. In either case, he obviously felt that Bettie Lewis was entitled to the gift as a matter of justice. Lacy presented his contrary view of the facts much more strongly than necessary if he believed that his reading of the law was correct. Perhaps he wanted to reinforce that reading by a slight rearrangement of the evidence. His attempt was futile. Bettie Thomas Lewis received her sizable gift.[46]

During the years 1870-1902 the Virginia Supreme Court of Appeals heard a number of cases involving blacks and decedents' estates. Some cases had originated in the days of slavery and presented unique problems caused by the end of the peculiar institution. Most postwar cases, however, were routine estate controversies that happened to include black parties. They involved no great legal questions, but they

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[46]The decision made Lewis the wealthiest black person in Virginia. Augusta County Argus, January 13, 1891.

did allow the judges to interpret and discuss family and social relations.

In no case did a black fail to receive a legacy to which he was obviously entitled. Some question remains about the justness of the outcome of Johns v. Scott, but the decision was neither illogical nor contrary to law. In other instances, such as Jones's Administrator and Thomas, the court stressed the equitableness of the situation as much as the law. In cases involving a black legacy only indirectly, the court did not comment unduly on that fact. Generally, the court disposed of estate cases involving blacks without special mention or treatment.

The appellate opinions also provide some clue to the treatment of such cases in the lower courts. Blacks were neither too ignorant nor too intimidated to assert their rights in court. In some of these cases the blacks were originally plaintiffs. In a number of cases the blacks appeared before the Supreme Court as appellees, showing that black parties won at least some disputes in the lower courts. Sometimes the estate in controversy was that of a black man, and both parties were black. In the area of decedents' estates the black citizen received his due in the legal system of Virginia.

VI. COMMERCIAL RELATIONS

One function of a legal system is to serve as a forum for the settlement of disputes between citizens. This arbitrative function of the courts plays a major role in determining the economic well-being of the citizens under their jurisdiction. In their newly freed status after the Civil War black Virginians entered the commercial life of the state, and one result of this participation was business disputes between blacks and whites and among blacks themselves. A number of these disputes reached the Supreme Court of Appeals. These cases demonstrate the nature of black business dealings and indicate how blacks were treated in the state's courts.

The right to own property was not new to all Virginia blacks. Before the war free blacks enjoyed the right to obtain, hold, and transfer property in much the same manner as whites. There were some limitations--notably prohibitions against black ownership of firearms, liquor, dogs, and the like--but for the most part free black rights were unencumbered.[1] The slaves, however, possessed no rights to property.

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[1]Luther Porter Jackson, Free Negro Labor and Property Holding in Virginia, 1830-1860 (New York: D. Appleton-Century Company, Inc., 1942); John Henderson Russell, The Free Negro

Emancipation thrust a large number of new participants into the business marketplace. Because land was the most important commodity in a predominantly agricultural society, black Virginians were most concerned with real estate.

Immediately after the war land values throughout the state dropped to a fraction of their antebellum level. The freedmen could not take advantage of this deflation, though, due to a lack of capital. As the blacks acquired cash through labor, agriculture became more profitable and the price of land increased. The return of stable economic conditions after 1880 hastened the growth of black land ownership, and by 1890 there were more than 13,000 black farm owners in the state.[2] In 1894 Orra Langhorne could separate Virginia's blacks into two classes, one of which was "ignorant and degraded," the other characterized by excellent citizens of

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in Virginia, 1619-1865 (Baltimore: Johns Hopkins Press, 1913), especially pp. 94-98.

[2]W. H. Brown, The Education and Economic Development of the Negro in Virginia, Phelps-Stokes Fellowship Papers, No. 6 (Charlottesville: Publications of the University of Virginia, [1923]), pp. 82-91; Samuel T. Bitting, Rural Land Ownership Among the Negroes of Virginia, Phelps-Stokes Fellowship Papers (Charlottesville: Publications of the University of Virginia, n.d.), pp. 7-30. Although lack of capital prevented many blacks from taking advantage of depressed land prices during Reconstruction, in the first flush of freedom more blacks bought land during the years 1865-1868 than during any succeeding three year period. John Preston McConnell, Negroes and Their Treatment in Virginia from 1865 to 1867 (Pulaski, Virginia: B. D. Smith & Brothers, 1910), pp. 40-41; Alrutheus Ambush Taylor, The Negro in the Reconstruction of Virginia (Washington, D. C.: Association for the Study of Negro Life and History, 1926), pp. 130-35.

"substantial property."[3]

Most white Virginians favored black ownership of land. Even Philip A. Bruce, who had little good to say about the freedmen in any respect, approved of black land ownership. He wrote, "Many of the negroes who have acquired land of their own in fee simple appear to more advantage than those who simply rent it from white proprietors." These black owners possessed steadiness, prudence, ambition, and self-control.[4] In addition, owning land gave blacks a stake in the peace and order of society. Thus, it was in the self-interest of the white community to encourage black ownership. D. Hiden Ramsey best expressed this idea:

> The Southern people realize very clearly that the hope of the negro race lies largely in the incentive to the accumulation of property. To destroy or weaken this incentive would be suicidal. Such discrimination would confirm the negro in his nomadic habits and would militate against those stable influences which the white leaders have striven to introduce. The law must assist in the effort to make the negro a propertied class.[5]

In a series of cases after 1870 the Virginia Supreme

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[3]Orra Langhorne, Southern Sketches from Virginia, 1881-1901, ed. by Charles E. Wynes (Charlottesville: University Press of Virginia, 1964), pp. 123-24.

[4]Philip A. Bruce, The Plantation Negro as a Freeman (New York: G. P. Putnam's Sons, 1889), pp. 215-16.

[5]D. Hiden Ramsey, "Negro Criminality," in Lectures and Addresses on the Negro in the South, Phelps-Stokes Fellowship Papers (Charlottesville: Publications of the University of Virginia, n.d.), p. 107.

Court had the opportunity to oversee the right of blacks to hold and transfer property. Talley v. Robinson's assignee[6] dealt with a white-black contract made during the war. In September, 1864, John Robinson, a free black, sold a tract of land in Cumberland County to William Talley. Talley paid Robinson the entire purchase price of $4,000, but did not receive the land because Robinson was unable to obtain the deed from the previous owner. After the war Robinson refused to make over the deed and, in 1867, Talley brought suit against him for specific execution of the contract. In August, 1869, while the case was in the courts, Robinson went bankrupt and his assignee became a party.

Robinson asserted that the contract was invalid because it had been extorted from him by threats and violence. He also contended that the original price was inequitable because $4,000 in Confederate money had carried a true value of less than $200. Robinson stated that he had been whipped and driven from the county. Forbidden to be seen in the area, he was unable to manage his land. Had it not been for those reasons, he said, he would not have sold. In addition, he was so flustered at the time that he did not understand the terms of the contract.

Talley emphasized that he had not been a member of the mob. He said that Robinson had initiated the deal by sending for him and offering to sell the land. As for Robinson's

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[6]63 Va. (22 Gratt.) 888 (1872).

alleged inability to understand the terms of the contract, Talley argued that a white man chosen by Robinson had drafted the agreement. He admitted on cross-examination that he had known of Robinson's being driven from the county.

In March, 1870, the Circuit Court of Cumberland County ruled that,

> it appearing from the evidence . . . that the defendant . . . was induced to [dispose of the land] because of lawless violence, which, after inflicting great bodily injury on him, kept him in fear and jeopardy of his life; of all which the plaintiff was informed when he entered into the contract . . .; and it appearing that the price agreed to be paid for the said land is inadequate; and it also appearing that the said contract was made for treasury notes of the Southern Confederate States . . ., and that the $4,000 was, on the day the contract was made, only worth $166, and that the said land was . . . worth $500 at the least,[7]

Talley was to pay the remainder of the $500 to the assignee or surrender the land to him, in which case Talley would get a $166 refund.

On appeal, the Supreme Court disagreed. President Moncure felt that the defense had not proved a case of inadequate consideration. No proof existed of the true value of the land in Confederate dollars. More important, simple inadequacy of consideration was not sufficient to set aside a contract. Needed were additional circumstances making the transaction inequitable or unconscionable. Concerning the defendant's claim of duress, Moncure wrote, "Undoubtedly, a great outrage

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[7] Ibid., at 893.

was perpetrated by certain persons upon Robinson. . . . And if any person concerned in . . . that outrage, had thereafter . . . made the contract . . ., the contract might have been considered as made by him under duress; and certainly a court of equity would not have afforded its aid to such person to compel the specific execution of the contract."[8] But Talley did not take part in the coercion. Robinson made the first offer and named the price. Moncure found no attempt by Talley to take advantage of Robinson's position. The facts showed the transaction to have been fair and proper.

A different type of duress was involved in Davis v. Strange's Executor,[9] decided in 1890. Alice Lee Davis was the daughter of a white man, Thomas V. Strange, and a black woman. Strange and his legal wife recognized her as his child, treated her as a member of the family, and showered her with love and privileges equal to those given their own legitimate daughter. In 1881 Strange conveyed to Alice a house in Washington worth $3,500. The deed stated that the conveyance was made,

> in consideration of the obligations growing out of the peculiar and near relations existing between him and the said Alice Lee Strange [Davis], which relations, under a sense of duty, not only to her, but to his God, he feels bound to acknowledge, and takes pleasure in heeding; and also in consideration of personal kindnesses and attention shown and services rendered him by the said Alice Lee Strange,

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[8] Ibid., at 895.

[9] 86 Va. 793 (1890).

> as well as in consideration of the earnest request made of him by his wife before and in her last illness.[10]

He also conveyed to her by deed some property in Lynchburg, reserving for himself a life estate.

Nannie, the legitimate daughter, and her husband held her parents' treatment of Alice in strong disfavor and opposed Strange's gifts to her. The husband, L. E. Litchford, told Strange that he would rather see the Lynchburg property burned than let Alice take it. In 1887 the Litchfords consulted an attorney about the deed, but he advised that they had no legal remedy. Nannie raged to such an extent, however, that Strange, now living with her, finally offered to get the property back.

The next day, with a new deed already made out, Strange and lawyer William Branch traveled to Chatham to see Alice. At first Strange did not tell Alice the purpose of his visit, but finally did so under strong prodding by Branch. Despite Branch's mention of the threat of arson and assertions by her father that she would lose nothing in the transaction, Alice refused to reconvey the property. Branch reminded her that the land would be useless to her since "the people near there said no colored person should live there." Strange explained that he wanted the property back because the rest of the family was disturbed by her holding it. Both father and daughter

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[10] Ibid., at 799.

cried, and Strange wandered about greatly distressed. Alice asked Branch whether Strange had made a will. The lawyer replied that he had, but failed to mention that the will contained no provision for her.

Finally, Alice sobbed that she wanted to cause her sick father no more distress and would come to Lynchburg to settle the transfer. Branch produced the previously drawn deed and urged her to sign it immediately. He then hurried back to Lynchburg and recorded it the same day. Within a week Strange was dead, and soon afterward Alice and her husband brought suit to set aside the deed on the ground of undue influence. In January, 1889, the Circuit Court of Lynchburg dismissed their bill.

In April, 1890, the Supreme Court reversed the decision by a 3-2 vote. Judge Fauntleroy, delivering the majority opinion, began with a consideration of the relationship between Strange and Alice. He asserted, "It is the fact--the status--of this relation of parent and child, and the family recognition and association, which obtained between the appellant and her father and his household, which it is important to state and remark: however revolting to the moral sense and offensive against public policy."[11] Having made this ritualistic statement of displeasure at miscegenation, Fauntleroy then detailed the tender love and affection in

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[11] Ibid., at 795.

the "revolting" relationship. He quoted extensively from correspondence between Strange and Alice which showed deep affection between the two.

The letters also referred to the attitude of Nannie and her husband. Strange had written to Alice in 1878, "It is a fact, that we have kept secret from you, that you are hated by one in the family with unequaled hatred, and simply because Minnie and myself love and provide for you, and intend to do." No doubt existed in Strange's mind that Alice's color was the cause of the Litchfords' dislike for her. The correspondence in fact proved that Strange had indeed felt greater affection for Alice than for Nannie. Although he wished both daughters well, one letter said, he particularly wanted Alice to be successful.

Having discussed the family relationships, Fauntleroy next considered the details of the various transactions. He emphasized that Strange had continually made efforts over the years to provide for Alice, at first by will and later by deed. The object was to protect "his best loved child from the contingencies of fortune, and the dreaded avarice and hate of his selfish son-in-law." In his last days, however, the old man, "in a condition of senile imbecility," was unable to withstand the pressure from Nannie and her husband. Fauntleroy became indignant discussing Strange's final trip: "This poor, old, dying man, who, in a week afterwards, was at rest from his sorrow, was taken down, to be made the

unwilling instrument--a puppet in the hands of the managers--to sacrifice the rights of his dear child Alice, that his few remaining days might be passed in peace."[12]

Fauntleroy was outraged by Branch's actions. It was the lawyer,

> who was employed, by those who were to receive the benefit, to induce this young and unadvised girl, in a moment of sudden and irresistible importunity, and of sympathetic sorrow at the sight of the halting gait, the trembling frame and quivering voice of the poor old father whom she tenderly loved and on whom she had implicitly relied and trusted as the devoted and faithful protector and author and guide of her life, without reflection, and without the advice of friends, or the counsel of a lawyer, to give away property which was valued at $8,000.00 or $10,000.00, and which she had held for over six years.[13]

It was the lawyer who urged Alice to grant her father's request, and who assured her that her father had made a will, but failed to mention that there was nothing in it for her. It was the lawyer whose persuasion overcame "the tender-hearted girl." Afterwards, to preclude Alice's reconsidering the deed or seeking legal advice, Branch hurriedly returned to Lynchburg and recorded the deed the same day. Branch's own deposition, the judge thought, proved the case to be one of "unconscionable cunning and cruel wrong."

The court should be especially concerned, Fauntleroy said, about any conveyance between parent and child where no

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[12] Ibid., at 802.

[13] Ibid., at 803.

consideration was involved. Also suspicious was any transaction where the gift seemed disproportionate to the donor's means. He cited Justice Story on such situations and concluded, "If Judge Story had been commenting upon the facts of this case . . . he could not have more exactly described every feature, circumstance and character of this revolting transaction." The judge ordered that the deed conveying the the property from Alice to Strange be set aside.

A year after the Davis decision Fauntleroy delivered the majority opinion in Reynolds v. Reynolds' Ex'or,[14] the second time the case had appeared before the court. The plaintiff was an elderly black man named Harvey Reynolds. On the basis of newly discovered evidence the court reversed its earlier decision and granted the relief sought by Reynolds. Some question remains, though, whether the new evidence was truly sufficient to cause the court's reversal. The suspicion arises that the judges used that rationale to support a change of opinion.

In 1869 Charles B. Reynolds sold to his former slave Harvey Reynolds two tracts of land in Floyd County for $5,000, to be paid "upon long and easy terms." The larger parcel, later in controversy, was one half of the so-called "Guerrant" tract, the half estimated to be 400 acres. At that time no definite boundaries divided the two halves. In 1872 Charles

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[14] 88 Va. 149 (1891).

Reynolds hired surveyor Stephen Guerrant to survey the land and mark off one-half for Harvey Reynolds. The surveyor drew up a deed designating boundaries that, he informed Charles, equally divided the tract. Charles Reynolds executed and delivered the deed to Harvey Reynolds, both men assuming that the boundaries were accurate.

When Charles Reynolds several years later decided to sell his half of the tract, Stephen Guerrant offered to guarantee that the section contained 400 acres, on condition that he (Guerrant) receive all additional acreage above 400. After Reynolds agreed, Guerrant conducted a new survey and "discovered" that his original effort had been in error. The entire tract contained more than 900 acres and the boundary set in the first deed had left Harvey Reynolds 102 acres short of owning half. Charles Reynolds was greatly upset and bitter towards Guerrant, but he paid the surveyor $300 to settle the claim for the excess land.

Charles died in 1876, and six years later his executor and assignee, Stephen Watts, filed a bill in Floyd County Circuit Court to enforce a lien against Harvey Reynolds for $1,600 unpaid on the 1869 purchase. Reynolds answered that both parties to the original transaction had been misled by Guerrant to the extent that his land was 102 acres short, and he asked for an equitable abatement of the purchase money. The court ruled that the agreement between the two men had been a contract of hazard according to the boundaries set in

the deed and refused Reynolds' plea for abatement.

The Supreme Court affirmed in June, 1885, with Judge Lacy delivering the majority opinion.[15] He agreed with the circuit court that the sale had been determined by the tract and not by the number of acres. The dissent charged that the majority decision overlooked the intention of the parties and was unfair to Harvey Reynolds. Both parties had wanted Harvey to have one-half of the Guerrant land, and the courts in equity could easily correct the subsequent mutual mistake.

In November, 1886, Harvey Reynolds filed a bill of review in circuit court on the basis of after-discovered evidence. The court heard the new evidence, basically testimony by four of Charles Reynolds' white friends concerning his intentions, and dismissed the bill. Reynolds again appealed to the Supreme Court, this time successfully.

Fauntleroy's description of the parties offered a strong clue to his feelings in the case. This was especially true of his characterization of Harvey Reynolds. Harvey, he noted, "who had been [Charles'] former slave and, up to his death in 1875, his trusted friend and business manager, was an illiterate but industrious, thrifty, and worthy colored man, between whom and C. B. Reynolds there existed kindness,

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[15]The decision of the Supreme Court, June 25, 1885, is not reported. In his dissent in the second hearing, however, Lacy quotes extensively from his original majority opinion on pp. 158-62, and from the anonymous dissent on pp. 162-67.

affection, and perfect confidence."[16]

To support the bill of review, the new evidence had to meet three criteria--that the evidence have been unknown at the time of the original decree, that it have been unknowable by reasonable diligence at the time, and that it be sufficient to reverse that decree. The new evidence consisted of the testimony of four former friends of Charles Reynolds, "all highly respectable white men of Franklin County." William Thompson recalled that Charles had told him of the sale to Harvey. Thompson asked whether one-half of the tract would not be too large a contract. Charles replied that he thought Harvey industrious and energetic, and that he had set the payments to ease Harvey's burden. After Charles' difficulties with Stephen Guerrant, Thompson continued, Charles had been very bitter towards the surveyor for upsetting the plan to give Harvey one-half the land.

The other new witnesses testified similarly, and all noted Charles' desire to give Harvey credit for the short acreage to alleviate the injustice. The witnesses also testified that their evidence was not known to Harvey Reynolds during the first hearings. Fauntleroy found that the new evidence was strong enough to have produced a different result in the original cause and ordered the circuit court to grant the relief asked in the bill of review.

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[16] 88 Va. 154.

Lacy disagreed with his colleagues. He pointed out that Harvey Reynolds had never claimed the acreage to be deficient until after Charles' death. In addition, Watts produced fifteen letters from Harvey to Charles, and later to Watts, discussing payment on the contract. In none of the letters did Harvey assert that he had not received the full value of the agreement.

These facts led Lacy to believe that Harvey's defense was an after-thought subsequent to Charles' death. In addition, the new evidence was insufficient to support a bill of review because it was merely cumulative. Because other witnesses had already testified that Charles intended to sell one-half the tract to Harvey, the additional testimony presented no new facts. Lacy thought that both the original Supreme Court decision and the more recent circuit court dismissal were correct.

It appears that Lacy was half right. Assuming the first decision to have been correct, Lacy's assessment of the new evidence was more accurate than Fauntleroy's. Although the new testimony reinforced Harvey Reynolds' assertions about Charles' intent, it presented no new points. The appearance by Thompson and his fellow "highly respectable white men" on the stand may have been more impressive than that of Harvey's former witnesses, but it added nothing materially to the facts of the case. Fauntleroy stated that, had the new evidence been known earlier, it would have led to a different

result. But similar evidence was in the record at the first Supreme Court hearing.

It is obvious that the court here was not reacting to new evidence, but rather was reversing a previous inequitable decision. The fiction that there was important new evidence in the case afforded the majority an opportunity to change that decision. Whether the court would have reversed solely on the earlier evidence if given the oppotunity, or whether the strength of the new testimony provided personal (though not legal) reason for the change, is not known. In either case, the second decision was more just than the first. Charles had wanted Harvey to have one-half the tract, not only the area limited by Guerrant's survey boundaries. The decision gave Harvey credit for his full acreage.

The facts in Reynolds also provide valuable information about blacks and landholding during the postwar period. Charles Reynolds was willing to sell to his former slave, in 1869, more than 400 acres of land. The purchase price of $5,000 was a considerable sum. The transaction involved liberal credit terms, demonstrating that Charles had confidence in Harvey's industry and ambition. Harvey also acted as business manager for his former master, a man of great wealth and property. These facts challenge the assertions by contemporary observers and later historians that the blacks of the time were ignorant of contractual responsibilities and

business practices.[17]

The contract in dispute in Burdine v. Burdine's Ex'or[18] represented a relationship more social than commercial. Roena Burdine and her daughter Nancy remained in the service of their former master, N. E. Burdine, until 1883, when the two black women decided to move away. Roena did leave, but Nancy stayed to care for the gravely ill Mrs. Burdine. To retain the services of Nancy and to lure Roena back, Burdine wrote the following agreement:

> Know all men by these presents, that I, N. E. Burdine, . . . am held and firmly bound in the sum of ten thousand dollars to Roena and Nancy Burdine, colored,. . . . The conditions of the above bond are as follows: [Here Burdine described the land, stocks and cash each was to receive.] All this property and cash to pass to the other parties by will at my death; provided, they live and remain with myself and wife during our natural lives . . .; and provided, further, that [Roena] return to my home at once and remain as above stated. I further bind myself to treat both parties with kindness and respectability, they treating me and my wife in like manner.[19]

Roena returned, and mother and daughter served until Roena's death in 1885. Nancy remained until Mrs. Burdine, and finally her husband, died (the latter in 1897). Because Burdine died without leaving her the property by will, as provided in the 1883 agreement, Nancy brought a suit in chancery against his representative to make good the promise.

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[17]See, for example, Bruce, Plantation Negro, pp. 160-61, 181; Bitting, Rural Land Ownership, p. 30.

[18]98 Va. 515 (1900).

[19]Ibid., at 516-17.

The Circuit Court of Russell County decreed against Nancy, and she appealed to the Supreme Court.

That court's decision noted that Nancy Burdine's case rested completely on principles of equity. Judge Buchanan acknowledged that an agreement to dispose of property by will was not technically enforceable. In equity, however, a court could order the equivalent of specific performance on the ground that a trust had been created and that the representative of the deceased was charged with that trust. The judge then set to work to uphold the contract, disposing of claims by the executor that it was unenforceable due to indefiniteness, lack of mutuality, and nonperformance.

Another of the executor's contentions attacked Nancy for her actions under the agreement. She had not performed her duties, charged the executor, but instead had refused to serve the Burdines and become "unruly, vicious, aggravating, disobedient, and lewd." Her "notorious" conduct produced five illegitimate children. Buchanan agreed that some of the allegations of misconduct appeared to be true, and that such actions were grounds for discharge. But Burdine did not discharge her. She lived in his house until his remarriage, at which time she moved to another building on his farm. She managed much of the estate, and in his last illness kept him at her house and cared for him. Obviously, said Buchanan, neither of the parties thought the contract had ended due to Nancy's immorality.

Buchanan ended with a discussion of the executor's contention that the contract was unenforceable because it was based on immoral consideration. What N. E. Burdine actually was contracting for, according to this theory, was illicit cohabitation between Roena and himself. The judge met this claim squarely, as he had the allegations of Nancy's immorality. He wrote,

> There is evidence showing that improper relations had existed between Mr. Burdine and the mother, and that he had admitted that he was the father of the daughter,. . . There is also evidence tending to show that one reason why the mother left his house . . . was that she might lead a different life. It does not appear, however, either from the agreement, or otherwise, that the consideration for the agreement was the future illicit cohabitation of the parties. It purports to be for services on her part which were lawful, and which were rendered.[20]

Buchanan's treatment of this issue was notable. Had the court sought to deny Nancy's claim, the contention of immoral consideration would have furnished possible grounds. Instead, the judges demurred to the charges of previous immorality and looked only to the express terms of the contract.

Indeed, the court's decision as a whole was an attempt to deal justly with Nancy and Roena under the peculiar circumstances of this case. Although a master's desiring the continued companionship of his former slaves was not rare, the Burdine relationship included an unorthodox attempt to put the parties on a contractual basis. The court overlooked

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[20] Ibid., at 523.

certain technical weaknesses of the document and instead emphasized the intent of the parties.[21] Even evidence of immorality did not deter the judges from finding that the black women had fulfilled the roles desired of them by Burdine. They therefore were entitled to recovery.

Although the controversy in each of the previous cases involved at least one white party, legal disagreements also occurred with blacks on opposite sides. In Miller v. Miller[22] not only were the contesting parties both black, they were brothers as well. Reuben and Hubbard Miller bought jointly, in 1879, 137-1/2 acres of land in Buckingham County. Reuben paid a smaller amount and was to receive a proportional interest in the land, while the deed to the entire plot was made out to Hubbard. In the years following the sale the brothers lived on and improved the land, Reuben Miller occupying approximately 13 acres as his one-tenth share. They lived compatibly until 1897 when, to preclude later difficulties, they agreed to let three arbitrators settle the boundary.

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[21]Four years earlier the court rejected allegations of a similar contract. Mary Woodson claimed that she had returned in 1867 to the service of her former master and alleged natural father, William Utz, in return for an oral promise of $10,000, a house, and twenty-five acres. Utz died in 1890 without fulfilling his part of the agreement. The lower court found for Woodson against Utz's administrator, but the Supreme Court reversed. Judge Cardwell declared that Woodson's evidence was not sufficient to prove that Utz had made the alleged promise, and hinted that he believed the claim to be fraudulent. Hannah v. Woodson, 2 Va. Dec. 442 (1896).

[22]99 Va. 125 (1901).

The arbitrators decided that Reuben was entitled to thirteen acres and determined such boundaries as were necessary. At that point Hubbard Miller announced his refusal to be bound by the arbitration and, in addition, denied his brother the rights to any part of the land.

Reuben Miller filed a bill in circuit court asking that Hubbard be ordered to convey a deed for the contested portion of the tract. Hubbard Miller answered that, although Reuben had paid some money originally, he had since cut and sold timber from the land of value in excess of that amount. He also contended that the arbitration had not been completed and that therefore he was not bound by it. The circuit court held that the contract was too vague for enforcement and dismissed the bill.

On appeal, the Supreme Court disagreed. Judge Cardwell believed that there had been a clear agreement between the Millers about buying the land and dividing it proportionally. The problem arose because the two men were illiterate and inexperienced in business. Cardwell emphasized the role of the arbitrators, writing, "[The Millers] mutually agreed that three persons of their own race and color, selected by them, and who were also unlettered, should go upon the land, and ascertain and determine all matters in dispute . . ., and that their decision should be accepted as final by both parties."[23] The judge conceded that the proceedings had not

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[23] Ibid., at 128.

been conducted exactly in accord with statutory provisions for arbitration, but he thought nevertheless that Hubbard Miller was bound by the arbitrators' decision. The court ordered that Hubbard execute a deed for the land to Reuben.

It is notable that Cardwell, for the most part, ignored the color of the parties. At no time did he interrupt his discussion to mention specifically that the contestants were black.[24] Nothing in the circumstances of the case struck the court as unusual. That the parties were black was of no consequence. Cardwell mentioned that the men were illiterate and lacked business experience, but he did so only to explain the situation. No ridicule or condescension was involved.

In addition to holding property individually, blacks also formed groups to obtain and use property collectively. One common type of group effort was the church. Sermons on love and brotherhood, however, did not always keep the good parishioners from public squabbling over church land and buildings. In 1898, for example, a controversy among members of the Court Street Baptist Church in Lynchburg became so involved that the keys to the building wound up in the hands of the city sergeant. The pastor obtained a court

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[24] The appellant's brief did note the race of the parties. Miller v. Miller, in Virginia, Supreme Court of Appeals, Records and Briefs, CVI, O.S., 89.

injunction against his foes, but a court-supervised election resulted in the pastor's expulsion.[25]

The first such church case to reach the Supreme Court was Allen v. Paul,[26] in 1874. The Union Street Methodist Church in Petersburg originally received its land by deed conveyed to the trustees of the Methodist Episcopal Church. From 1844 to 1865 use of the property was delegated to the black members of the church. In 1865 the black members affiliated themselves with the African Methodist Episcopal Zion Church. The Methodist Episcopal trustees agreed with the officials of the Union Street group, under the new affiliation, that the congregation could continue to use the property for worship until it was needed by the Methodist Episcopal Church.

In 1871 a controversy at Union Street led to the election of new trustees. Afterwards James Allen and his fellow Union Street trustees claimed title in fee simple to the church property. Paul and the other trustees of the Methodist Episcopal Church, however, claimed to be the successors in office of the original landholders and brought suit to recover possession. They argued that the Union Street trustees had held possession only with their consent. The defendants argued that the building belonged to the local congregation and not to the church at large, and that a change in name did

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[25] Richmond Planet, March 26, June 4, 1898.

[26] 65 Va. (24 Gratt.) 332 (1874).

not affect the title. The jury found for the plaintiff, and the Union Street Trustees appealed.

Speaking for the Supreme Court, Judge Anderson found little merit to the appeal. The appellants contended that the major error came in the instructions to the jury, where the trial judge had delivered those proposed by plaintiff and denied those asked by the defense. Anderson thought that the judge's decision was right. Plaintiff's instructions were correct or, at worst, non-prejudicial. The defense instructions, on the other hand, were either incorrect or immaterial. The judge then placed the controversy in context:

> It seems that there is a division in the colored congregation. A part of them adhere to the church to which the congregation belonged when the charity was bestowed. But the majority of the congregation have withdrawn from that church, and formed a connection with another ecclesiastical body, and have put themselves under its government, have set the owners of the property at defiance, and assert it to be theirs, and have refused to allow the ministers of the old church to occupy the pulpit.[27]

Which faction of the congregation should have the church? The answer was to allow the property owners, the trustees of the Methodist Episcopal Church, to decide.[28]

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[27] Ibid., at 345.

[28] Allen and his colleagues were not long without a building. In 1880 the General Assembly passed an act authorizing Allen and others, as trustees of the African Methodist Zion Church of Petersburg, to execute a deed of trust on the church property to raise money to complete the building of the church. Virginia, General Assembly, Acts and Joint Resolutions, 1879-1880, ch. 195, p. 184. Such acts of authorization for both white and black churches were frequent during this period.

A second church property case, Clark v. Oliver,[29] came before the court in 1895. In 1865 a group of blacks purchased a lot and buildings in Richmond and conveyed them to John Oliver and others, trustees of the Moore Street Baptist Church. At about the same time another group of blacks began a fund to establish an industrial school for black youth in Richmond, to be called the Moore Street Industrial Society. The chief fund raiser for this group was John Oliver. In 1880 a controversy arose over title to the property. The church held posession and legal title, but the school officials claimed the property because most of the purchase money had come from contributions solicited for the school. The trustees of the school and church compromised and executed a deed conveying the greater part of the property to the school. The remainder went to the church, with a covenant that it would revert to the school if the church should cease to use it for religious purposes.

The compromise was not satisfactory to all concerned. In 1886 the plaintiffs filed a bill on behalf of contributors to the school fund, asserting that they had given money specifically for the school, not to support a church. They charged that Oliver had diverted the funds. The Circuit Court of Henrico County sustained the defendants' demurrer, and plaintiffs appealed. President Keith delivered the Supreme Court's

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[29] 91 Va. 421 (1895); Richmond Planet, May 4, 1895; The Virginia Law Register, I, No. 3 (1895), 195.

decision. The contributors, he declared, lost control over their money once they had paid it into the fund. He acknowledged that an equity court could compel specific execution of a trust, but ruled that the contributors were not eligible to call for such action. The court affirmed the lower court decision.

These two church cases again demonstrated the lack of special notice taken by the court in regard to black parties. That the congregation in Allen was black drew no unnecessary mention from Judge Anderson. Neither did the court see anything unusual in Clark. The opinion in that case was notable because it contained no adverse observations about the ethicality of Oliver's diversion of the school funds. Although the diversion was done in good faith, some question remains about the ethics of the arrangement. Had Anderson wished to pass a few disparaging remarks on the business integrity of blacks, Clark afforded him the perfect opportunity.

In both Allen and Clark the issues were straightforward. When the African Methodist Episcopal Church of Berkeley needed money in 1893 to pay off a contractor, however, matters became somewhat complicated. In debt to John W. Jones for $4,525, the church wanted a loan from the Chesapeake Classified Building Association. Unfortunately, the charter and by-laws of the association allowed loans only to whites who were members of the association. This proved to be no obstacle. The church trustees, Jones, and George T. Tilley,

secretary of the association, arranged for Tilley to subscribe to the amount of association stock necessary to obtain a $4,000 loan, which the trustees secured by a trust deed on the church property. The plan appeared to work rather well.

Problems arose with a controversy among the association, Jones, and a subcontractor's assignee over certain payments. By the time the case reached the Supreme Court,[30] the church trustees had little to do but sit on the sidelines and watch the other parties battle. Judge Cardwell took time out from sorting through the complicated series of loans and payments to say just that. Cardwell did not say anything else about the trustees. He did not comment on the fact that the transactions had sprung from a plan to circumvent a racially exclusive provision of the association's charter. Perhaps Cardwell saw nothing wrong with the situation because the association's officers themselves had been in on the plot. Neither the businessmen involved nor the judges who reviewed the loan were upset by this commercial subterfuge.[31]

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[30]Chesapeake Classified Bldg. Assn'n. v. Coleman, 94 Va. 433 (1897).

[31]Blacks founded their own building associations in several cities, and some associations in the state had both white and black shareholders. Work Projects Administration, Writers' Program, The Negro in Virginia (New York: Sponsored by The Hampton Institute, Hastings House, Publishers, 1940), p. 300; Taylor, Negro in Reconstruction of Virginia, p. 131; W. E. Burghardt DuBois, "The Negroes of Farmville, Virginia: A Social Study," Bulletin of the Department of Labor, III, No. 14 (1898), 29; Augusta County Argus, June 6, 1893.

In addition to forming churches, Virginia blacks also banded together in benevolent and fraternal societies. Due to the refusal of white institutions to deal with blacks, these societies served commercial purposes as well, providing insurance and banking services.[32] The most successful of the societies was the Grand Fountain of the United Order of True Reformers. The True Reformers were headquartered in Richmond and composed of an integrated group of enterprises--health and life insurance, a newspaper, hotel, old folks home, building and loan association, and savings bank.[33] It was because of the insurance business that the True Reformers usually appeared in the state courts. In 1896 the beneficiaries of Mary E. Ross brought suit in Lynchburg against the society for nonpayment of death benefits. R. P. Armistead and N. T. Goldsberry, a black law firm, represented the plaintiffs, while the society retained two white attorneys. The defense claimed that Ross had been delinquent in her premiums. At issue was whether the society had given good notice to Ross about her delinquency and the pending loss of benefits. The judge gave the jury the instructions submitted by plaintiffs,

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[32]On the benevolent societies in banking and insurance, see WPA, Negro in Virginia, pp. 295-96; Brown, Education and Economic Development, pp. 120-23; DuBois, "Negroes of Farmville," pp. 35-36.

[33]The official history is W. P. Burrell and D. E. Johnson, Sr., Twenty-Five Years History of the Grand Fountain of the United Order of True Reformers, 1881-1905 (Richmond: Grand Fountain, U.O.T.R., 1909).

and the jury found for the beneficiaries.[34]

In 1899 a True Reformers case from Lynchburg reached the Supreme Court.[35] The society had insured the life of Cealia Wilson for $500, with her two children as beneficiaries. On the certificate was an endorsement by Wilson naming Sarah C. Watkins her executrix and receiver for the children of any money paid on the policy. Upon Wilson's death Watkins presented the policies for payment. At first the society refused her request, but finally made payment after Wilson's husband Samuel appeared with his counsel. Samuel stated that the parties agreed the money should go to Watkins. Afterwards, William Wilson, the surviving child, brought an action against the insurer to recover on the policies. At trial in Lynchburg Corporation Court the verdict was for Wilson, and the True Reformers appealed.

The supreme court, speaking through President Keith, upheld the trial judge's actions in every instance. The basic fact, Keith concluded, was that the endorsement was invalid. That finding settled all points. It was irrelevant that Watkins had used the money to help support William Wilson and to pay Cealia Wilson's medical bills. The True Reformers had erred in paying her, and still owed on the policy

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[34]Richmond Planet, December 19, 1896.

[35]Grand Fountain U. O. T. R. v. Wilson, 96 Va. 594 (1899).

to William Wilson.[36]

The unique case of Thomas v. Turner's Adm'r,[37] which involved a black woman and her white attorney, reached the Supreme Court in 1890. Lemuel Turner, a wealthy Nelson County resident, died in 1878, leaving most of his estate in trust for the use of his natural daughter and former slave Emily R. Thomas. At the time of his death Turner was defendant in a lawsuit. Acting as both administrator of the estate and attorney for Emily Thomas, Thomas P. Fitzpatrick defended the case. The lower court found against Turner's estate in the amount of $18,000, but the Supreme Court reversed that decision. Afterwards, Thomas and Fitzpatrick disagreed over the fee the lawyer should receive.

In December, 1886, Emily Thomas and Fitzpatrick executed a written contract. The paper praised the lawyer for his services and credited him with having saved the woman's estate. She then assigned to the lawyer the interest on all money belonging to "the residuum of the estate," i.e., Emily's share, from the death of Lemuel Turner until January, 1890, plus $5,000 of the principal. Emily signed the contract with an "X," and the document included a certificate from Justice

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[36]Another case arising from a True Reformer policy was in litigation in Lynchburg during this period, but the Supreme Court did not render its decision until 1903. Leftwich v. Wells, 101 Va. 255.

[37]87 Va. 1 (1890).

of the Peace J. J. Camp that the contract had been read and explained to Emily in his presence.

Shortly thereafter Fitzpatrick filed a bill in equity against Emily Thomas and her children to settle the account. Thomas answered that she had signed the contract in ignorance of its true meaning. She had thought that she was agreeing only to a payment of $5,000 out of the estate. Her answer also noted that the interest in dispute came to more than $4,000. If that amount were added to the $5,000 principal, plus the usual administrator's fee, Fitzpatrick would receive approximately $10-12,000 in payment. That would be quite a reward, considering that he had originally saved the estate only $18,000.

At trial, Fitzpatrick testified that at one time Emily had been willing to give him all the estate except for her farm, but he had refused. When she insisted on paying him well, he suggested the current contract and produced a document previously prepared with those terms. Afterwards, he continued, he read the document slowly and explained it to her. Camp also tried to explain it and advised her that the terms were fair. After signing, Emily mentioned that she had expected him to charge a larger fee and that she was well satisfied.

When Emily Thomas testified about the meeting she remembered it differently. He had told her, she said, that the $5,000 was the complete fee, and she had replied that she

thought that amount to be sufficient. The lawyer assured her that after the $5,000 payment the balance of the personal estate would be hers. She told Fitzpatrick at the time that she did not understand the contract, even after he had read it twice. She emphasized that the only part of the contract she had understood was the $5,000 payment, and that she had stated to the lawyer her resolution that that amount was all she was willing to pay.

Two other witnesses who had been present at the meeting testified. Fitzpatrick's son remembered that Emily had said that she understood and was willing to sign the contract. Camp also recalled her listening to and seeming to be satisfied with the agreement. On cross-examination, however, he admitted that his own interpretation of the contract had been that the lawyer was to receive only the $5,000 fee. Sheriff M. K. Estes, Emily Thomas' trustee, testified that, when Emily had come to him sometime later to discuss the estate, she appeared to have no knowledge of the assignment of interest. When he explained it to her, she replied that she had wanted Fitzpatrick to have only the $5,000 principal. After weighing the testimony, the circuit court held the contract to be valid, and Thomas appealed.

Delivering the majority opinion for the Supreme Court, President Lewis found the lower court decree erroneous. Courts must watch closely, he declared, any attorney-client dealings that were for the benefit of the attorney. As a

matter of public policy such transactions were "presumptively invalid," the presumption to be overcome only by clear evidence. The purpose of such a policy was to protect clients. It was the lawyer's responsibility to prove that the contract was fair and that the client had entered into it freely and with full understanding of its terms.

In the present case the attorney-client relationship had even greater effect because Fitzpatrick was also administrator of the estate. Thomas, on the other hand, was an illiterate woman unaccustomed to legal business. It was only natural that she should feel gratitude to the lawyer, but that very gratitude was the problem. Her gratitude to and dependence on Fitzpatrick may easily have led her to an unwise decision. Lewis stated, "[The evidence] shows very clearly that the contract, instead of being an act of rational consideration, an act of pure volition uninfluenced, was rather the impulsive, hasty, and unadvised act of one who, to use the surprisingly apt language of the appellee's own counsel, was under a 'generous thraldom of gratitude' to the attorney whom she regarded as her 'deliverer.'"[38] Although Emily had a right to be generous, Fitzpatrick had a special duty to guard her against too much generosity. At the least, he should have summoned a disinterested adviser. Camp thought that he had been called only to certify her acknowledgement,

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[38] Ibid., at 18.

not to act as Thomas' adviser. In addition, Camp testified that he himself had interpreted the contract in the same way as had Emily.

For Lewis, the issue was whether Thomas had understood the effects of the contract when she signed it. He found no evidence that she had, and therefore assumed that she had not. He emphasized that he was not impugning Fitzpatrick's integrity, only suggesting that the attorney had been careless. Fitzpatrick should still receive, as compensation for his services, $5,000 from the estate. Concerning the contract, Lewis remarked, "We . . . are of opinion that a decision could hardly be rendered more repugnant to public policy . . . than would be a decision upholding this contract under the circumstances disclosed by the record."[39]

Judge Lacy, however, dissented from his colleagues. He denied that any rule existed in Virginia requiring special watchfulness over a lawyer-client transaction. An attorney had no greater burden than any other party when entering into a contract. Emily Thomas had at one time offered Fitzpatrick all of the estate except her farm, so that in the end he took less than the original settlement. Also, she "readily and cheerfully" agreed to the final contract. Lacy thought that Thomas was simply trying to avoid her responsibilities under the contract.

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[39] Ibid., at 21.

The persistent hints at attempted fraud contained in Lacy's dissents in Thomas and Reynolds seem to have been more the products of his own suspicions than of the evidence. In the 1887 case of Waller v. Johnson,[40] however, his colleagues shared his skepticism about a contested claim. In 1882 a black woman named Ellen Waller brought suit in equity against Crawford H. Johnson and his wife Elizabeth to set aside an 1874 deed conveying real estate in Norfolk from Johnson to his wife. Waller asserted that Johnson owed her $1,175 on two loans dating from 1873, proved by his notes and a promissory letter dated 1881. The Corporation Court of Norfolk decreed for the defendants, and the circuit court dismissed an appeal. The Supreme Court accepted the case, but its decision gave Waller no more relief than she had received below.

Judge Hinton not only rejected her claim but also challenged her motive. He said, "We are forced to the conclusion that no such indebtedness ever existed; that the whole claim is but a fraudulent scheme devised between the said Crawford H. Johnson and his paramour, Ellen Waller, to deprive his wife of [her property]."[41] The evidence, Hinton continued, showed that Waller was a former slave who in 1873 was living on the Eastern Shore and working for forty cents a day. This contradicted her claim that at that time she was living in

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[40] 82 Va. 966 (1887).

[41] Ibid., at 967.

Baltimore and had made a loan of more than $1,000. Hinton also viewed with suspicion the fact that prior to the suit Crawford Johnson had deserted his wife and "taken up" with Waller. If Hinton's interpretation of the evidence was correct, Waller did indeed have a poor case.

Problems of land fraud dated to the early Reconstruction period when illiterate and inexperienced freedmen were easy prey for unscrupulous sellers. False deeds were common, and even sellers who legitimately owned their land sometimes refused to transfer title.[42] As the years passed, abuses became less flagrant but still occurred in a variety of forms. In 1876 a white man was sentenced to the chain gang for charging black residents of Norfolk a fee for assessing the value of their houses, supposedly as a step toward reducing their rent.[43] B. F. Turner, a black real estate agent, cheated a black Richmond cook on a land transaction in 1897.[44] One major fraud involved a number of black Richmond residents who had invested in Virginia Beach land.[45]

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[42]WPA, Negro in Virginia, pp. 219-20; DuBois, "Negroes of Farmville," p. 29.

[43]Richmond Daily Dispatch, January 25, 1876.

[44]Richmond Planet, March 6, 1897. The article does not give Turner's race, but Chataigne's Gazetteer and Classified Business Directory, 1888-'9 (Richmond: J. H. Chataigne & Co. Publishers, 1887), p. 446, lists a black real estate agent named B. T. Turner.

[45]Richmond Planet, September 9, 1899.

In Fay v. Commonwealth[46] the Supreme Court considered the case of William Fay, sentenced to three years in the penitentiary for obtaining money under false pretenses. Fay sold Nelson Randolph, a black man, a lot for $200. The problem was that Fay did not own the lot. Having received a down payment from Randolph, Fay used the money as his own down payment to purchase the lot from its true owner. Fay followed the same procedure with a second portion of the owner's land. His plan was to sell the two sections for $200, while paying $300 for the entire plot. Unfortunately, Fay went bankrupt before he could finish his payments to the owner. Randolph, in the meantime, had paid off his debt to Fay and demanded title to the land. Only then did he learn that Fay was not the true owner. Randolph finally obtained his deed by paying the owner the amount still owed by Fay. Fay promised to repay Randolph, but never did.

The Supreme Court reversed the conviction on two grounds. First, said Judge Anderson, the Commonwealth failed to prove that Fay's pretense of ownership had led Randolph to make a purchase he would not otherwise have made. The best that can be said for Anderson's interpretation of the evidence on this

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[46] 69 Va. (28 Gratt.) 912 (1877). The opinion does not identify Fay by race, but since Randolph is described as a "colored man," the assumption is that Fay would also be so described if he were black. The only William Fay listed in Chataigne's Richmond City Directory, 1879-80 (Richmond: Compiled and Published by J. H. Chataigne, 1879), p. 125, is white. On this case see, also, Richmond Daily Dispatch, September 21, October 2, 1876.

point is that it was somewhat strained. More understandable was the court's ruling that the defendant had not acted with fraudulent intent. Indeed, Fay intended that Randolph should get his land at the price agreed upon. Had Fay not gone into bankruptcy all parties would have been satisfied. After arranging the deal with the two black men, Fay had explained his plan to the owner, who made no objection until Fay later defaulted on his payments. Fay was out to cheat no one, only to turn an easy profit as middleman. His conduct was, in Anderson's word, "censurable," but not criminal under the statute involved.

Although they did not concern business affairs, one final group of civil cases, those concerned with torts, should be noted. Although the Supreme Court decided a large number of tort cases during this period, in only two were the parties specifically identified as black. Despite this fact, the very nature of such cases guarantees that many other plaintiffs were also black. A substantial proportion of the cases concerned railroad accidents--death or injury of passengers, crewmen, track workers, or pedestrians caught on the right of way.[47] These categories included large numbers of blacks, as did another common class of victims, manual laborers in

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[47] In his memoirs, railroad attorney Beverley B. Munford recalled several cases in which the plaintiffs were black. Random Recollections (n.p.: Privately Printed, 1905), pp. 106-23. Richmond State, June 11, 1883, reports a successful action by the estate of David Frazier, black, against a railroad.

dangerous occupations. The lack of mention of blacks in the reported opinions thus signifies only that such parties were not described by race.

One man who was so identified was George Moon, killed while serving as a rear brakeman on the Richmond & Allegheny Railroad. The derailment that caused his death was a result of a foreman's failure to signal the engineer that part of the roadbed was under repair. Moon's administrator brought an action against the railroad for wrongful death, claiming negligence. The railroad contended that any negligence had been on the part of the deceased's fellow servants, for which the company was not liable. The instructions given to the jury supported the defense contentions, leading the jury to find for the company. The Supreme Court reversed, holding that the foreman was not a fellow servant but an agent of the company for whose negligence the railroad was liable. The court ordered a new trial.[48]

The second tort case in which a party was specifically described as black was Piedmont Electric Illuminating Co. v. Patteson's Adm'x,[49] decided in 1888. Miles Patteson

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[48]Moon's Adm'r v. Richmond & A.R.R., 78 Va. 745 (1884). Torian's Adm'r v. Richmond & A.R.R., 84 Va. 192 (1887), arose from the same accident, had a similar judicial history, and reached a similar conclusion in the Supreme Court. Robert Torian is not identified by race, but he was serving in the same capacity as Moon. The assumption is that he was black.

[49]84 Va. 747 (1888).

was an employee of the electric company, dispatched to repair an open circuit. He was later found at the top of a lamp pole, dead from electrocution. Circumstances pointed to defective equipment as the cause of the fatal accident. Patteson's administratrix brought an action in Lynchburg Corporation Court, where a jury found the company guilty of negligence and awarded her $3,000. The defense appealed, stressing assumption of risk and contributory negligence on the part of the deceased. The Supreme Court, believing the evidence for contributory negligence conclusive, reversed the decision.

Judge Cardwell's opinion in Richmond Passenger & Power Co. v. Robinson did not identify the plaintiff as black, although that fact was known to the court.[50] Robinson, the driver of a delivery wagon in Richmond, received serious injuries when his horse was shocked while crossing a defective track of the defendant's electric street railway line. The shock threw Robinson from his vehicle and onto the tracks. At trial he asked for $1,500 damages and received $550. The company appealed, citing erroneous instructions to the jury. The Supreme Court affirmed, holding that the instructions were correct. In addition, wrote Cardwell, the damages awarded were hardly excessive. When medical expenses and

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[50] 100 Va. 394 (1902). Robinson's race is mentioned several times in the testimony included in the lower court record, as well as in his own brief. Richmond Passenger v. Robinson, in Supreme Court of Appeals, Records and Briefs, CXXI, O.S., 1, 42.

loss of wages had been deducted, the remaining amount was reasonable compensation for the plaintiff's physical pain, mental suffering, inconvenience, and disability.

One final tort case, Payne v. Tancil,[51] is noteworthy more for the parties involved than for the legal issues in dispute. Tancil brought an action for defamation against Payne, alleging that the latter had publicly stated that Tancil was guilty of fornication and adultery. A jury in Richmond Law and Equity Court awarded the plaintiff damages of $1,500. Defendant appealed on the ground that the wording of the plaintiff's complaint was erroneous. The Supreme Court affirmed, with Judge Buchanan's opinion hewing to the procedural question. The untold story was that Payne was pastor of the black Fourth Baptist Church and Tancil a respected black physician and banker.[52]

The cases in this chapter indicate that the Virginia Supreme Court of Appeals attempted to protect the legal and equitable rights of blacks during this period. The fact that one or both of the parties to a suit were black appears to have made little difference. Blacks did not hesitate to appeal to the courts to release them from contractual obligations,

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[51] 98 Va. 262 (1900); Richmond Dispatch, June 11, 1899; Richmond Planet, March 31, 1900.

[52] The trial verdict caused additional problems for Payne, with several deacons bringing charges against him at a church meeting. The ensuing uproar ended in police court with the pastor's critics and supporters trading charges of assault. Richmond Planet, August 26, September 9, 1899.

and the Supreme Court used its equity powers to insure justice for all concerned. Only Judge Lacy sometimes was reluctant to believe black parties and voiced dark suspicions about their motives.

Most cases which reached the Supreme Court involved substantial amounts of land or money. These cases tell little about the fate of blacks embroiled in controversies where smaller amounts were at stake. Perhaps those blacks received poorer justice at the hands of lower state courts, or were not able to use the courts at all. Blacks whose cases reached the Supreme Court at least had reason to believe that their pleas would be examined fairly.

VII. INTRODUCTION TO CRIMINAL CASES AND THE CRIME OF RAPE

In the years following Emancipation a principal topic of concern in the South was the supposed criminal nature of the black man. Released from the moral guidance and physical restraint of slavery, the freedman's low intelligence and lack of moral sensitivity would surely lead him to an orgy of crime, or so many believed. For the next forty years southern whites pointed to general statistics and specific instances to prove that their fears were well-founded. They demanded that the legal system protect them from the thieving, violent horde. The blacks, on the other hand, challenged the statistics and charged that illegal actions carried out in the name of the law were turning the white fear into self-fulfilling prophecy.

That black crime increased after the Civil War is hardly surprising. How much effect the moral instruction and example provided by masters actually had is open to question, but the physical limitations imposed by slavery were effective in holding down slave crime. Restrictions on travel, ownership of property, and possession of weapons, combined with constant supervision and the threat of summary punishment, precluded criminal desires and opportunities. The removal of these obstacles allowed blacks of a criminal nature

to pursue their calling, but no proof exists that this class included the majority or even a substantial number of the freedmen.

The causes of black criminality were many and varied, arising from both the enslaved past and the oppressed present. Apologists' claims to the contrary, the "school" of slavery did little to prepare black people for freedom. The new freedmen possessed little moral training, loose ideas about the nature of personal property, and a lack of self-respect. Some reacted to their unaccustomed freedom by lapsing into idleness. Having been shielded from, or deprived of, the normal workings of the law by their masters, the former slaves were unfamiliar with many aspects of the legal system.

After time and experience had erased the vestigial effects of slavery, the circumstances of black life retained many aspects conducive to crime. Most blacks suffered from poverty, frequent unemployment, and poor economic conditions in general. Low social status resulted in a lack of dignity and self-respect, and mistreatment by whites evoked feelings of hatred and a desire for revenge. The discriminatory administration of justice did little to encourage black respect for the law. The common knowledge that black defendants often were accused and convicted unjustly led the black community to treat them as martyrs rather than criminals. That whites guilty of crimes against blacks often escaped punishment, and that crimes within the black community were often ignored,

further lessened black belief in the fairness and efficacy of the law.[1]

Given these factors, it is not surprising that the rate of black criminality was somewhat high. Unfortunately, to determine how high is impossible. White southerners used various statistics, usually conviction and prison records, to prove the black man's excessive predilection toward crime. The nature of the system from which those statistics were gathered, however, made such usage invalid. The racial discrimination inherent throughout the southern criminal justice system distorted the meaning of all such statistics. Although accurate in themselves, they were not meaningful enough to carry much significance beyond the data specifically computed. Even so, a cautious and informed approach can extract valuable quantitative information from such records. Thus, the fact that during the years 1870-1901, 78 percent of the prisoners received at the Virginia state penitentiary were black does not mean that blacks were so much more criminally inclined than whites. It does indicate that blacks were convicted

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[1]The causes of black crime have been a common topic among scholars. Helpful discussions include: Guy B. Johnson, "The Negro and Crime," The Annals of the American Academy of Political and Social Science, CCXVII (September, 1941), 93-104; Monroe N. Work, "Negro Criminality in the South," ibid., XLIX (September, 1913), 74-80; Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (2 vols.; New York: Harper & Brothers Publishers, 1944), II, 974-79; W. E. Burghardt DuBois, ed., "Some Notes on Negro Crime, Particularly in Georgia," Report on a Social Study . . ., Atlanta University Publications No. 9 (Atlanta: Atlanta University Press, 1904).

of felonies substantially more often than were whites.[2]

Even before the war blacks had committed crimes and appeared before the Virginia bar of justice. Until 1832 free blacks were entitled to the same procedural rights as white men, but in that year the General Assembly decided that free blacks should receive jury trials only in cases of homicide or when in jeopardy of capital punishment. For all other felonies they were to be tried "in the same manner as slaves," by courts of oyer and terminer consisting of at least five county or corporation court justices. Conviction required a unanimous bench, and there was no appeal of the verdict. For a misdemeanor punishable by stripes a free black was tried before a justice of the county or corporation court. For other misdemeanors charged against a free black the justice had the option either to try him as a slave or to commit him for the next session of the regular court, where he would "be tried as other free persons."[3]

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[2]Compiled from Virginia, Board of Directors of the Virginia Penitentiary, Reports (published annually). The penitentiary received 9,692 blacks and 2,671 whites. On the factors causing distortion in such statistics, see Thorsten Sellin, "The Negro Criminal: A Statistical Note," The Annals, CXL (November, 1928), 52-64; Nathaniel Cantor, "Crime and the Negro," The Journal of Negro History, XVI, No. 1 (1931), 62-65; Willis D. Weatherford and Charles S. Johnson, Race Relations: Adjustment of Whites and Negroes in the United States (Boston: D. C. Heath and Company, 1934), pp. 431-32.

[3]Virginia, General Assembly, Acts, 1831-1832, ch. 22, sec. 11, reprinted in Supplement to the Revised Code (1833), ch. 187, sec. 11, p. 248; Revised Code (1819), I, ch. 111, secs. 32-37, pp. 428-30; Code (1849), ch. 212, sec. 14, p. 788; John Henderson Russell, The Free Negro in Virginia, 1619-1865 (Baltimore: Johns Hopkins Press, 1913), pp. 103-104.

For most felonies free blacks were liable to the same punishment as whites, but there were some important differences. An 1823 law provided that free blacks convicted of any crime previously punishable by imprisonment for more than two years were henceforth to be sold as slaves and transported beyond the United States.[4] Public disapproval forced repeal of the law in 1828, but by then thirty-five free blacks had been sold into slavery. In the Code of 1849 the criminal prohibitions referred to "free persons," thus putting together whites and free blacks for all offenses except such obviously sensitive crimes as rape, attempted rape of a white woman, and attempted murder of a white person. In 1860 the General Assembly reinstituted the possibility of sale into slavery.[5]

Laws concerning the criminal acts of slaves were more consistent throughout the antebellum period. A 1692 act required that any slave charged with a capital offense be tried without jury by a court of oyer and terminer appointed by the governor. Slight changes of detail were made at various times

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[4]General Assembly, Acts, 1822-1823, chs. 32, 33, reprinted in Supplement (1833), ch. 176, p. 234. In Aldridge v. Commonwealth, 2 Va. Cas. 447 (1824), the General Court of Virginia held the statute constitutional on the ground that the sections of the state constitution calling for equal rights did not extend to free blacks.

[5]General Assembly, Acts, 1827-1828, ch. 37, reprinted in Supplement (1833), ch. 183, secs. 1, 4, p. 242; Code (1849), chs. 190-200, pp. 722-754; General Assembly, Acts, 1859-1860, ch. 54, sec. 1, p. 163; Russell, Free Negro in Virginia, pp. 104-106; [Kenneth M. Murchison and Arthur J. Schwab,] Note, "Capital Punishment in Virginia," Virginia Law Review, LVIII, No. 1 (1972), 102-105.

during the eighteenth century, and by 1819 the procedure for trying slaves for felony was well-set. The justices of the county or corporation court served as justices of oyer and terminer, a minimum of five of whom were required for trial. The justices assigned counsel to the slave, to be paid by the owner, and a unanimous verdict was necessary for conviction. On a misdemeanor charge a slave was tried by one justice with the possibility of appeal by the owner to the county or corporation court.[6]

Because the threat of loss of freedom was no deterrent to the slave, the sanctions against his criminal activity consisted of physical punishment. Most noticeable is the large number of offenses which called for capital punishment. By the Code of 1849 a slave was subject to death if he committed any crime that, if committed by a free black, was punishable by death or imprisonment for a minimum of three years. The only mitigating circumstance was a slim one. If the offense was not one for which a white person would also be liable for death, the court could order the slave's sale and transportation beyond the United States. For lesser crimes the punishment was stripes.[7]

As important as the statutes themselves was the manner

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[6]William W. Hening, The Statutes at Large: Being a Collection of All the Laws of Virginia (13 vols.; Richmond: Printed for the Editor, 1809), III, 102-103; Revised Code (1819), I, ch. 111, sec. 32, pp. 428-29; Code (1849), ch. 212, secs. 13, 15, p. 788; James Curtis Ballagh, A History of Slavery in Virginia (Baltimore: Johns Hopkins Press, 1902), pp. 82-85.

[7]Virginia, Code (1849) ch. 200, secs. 4, 5, 7, pp. 753-54; Ballagh, Slavery in Virginia, pp. 85-89.

in which they were applied. Unfortunately, scholarly research on the subject has been meager. Few substantive appeals appear in the printed reports because the verdicts of the trial courts of oyer and terminer could not be revised by any other court.[8] In the cases that did reach the General Court, the judges showed no trend toward either severity or leniency in interpreting the statutes. In Aldridge v. Commonwealth[9] the court upheld the constitutionality of the 1823 Act calling for the sale and transportation of free blacks convicted of offenses previously calling for more than two years' imprisonment. The court also interpreted the act to mean that the two-year limit referred to the maximum possible sentence, thus extending the act's dire effects. It did so despite a dissent by Judge R. E. Parker that the opposite reading would, "in a great measure, free the Act from the charge of gross inhumanity; . . . and we shall be doing this in favour of the prisoner; in favour of liberty, and not against it."[10] In Commonwealth v. Weldon,[11] however, the court ruled that the 1832 act transferring jurisdiction over free black crimes to the slave courts of oyer and terminer referred only to the procedural aspects of trial, and that free blacks were not liable to the harsher punishments decreed for slaves.

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[8]Peter v. Commonwealth, 2 Va. Cas. 330 (1823); Anderson v. Commonwealth, 32 Va. (5 Leigh) 740 (1835).

[9]2 Va. Cas. 447 (1824).

[10]Ibid., at 456.

[11]31 Va. (4 Leigh) 652 (1833).

Although there was no judicial appeal from courts of oyer and terminer, the governor received trial records of major crimes for executive review. James H. Johnston's analysis of these records provides some clue to the nature of slave trials. Johnston wrote:

> The study of slave crime and the administration of justice . . . impresses the student with the fact that the slaveholders were, in most cases, sincere in their efforts to give full justice to the slave according to the letter of the law. It appears that the slave under arrest received full measure of "due process of law" according to pre-Civil War standards. This belief is attested by voluminous testimony of witnesses at slave trials, both white and Negro. . . . [T]he student is led to believe that the Negro slave in Virginia may have received, according to slave law and legal procedure, a more full measure of "due process of law" than is possible in many of the courts of certain states in the present day.[12]

There were other reasons why the courts may have treated blacks with fairness, but some measure of humanitarian feeling was involved in such trials. Having sentenced a slave to death, the justices of one court protested to the governor that, "as members of the Court from the whole train of evidence we thought him guilty . . ., but as the law under

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[12]James Hugo Johnston, Race Relations in Virginia and Miscegenation in the South, 1776-1860 (Amherst: University of Massachusetts Press, 1970), p. 86. For a similar finding for the South generally, see A. E. Keir Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," Virginia Law Review, LVI, No. 1 (1970), 64-100. A more recent study charges that the procedural weaknesses of the Virginia system, especially the lack of judicial review, made the state compare unfavorably with her southern sisters: "Virginia, considered by contemporaries and historians alike as the most humane of slave states in day-to-day practice, maintained the most repressive system of criminal law regarding slaves." Daniel J. Flanigan, "Criminal Procedure in Slave Trials in the Antebellum South," The Journal of Southern History, XL, No. 4 (1974), 540-46, quote on p. 546.

which he stood condemned appeared to be a very harsh one and inasmuch as it made that offense a capital one in a black man or a slave, which only inflicted a moderate corporal punishment on a free person, we could not help feeling considerable concern, that we were called upon to take part in the execution of a law which operated so unequally."[13] Johnston found that appeals to the governor for mercy were often successful, and that courts sometimes pronounced guilty verdicts only because they felt a recommendation of mercy would be granted.

The amount of black crime during the slavery period posed a problem for postwar southern whites. A high incidence would have justified the severity and discriminatory aspects of the old criminal code. On the other hand, a low antebellum incidence of crime would have proved that the peculiar institution provided a necessary rein on the black man's inherent criminality. As James C. Ballagh wrote in 1902, "Law and customary treatment together served to a remarkable degree the purpose of preventing that large growth of individual crime that has come with this class of population in its free condition, relieved of the extraordinary restraints of slavery and of discrimination."[14] According to Ballagh, the harshness of the statutes was meant as a deterrent and was successful in keeping down the amount of serious slave crime.[15]

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[13]Quoted in Johnston, Race Relations, p. 82.

[14]Ballagh, Slavery in Virginia, p. 89.

[15]Ibid., pp. 88-89.

James H. Johnston, however, found eighty-eight slaves condemned for murder or attempted murder of white men in the years 1800-1833, excluding those involved in insurrection. In addition, he discovered twenty-seven cases of attempted poisoning and fifteen of arson.[16] These totals are not extraordinarily high, but they indicate that serious slave crime was more extensive than Ballagh and other supporters of old regime discipline would have us believe.

Concerning the free black, Ballagh perceived what he interpreted to be the first stirrings of the race's future rampant criminality. Free blacks not only committed serious crimes but were far over-represented in the state penitentiary.[17] John H. Russell, however, disagreed with Ballagh's conclusion. Russell noted that as early as the 1820's Governor William Giles had challenged the relevance of prison statistics. Russell agreed with Giles that unequal administration of justice distorted the figures, while the free black's precarious economic situation often was the cause of the crime that did exist. Russell wrote, "The criminal capacities and tendencies of the antebellum free negro were not so great as they were quite generally belived to be."[18]

With the end of slavery the need for a separate judicial system do deal with the crimes of blacks also disappeared.

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[16]Johnston, Race Relations, pp. 20-29, 76, 317-21.

[17]Ballagh, Slavery in Virginia, pp. 89, 146-47.

[18]Russell, Free Negro in Virginia, pp. 164-67.

In February, 1866, the General Assembly repealed those chapters of the state code dealing with offenses by and criminal proceedings against blacks, and instead provided that, "All laws in respect to crimes and punishments, and in respect to criminal proceedings, applicable to white persons, shall apply in like manner to colored persons and to Indians, unless when it is otherwise specifically provided."[19] This act meant that crimes formerly punishable by death if committed by blacks, especially slaves, no longer carried such a deterrence. To remedy this problem the General Assembly enacted new laws extending capital punishment to the offenses of rape, burglary, horse stealing, and armed robbery.[20] As two recent commentators note,

> The effect of the 1866 legislation was once again to authorize the death penalty for these crimes. But since the legislature apparently felt it impolitic to distinguish penalties by race, they made the death penalty discretionary for these crimes, and placed their trust in the judgment of white judges and white juries.[21]

In April, 1867, the General Assembly passed a lengthy act amending the entire structure of criminal procedure in the state courts.[22] Some changes were made necessary by the

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[19] General Assembly, Acts, 1865-1866, ch. 17, secs. 2, 3, pp. 84-85.

[20] Ibid., ch. 14, p. 82; ch. 22, pp. 88-89; chs. 25-26, p. 90.

[21] [Murchison and Schwab,] "Capital Punishment in Virginia," p. 106. "It is difficult to escape the conclusion that the aim of this statute was to threaten the former slaves with death if they attempted to take by force the property of their former masters." Ibid., p. 116.

[22] General Assembly, Acts, 1866-1867, ch. 118, pp. 915-46.

disappearance of the old slave court system. Although the act contained no specific mention of blacks, "it doubtless grew, in a great measure, out of the emancipation of negroes, and the policy of obliterating the pre-existing differences in the mode of prosecuting criminal offences when committed by white or free persons on the one hand, and slaves on the other."[23] The major problem caused by the end of the old oyer and terminer system had been the swamping of the circuit courts by felony trials of both whites and blacks. The new act enabled the county courts to share jurisdiction over such trials.[24]

Little information concerning black crime in the post-war period is available. Newspaper accounts were scattered, incomplete, and usually biased. Contemporary commentators were similarly prejudiced and often ill-informed. The nature of these two sources led them to note the extraordinary crime and trial rather than the representative. The legal documents themselves provide the most complete and accurate view of black crimes and trials. The basic source is the trial record--the history of the crime and legal proceedings. Although these records are scattered in court houses throughout Virginia, many were reprinted for the benefit of the Supreme Court when hearing appeals. Much of the material

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[23]Philips v. Commonwealth, 60 Va. (19 Gratt.) 485, 519-20 (1868).

[24]Ibid.; General Assembly, Acts, 1866-1867, ch. 118; Wright v. Commonwealth, 60 Va. (19 Gratt.) 626 (1870).

contained in the briefs and records was, in turn, reprinted in the opinions of the judges.

In criminal cases the Supreme Court served as a final check against wrongful conviction. In general, the court reversed convictions for either or both of two reasons--lack of sufficient evidence to warrant a guilty verdict, and failure to enforce procedural safeguards intended to guarantee fair trial. A reversal did not mean that the court thought the defendant innocent, only that the requirements of law had not been met at the trial. A finding of insufficient evidence did not imply that such evidence did not exist, only that it had not been presented legally at the trial. And reversal did not mean freedom for the defendant. He was still liable to, and usually could expect, retrial. In short, the judges' immediate duty was to guarantee not the accuracy of a verdict but the integrity of the process by which that verdict had been reached.

This role proved especially important for the Virginia Supreme Court in the case of black defendants in the years following Reconstruction. Racial hostility, fear of black crime, social inequality, and a tradition of summary punishment of slaves all made suspect the ability of a black man or woman to receive a fair trial. Jurors and lower court judges too easily could be moved by prejudice and emotion. The judges of the Supreme Court, although perhaps holding some racial prejudice of their own, were yet a step removed

from the emotions of a case.[25] They studied the evidence in the quiet of their chambers rather than the heated atmosphere of a trial courtroom. Also, they realized the importance of their high position and the integrity, wisdom, and fairness it demanded.

The most visible form of injustice was the conviction of a defendant on the basis of insufficient evidence. Ironically, it was in such cases that the Supreme Court felt the most restraint on its power to reverse.[26] It believed that the jury box was the proper place to weigh the evidence. To infringe on the prerogatives of the jury was a dangerous and distasteful step. It rebuked not only the jurors but the trial judge who had allowed such a verdict to stand. The court sometimes affirmed a conviction but implied that its own verdict on the evidence would have been different. The judges reversed only those cases in which the evidence plainly did not warrant the verdict.

II

After the Civil War, one observer has noted, "the myth of the faithful slave was replaced by the legend of the Negro

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[25]Counsel for one black appellant emphasized the important position of a judge who "calmly considers the law . . . removed from the influence of public sentiment." Hairston v. Commonwealth, in Virginia, Supreme Court of Appeals, Records and Briefs, XC, O.S., 42, 45.

[26]See the discussion in Cash v. Commonwealth, 2 Va. Dec. 1, 4-5 (1895).

as a rapist."[27] No legend had more widespread acceptance among whites, and none had more important effect on the theory and practice of race relations. Black rape was the most feared result of the ex-slaves' new freedom. The punishment of rape was a function of the law, but in no other area were legal institutions under such extreme pressure from extra-legal considerations. As one attorney argued before the Virginia Supreme Court, "[I]n the eyes of the white man generally, the charge is sufficient to make them [a white jury] think the accused is guilty without evidence to prove it, and, in such cases it has been the experience of men that so revolting is the offence in the eyes of a southern white man that negroes are ofttimes hung by the lynchers . . . on mere suspicion, and doubtless many innocent men have given up their lives . . . simply on a charge of having been guilty of this detestable crime."[28]

The uncontrollable lust of the black man for white women was more than an article of faith among southern whites. It was accepted as scientific fact. "There is something strangely alluring and seductive to them in the appearance of a white woman," wrote Philip A. Bruce, "and it moves them to gratify their lust at any cost and in spite of every obstacle."[29]

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[27]Rayford W. Logan, The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson (New York: Collier Books, 1965), p. 115.

[28]Hairston v. Commonwealth, Records and Briefs, XC, O.S., 45.

[29]Philip A. Bruce, The Plantation Negro as a Freeman, (New York: G. P. Putnam's Sons, 1889), p. 83.

Men with impeccable scientific credentials shared Bruce's views. Dr. Hunter McGuire, the most respected Virginia physician of his day, commented publicly on "the sexual perversion in the negro of the present day," referring to the "common" occurrence of interracial rape by black men.[30]

No evidence existed then, as none exists now, to support the legend of the black rapist. Emancipation did not unleash an unnatural black lust previously held in check by slavery. The restrictive nature of slave society had lessened the opportunities for black interracial rape, but such rape was not unknown. Edward Reuter noted that 105 slaves were convicted in Virginia of rape or attempted rape between 1780 and 1864, and James H. Johnson lists sixty cases of slaves condemned to death for the rape of white women between 1789 and 1833.[31] Reuter also found that more recent figures do not support the idea of a predilection among blacks toward sex crimes.[32] The tendency of white newspapers to emphasize and dramatize rapes

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[30]"Sexual Crimes Among the Southern Negroes Scientifically Considered--An Open Correspondence between Hunter McGuire, M.D., LL.D., of Richmond, Va., and G. Frank Lydston, M.D., of Chicago, Ill.," Virginia Medical Monthly, XX, No. 2 (1893), 124-125. Lydston disagreed with McGuire about the "perverse" nature of black sexuality, but he did accept the fact of prevalent black rape in the South: "This furor sexualis has been especially frequent among the negroes in States cursed by carpet-bag statesmanship, in which frequent changes in the social and commercial status of the negro race have occurred." Ibid., p. 118. McGuire served as president of the Medical Society of Virginia, the American Medical Association, and the American Surgical Association.

[31]Edward Byron Reuter, The American Race Problem, rev. by Jitsuichi Masuoka (New York: Thomas Y. Crowell Company, 1970), p. 315; Johnston, Race Relations, pp. 257-63.

[32]Reuter, American Race Problem, pp. 324-26.

by blacks, however, helped to convince Virginians that a severe threat existed. If the threat was exaggerated, the fright was real. As W. J. Cash noted,

> There was real fear, and in some districts even terror, on the part of the white women themselves. And there were neurotic old maids and wives, hysterical young girls, to react to all this in a fashion well enough understood now, but understood by almost nobody then.
>
> Hence, if the actual danger was small, it was nevertheless the most natural thing in the world for the South to see it as very great, to believe in it, fully and in all honesty as a menace requiring the most desperate measures if it was to be held off.[33]

Adding to the problem of black rape was the fact that, where a black man and white woman were concerned, the definition of rape was often strained. In part, this stretching resulted from the belief that any untoward act in the presence of a white woman was the prelude to physical attack. To a greater degree, the stretching came about because such an act was considered in itself an attack. Again, Cash best explains the southern mind and its "rape complex":

> What Southerners felt . . . was that any assertion of any kind on the part of the Negro constituted in a perfectly real manner an attack on the Southern woman. What they saw . . . in the conditions of Reconstruction was a passage toward a condition for her as degrading, in their view, as rape itself. And a condition, moreover, which, logic or no logic, they infallibly thought of as being as absolutely forced upon her as rape, and hence a condition for which the term "rape" stood as truly as for the de facto deed.[34]

Such an attitude would explain, for example, the 1897

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[33] W. J. Cash, The Mind of the South (New York: Alfred A. Knopf, 1941), p. 115.

[34] Ibid., p. 116.

conviction of Wesley Mayo on a charge of assault with intent to rape a white woman. The jury found Mayo guilty even though the alleged assault had taken place in daylight in an area open to public view. Though there was conflicting testimony whether he had chased the woman or not, all agreed that he had not come within 30 yards of her. Trial judge J. H. Ingram, demonstrating a stricter adherence to the letter of the law than to social attitudes, set aside the verdict as contrary to the evidence. Ingram believed that Mayo probably had made indecent motions to the woman, but he emphasized that such actions were not sufficient to convict the defendant of the crime charged.[35]

A similar "rape complex" case reached the Supreme Court in 1899, and again the judges adhered to the law rather than extra-legal beliefs. In his appeal, defense attorney William M. Peyton emphasized the prevailing attitude at the trial of George Hairston for attempted rape:

> And there is no doubt in this world that your petitioner was convicted and had this harsh verdict entered against him . . . on account of a dreadfully inflamed public sentiment against his race. For he is assured that had a white man been before the same jury who charged him on trial for the same offence with the same evidence, he would have gone from the court house a free man, or he would have had a reasonable fine

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[35]Richmond Planet, May 8, 15, 1897. The judge who tried Washington Williams in Amelia County in 1874 was not so scrupulous. Williams served more than thirteen years for attempted rape until pardoned by the governor "upon satisfactory evidence that the boy (a mere youth) made no attempt at rape--was only guilty of indecent exposure of person." Virginia, Senate, Journal, 1887-1888, A Communication from the Governor . . . Transmitting a List of Pardons [hereafter cited as Governor's Pardon Report], S. Doc. 23, p. 17.

assessed against him for an assault.[36]

The court, speaking through Judge Riely, agreed.[37]

According to the testimony of the alleged victim, Hairston had come to the house of Mary E. Thomasson to speak with her about some previous business. He made an "indecent proposal," jumped off his mule, and advanced toward her. He made a motion as if to grab her dress but did not touch her. She screamed, jumped away, and threw a stone at him. When he failed to stop, she threw some more stones until he finally left. The court did not find this evidence convincing. The alleged attack, Riely remarked, had taken place at noon, only 50 yards from a house containing Thomasson's parents, and within sight and hearing of another house. Yet no one saw the attack or heard the screams. The circumstances, in Riely's words, "invest the charge with very great improbability."

In addition, the court ruled that the state had not proved attempted rape. Conviction for that crime required evidence of force or intent to use force. Hairston did not use force, or the threat thereof. There was no evidence that he had intended to use violence. The court had little liking for Hairston's actions, which it interpreted as solicitation, but the issue under consideration was attempted rape. Riely wrote, "However reprehensible is the conduct of the accused, the evidence is consistent with a desire [on] his part to have sexual intercourse

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[36]Hairston v. Commonwealth, Records and Briefs, XC, O.S., 45.

[37]Hairston v. Commonwealth, 97 Va. 754 (1899).

with the prosecutrix, but, without evidence of an intention to use force, if necessary, to gratify his desire--only persuasion."[38]

Riely's opinion is notable for his flouting of two sacrosanct southern customs. First, he did not accommodate the rape complex. He acknowledged that a black man had made sexual advances toward a white woman, but he refused to consider the episode an attempted rape. In addition, he demonstrated a lack of total belief in Thomasson's story. He did not openly dispute her, but his comment about the charge's "very great improbability" indicated a refusal to accept the word of a white woman regarding her sexual confrontation with a black man. To appreciate the significance of his position, note the discretion with which attorney Peyton had approached the woman's credibility: "We can very well appreciate that a white woman would have been very indignant at such a proposition having been made to her by a negro, and in her determination to convict him we can well understand how she would have very strong temptation to make the case as strong as possible."[39]

Stretching the concept of rape also occurred in another relationship seldom mentioned by southerners of the period. As Kelly Miller has delicately put it, "We must not overlook the fact that where a colored man and white woman are concerned,

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[38] Ibid., at 757.

[39] Hairston v. Commonwealth, Records and Briefs, XC, O.S., 43.

rape has a larger definition than is set down in the dictionaries. Relations are often punished under this head, which, if sustained among members of the same race, would receive a less abominable, though perhaps an equally unhallowed name."[40] Despite the social taboos to the contrary, instances did occur in which white women voluntarily had sexual relations with black men. In some cases, perverseness or social pressure then led the woman to charge criminal rape, but in other cases she refused to bend and stood by her lover. In such cases society often brought the charge for her.

One method of doing so was illustrated by the Henrico case of Paul Davis and Cora Twitchell. Their sexual relations enraged her father, but Cora not only denied that Davis had used force but also admitted that she had been the pursuer in their romance. Undaunted by evidence to the contrary, including the woman's own assertion, Twitchell's father contended that she was under the age of consent and therefore the victim of statutory rape. Despite the evidence, a jury convicted Davis of assault and statutory rape and sentenced him to nine years in the penitentiary. Because records proved that Cora was of age, however, Davis' motion for a new trial was granted, and a nol pros entered.[41]

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[40] Kelly Miller, Race Adjustment: Essays on the Negro in America (2d ed.; New York: Neale Publishing Company, 1909), p. 78.

[41] Twitchell heightened the drama of the case by shooting Davis as the latter was led to trial. Twitchell was tried and acquitted, but no doubt felt himself sufficiently punished when Cora was delivered of a mulatto baby. Richmond Planet, January 16, 23, July 24, October 30, November 13, 1897.

Although not the only one of its type, the Davis-Twitchell relationship was far from common. Most rape cases either were similar to that of Wesley Mayo, or were true rapes where the sole question was the perpetrator's identity. It is difficult to determine how many such interracial cases reached the Supreme Court, because the judges often failed to note the race of the parties involved. Despite the fact that attorney Peyton had based much of his Hairston appeal on the nature of black-white relations in Virginia, for example, Riely nowhere mentioned race in his opinion.[42]

In another case, Cunningham v. Commonwealth,[43] Judge Lacy did acknowledge, if briefly, a similar claim of racial prejudice. Mance Cunningham, black, and Martha Hartsock, white, worked together as assistant cooks. Cunningham suggested that they live together, but Hartsock replied that "she had not got low enough yet to live that way with white men, let alone with negroes." Several nights later Hartsock awoke in bed to find a man touching her leg. When she yelled for her roommate, the man grabbed her by the shoulders and threatened to choke her. Hartsock screamed, and the man hurriedly left the room. A Bristol Hustings Court jury convicted Cunningham of attempted

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[42]The incomplete nature of the sources, and the mistakes often found therein, make racial identification difficult even for the student who searches beyond the opinions. Those who cannot go beyond the Reports face an impossible task. Note the errors in Table I, Rape Cases in the Supreme Court of Appeals of Virginia, 1820-1964, in Donald H. Partington, "The Incidence of the Death Penalty for Rape in Virginia," Washington and Lee Law Review, XXII, No. 1 (1965), 64-67. Partington identifies Hairston as white, among several other mistakes.

[43]88 Va. 37 (1891).

rape and sentenced him to three years in the penitentiary, the statutory minimum.

The Supreme Court affirmed the conviction. Lacy conceded that conflicts existed in the testimony and that defense witnesses had provided the defendant with an alibi. He ruled, though, that it was the province of the jury to resolve the conflicts and judge the evidence. Lacy treated the defendant's claim of race prejudice summarily:

> And, under the law, the term of confinement fixed for this crime is not less than three nor more than eighteen years. In accordance with the law the term is fixed, and it is tempered with mercy, as the lowest time allowed by the law is fixed for the period of the punishment. This answers, also, the complaint of the counsel for the prisoner, who claims that the jury was actuated by prejudice against the negro because he assaulted a white woman.[44]

In an earlier case, in which the court overturned the conviction of a black man for the rape of a white woman, the opinion again omitted the color of the parties involved.[45] Wilson Boxley was sentenced to ten years in prison almost entirely on the testimony of the alleged victim, Martha Spencer. She claimed to have been sitting on the ground when a man pulled her down backwards, held her bonnet over her face, and raped her. She had caught a glipse of the man's face but refused to swear that it was Boxley, whom she knew

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[44] Ibid., at 44.

[45] Boxley v. Commonwealth, 65 Va. (24 Gratt.) 649 (1874). The reporter's introduction lists the defendant as black. There is no specific reference to the victim's race, but Judge Bouldin refers to "Miss Martha Spencer" and "Miss Spencer," using a title almost never applied to young black women by whites.

well. She said only that she believed him to have been the man. Two physicians attested that she had had sexual relations, but that they found no bruises or other signs of violence on her face or body. The only other evidence was the testimony of a neighbor who had seen a man he thought to be Boxley walking quickly away from the scene of the alleged attack.

The Supreme Court felt that this evidence was insufficient to support a verdict of guilty. Judge Bouldin noted that Boxley was of medium build, while Spencer was a large woman. "It would require a large degree of charity and credulity," he wrote, "to believe that at noonday, [close to her own house and that of a neighbor,] a rape was perpetrated on this large and stout woman, with both her arms perfectly free, by a medium-sized man, who neither threatened her with violence nor did anything to disable her, and who . . . had the use of but one arm, [the other holding the bonnet over her face]."[46] The court's incredulity was further heightened because those nearby had heard no noise, the ground showed no sings of a scuffle, and there were no scratches or bruises on the woman's body. As for the neighbor's testimony, Bouldin noted that the witness had been 100 yards away and not positive of the identification. Spencer herself refused to swear that the defendant was her attacker, and her testimony conflicted with the neighbor's concerning the color of the hat worn by the man each had seen.

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[46]65 Va. (24 Gratt.) 652.

Other facts not directly concerned with the attack itself also troubled Bouldin. The record showed that Boxley "had previously . . . attempted to take improper liberties with Miss Spencer, which she does not appear to have disclosed or resented."[47] After the alleged attack Boxley had continued to work on the place as usual, until the woman's brothers charged him with the rape and beat him. It was not until he had got out a warrant against them that this case was begun. There was also a variation between Spencer's trial testimony and what she had originally told the magistrate. Given all these facts, Bouldin was uncertain that a rape had been committed, and, if it had, was even less certain that Boxley was the guilty party. The court remanded the case for a new trial.

Not all of the victims of black rapists were white. The literature of the period made so much of the black man's overwhelming lust for white women, however, that intraracial black rape was disregarded. In some instances its existence was positively denied. Philip A. Bruce, for example, wrote, "The rape of a negress by a male of her own color is almost unheard of."[48] Bruce believed that black women were so wanton in their sexual habits that the men did not need physical force. The assumption also existed that, due to their loose morality, black people did not regard any sexual activity with horror,

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[47] Ibid.

[48] Bruce, Plantation Negro as Freeman, p. 85.

even relations involving an unwilling party. The absurdity of Bruce's statement stems from the fact that, even in his own time, ample proof of its falsity existed. Bruce need only have opened any Virginia newspaper of the period to find numerous examples of black men arrested, tried, and convicted for raping black women.

Although whites did not consider the rape of a black woman to be as horrendous a crime as the rape of a white, neither did authorities ignore such crimes. White officials prosecuted black-black rapes as serious offenses deserving the law's notice. That the victim was black was not an automatic signal to treat the case lightly. The major obvious differences between cases with white and black victims was less reluctance on the part of a black defendant to attack the virtue of a black woman, and the fact that the rape of a white probably brought a heavier sentence. Given the nature of racial prejudice in Virginia, a black defendant probably had a better chance to receive a fair trial when the prosecutrix was also black, but this must remain supposition without an extensive case-by-case study at the trial level.

The Supreme Court judges treated black-black cases no differently than they did black-white ones, so far as can be seen. In one case the court did discuss the woman's color at some length, but not to lessen the seriousness of the crime or justify different treatment by the law. In discussing the nature of rape and the sufficiency of the evidence in specific cases, the judges made no distinction between black

and white victims. They did make a distinction between women of respectable and those of easy virtue, but did not imply that they assumed blacks to be in the latter category. When they did attack a woman's character, they emphasized her specific improbity and not her race.

Such a woman was Martha Mallory, the prosecutrix in the 1873 case of Christian v. Commonwealth.[49] Mallory and Henry Christian were returning from a night out when he made a sexual proposition, which she refused. He then pushed her to the ground, choked her, and tried to pull off her clothes. She resisted, and he could not overcome her. He stopped his attempt and they resumed the walk. He continued to proposition her but made no more threats of force. The evidence also showed that, though never married, she was the mother of two children. A Richmond Hustings Court jury found Christian guilty of attempted rape.

The Supreme Court disagreed, ruling that the record did not present sufficient evidence showing his intent to ravish her against her consent. Given the fact that Christian knocked the woman down and tried to disrobe her, such a position by the court seems ludicrous. Judge Francis T. Anderson explained, however, that the character of the parties could be the determining factor in such a situation: "Acts of the accused, which would be ample to show and to produce conviction on the mind, that it was the wicked attempt and purpose

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[49] 64 Va. (23 Gratt.) 954 (1873).

to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt, if they were acts done to a female of dissolute character, or easy virtue."[50] Because Mallory was the mother of two bastard children, she obviously belonged in the latter category.

Anderson reviewed the evidence from this viewpoint. He admitted that the defendant "had wooed her pretty roughly in a way that would have been horrible and a shocking outrage toward a woman of virtuous sensibilities," but because Mallory was not such a woman the true nature of the incident was less certain. The court placed great emphasis on the fact that Christian had not continued his attack when she resisted, thus showing that he was merely making "an attempt to work upon her passions, and overcome her virtue, which had yielded to others before." Anderson agreed that the defendant's actions were "extremely reprehensible," and probably criminal, but he ruled that they did not constitute attempted rape.

Anderson's opinion was hardly complimentary to Mallory, and certainly was questionable in its statement of the relationship between rape and the sexual history of the alleged victim. But while the decision may have been sexist, it was not racist. Mallory's character came into question not because she was a black woman, but because she was a black woman with two illegitimate children. (The question remains

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[50] Ibid., at 958.

whether the court would have been so understanding of Christian's actions had the victim been a white woman.)

Anderson's opinion in another case eight years later confirms the impression that his treatment of Martha Mallory sprang more from her unchastity than her color, and shows that he could be solicitous of a victim if he thought her deserving. The evidence in Lewis v. Commonwealth[51] also contains a direct refutation of the belief that blacks did not accept the moral imperative against indulging in indiscriminate sex.

The case involved the appeal of a black man sentenced to ten years in prison for the rape of a thirteen year old black girl named Lucy Thompson. Thompson testified that the rape had occurred in the kitchen of her employer, where Lewis pulled her down, placed his hand over her mouth, pulled up her clothing, and raped her. She said nothing to her employer about the incident, went home after work, and again failed to report the attack to her grandparents. The reason for this, she testified, was that her grandmother had threatened to drive her from the house if she ever had intercourse with a man. Her charade was foiled by the physician called to treat her injuries, which she claimed to have suffered in a fall. At the trial the doctor described her as having had a ruptured hymen, swelling and inflammation, bruises on her body, cuts on her lips and gums, and eyes swollen from crying. The

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[51] 6 Virginia Law Journal 272 (1881).

principle evidence for the defense was the testimony by Thompson's employer that he had been in the dining room at the time of the incident and would have heard any unusual noise, which he had not.

Anderson dismissed the employer's testimony as proving nothing, because there might have been confusion about the exact time of the attack. In addition, the girl testified that Lewis had kept his hand over her mouth. Indeed, thought the judge, the extensive nature of her injuries made it probable that she would have cried out whether indulging voluntarily or not. That her employer heard nothing meant that someone had prevented her from doing so. The bruises and cuts on her body also indicated a hard struggle. In sum, thought Anderson, not only was the evidence sufficient to support the verdict, but, if the jury believed the prosecution witnesses, it was the only verdict possible.

Anderson's most difficult task was to explain the girl's failure to report the rape immediately. He wrote, "It is not remarkable that she did not make immediate complaint to Dr. Bradford or to his family, as in the present status of the race they are not generally disposed to look to white people for protection, or for redress against one of their own color."[52] The judge thought that Lucy had not told her grandmother because she was trying to hide not the rape itself but that she had had sex with a man. He said, "It is, doubtless, the

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[52] Ibid., at 275.

natural impulse of woman of a chaste and pure nature, whatever may be her station in life, to shrink from publicity to such a fact, which in general, however, will be surmounted by a higher principle to vindicate the right and avenge the wrong, by visiting the offender with just retribution . . . and to absolve herself from all complicity with it."[53] Lucy had followed the first impulse but was perhaps too ignorant and fearful of her grandmother's warning to adhere to the second.

Anderson's desire to justify the girl's delay caused a blind spot in his reasoning. He insisted that her actions strengthened the presumption that she had been attacked. Had she wanted to protect herself by falsely accusing Lewis of rape, he thought, she would have done so from the first. In fact, an equally logical interpretation of the events supports the opposing possibility, that Thompson had consented. By this theory, the girl feared her grandmother's reaction so much that she attempted to conceal the fact of her dalliance. Once the doctor had discovered the truth it became necessary for her to protect herself by the next best alternative, a claim of rape. Anderson probably was correct, especially considering the injuries suffered by the girl, but is notable that his belief in her version led him to see only one interpretation of a very ambiguous piece of evidence.

In other cases the court did not enter into theoretical

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[53] Ibid., at 276.

discussions of chastity and the feminine nature. In Coleman v. Commonwealth[54] the question of chastity arose in the context of admissibility of evidence at trial. The Supreme Court merely mentioned that the evidence at issue was an attempt to prove the prosecutrix's reputation for chastity, and ruled that it was admissible. In his opinion President Lewis did not discuss the specific evidence, confining himself to the comment that the court had studied the evidence and was satisfied that the defendant was guilty. Seven years later, however, Governor Charles T. O'Ferrall pardoned Coleman with the notation that, "There have always been doubts as to his guilt."[55] Among those petitioning for his pardon was the alleged victim.

The 1889 case of Mings v. Commonwealth[56] concerned the conviction of James Mings for attempted rape. The victim testified that she and the defendant had been working together in the field when he pulled her into a thicket, threw her down, and raped her. She charged further that she had yelled for her parents throughout the attack and gone home immediately afterwards. Another witness testified that he had heard the cries from one-half mile away, and that upon approaching he had seen a man lying on something. He did not see the girl

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[54] 84 Va. 1 (1887).

[55] Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 5.

[56] 85 Va. 638 (1889). Partington's identification of the defendant as white is incorrect. Minge [sic] v. Commonwealth, Records and Briefs, XLIV, O.S., 1041, 1044.

until he was very close to the couple, at which point he recognized the defendant, who ran away.

Mings was sentenced to twelve years in prison for attempted rape. The Supreme Court affirmed the decision with little comment beyond a recapitulation of the evidence. One fact included in the certificate of evidence but not mentioned in President Lewis's opinion was Mings's claim that the girl had consented to have intercourse and had begun yelling only upon the approach of the witness.[57] This claim, taken together with the victim's testimony that Mings had effected penetration, makes the verdict of attempted rape senseless. Both parties admitted that there had been intercourse, so the verdict should have been rape or not, as determined by the presence of absence of consent. Lewis noted the girl's claim of penetration but supposed that the verdict of attempted rape had been influenced by the lack of bruises found on her body. The court ruled that the verdict was not contrary to the evidence.

That same year the court reviewed the conviction of William Glover for the attempted rape of Bertha Wright, a young girl under twelve years of age.[58] Glover, seventeen years old, took the girl to a stable, laid her down, pulled

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[57]The certificate is part of the Record, Records and Briefs, XLIV, O.S., 1041.

[58]Glover v. Commonwealth, 86 Va. 382 (1889). Partington identifies both parties as white, but Glover was black. Glover v. Commonwealth, Records and Briefs, XLVII, O.S. 821, 827. The girl's race remains uncertain.

up her clothes, exposed himself, and got on top of her. She testified that he had offered her an apple to go with him, and other children who had been with them supported her version. One of the children testified that he had seen Glover lying on top of Wright while both were exposed. In defense, Glover claimed that he had taken the girl to the stable to give her an apple, had got down on his knees to get it, and had fallen asleep after giving it to her. An Appomattox County Court jury found him guilty of attempted rape and sentenced him to three years in the penitentiary.

President Lewis, writing for the Supreme Court, found no error in the verdict. The actions of the defendant in taking the girl to the stable, and thereafter, constituted an attempt to commit rape. The jury believed that his intent in taking the girl to the stable was rape, and the evidence supported this belief. That Glover at no time attempted penetration, and that he voluntarily abandoned his attempt when the other children approached, did not lessen his guilt so far as the attempt was concerned. No doubt the court's finding was influenced by the feeling that, as Lewis put it, much of Glover's explanation was "altogether improbable."

In a third 1889 decision the court affirmed the conviction of William Smith for the rape of twelve year old Josephine Hairston.[59] The defendant based much of his appeal

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[59]Smith v. Commonwealth, 85 Va. 924 (1889). The opinion includes no racial identification. The trial record makes no positive statement, but it does provide clues that lead to the belief that both parties were black. Hairston described Smith as "brownish," and a local physician referred to him as "the

on the girl's having been too young at the trial to understand the oath. The court ruled that it was the duty of the jurors to judge her credibility, and that they obviously had been satisfied with her story enough to find Smith guilty. Concerning the evidence itself, Judge Fauntleroy refused to go into the "painful and shocking details." The judge did note, however, that, "He [Smith] was not only . . . identified by the child-victim as the perpetrator of the brutal outrage which was inflicted upon her; but he was proved to have been polluted with the foul disease which was imparted to the child by her ravisher; and he was proved by sundry witnesses to have been at the place and time, where . . . the atrocious deed was done."[60]

In some cases the Supreme Court disagreed with the jury's verdict, but it did not lightly transgress the restrictions in this area. Thus, in discussing the evidence in Lawrence v. Commonwealth, President Moncure wrote, "But without reviewing . . . the facts certified in the record as having

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boy." Other testimony was in a similar vein. The county marriage register identifies Hairston's parents as black. The trial record and marriage register are in the Henry County courthouse, Martinsville. See also, Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 13, listing a pardon for a black man named William Smith. Smith's conviction in December, 1888, Henry County Court, was for attempted rape. The details of the two cases do not match exactly, but the similarities make it probable that the pardoned Smith was the defendant in the case discussed here. Errors and misprints, common in public records of the time, may explain the discrepancies.

[60]85 Va. 927 (Emphasis original).

been proved on the trial, we are of opinion that while we would probably have given a verdict of not guilty if we had been upon the jury, or set aside the verdict which was given and granted a new trial, if we had presided at the trial, yet it is not a case in which this court can properly reverse the judgment for any supposed error therein in that respect."[61]

Moncure did not detail the evidence, but the controversy evidently concerned the question of consent by the prosecutrix, Serena Coleman. The girl was one month short of being 12 years old, the age of consent. The court's sympathy for the defendant leads to the assumption that Lawrence was unaware of the girl's age and confident that he had her consent. The court felt obligated to affirm the conviction, but obviously believed that its decision was not in the true interests of justice. Moncure added, "[W]e are unanimously of opinion that the case is a proper one for the exercise of executive clemency, and we therefore recommend that a pardon be granted by the governor of this Commonwealth to the accused for the offence of which he has been convicted as aforesaid."[62] The governor pardoned Lawrence nine days later.[63]

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[61] 71 Va. (30 Gratt.) 845, 856 (1878).

[62] Ibid.

[63] The pardon report identifies Lawrence as black, something not noted by Moncure. Serena Coleman's race is unknown, but the circumstances point to her having been black. The trial jury also recommended a pardon. House of Delegates, Journal, 1878-1879, Governor's Pardon Report, H. Doc. 2, p. 3.

In Brown v. Commonwealth[64] the court did not depend on the governor to prevent a miscarriage of justice. The verdict convicting Fleming Brown of rape was, according to Judge Fauntleroy, "wholly unwarranted." Lettie Lipscomb, the prosecutrix, was a young teenager who testified that Brown had come to her home while her parents were away and raped her. She said that she did not yell or try to push him away because she was ill. She also claimed not to have known that men and women had intercourse with each other. The evidence showed that the girl outweighed Brown by 35 pounds.

The court denied that the evidence was sufficient to warrant conviction. Fauntleroy emphasized the girl's own testimony that Brown had not used any force or threat of force. Not only did the judge say that the verdict was unwarranted, but he also complained that it represented an unwelcome predisposition characteristic of such cases. He wrote, "The chief and, indeed, the only material witness for the Commonwealth is the prosecutrix herself--Lettie Lipscomb--and her statement bears the impress of absurdity and falsehood upon its face; [proof that in rape cases the judge and jury] are often overhastily carried to the conviction of the

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[64]82 Va. 653 (1886). Partington lists both parties as white, but the 1880 census of Cumberland County shows that Fleming Brown was black. U.S., Census, 1880, Virginia, Cumberland County, Vol. 10, E.D. 76, p. 7, line 11. If it is assumed Brown was black, circumstances lead to a similar assumption concerning Lettie. The census lists a Letitia Lipscomb, black, whose age matches that of the prosecutrix, but there is a discrepancy in the name of the two fathers, Francisco in the census and Pius in the case. U.S., Census, 1880, Virginia, Cumberland County, Vol. 10, E.D. 76, p. 20, line 45.

person accused of this particular offence by the testimony of false and interested or malicious witnesses."[65]

More than one man went to prison because of the over-hasty acceptance of false testimony. For the luckier ones the truth ultimately emerged and led to a gubernatorial pardon. In the case of William Booker the alleged victim recanted her story a year after the trial, while in that of Benjamin Williams the governor merely cited "after-discovered evidence."[66] William Watson won his pardon because of post-trial doubts about his guilt, "owing to the dissolute conduct of the girl alleged to have been assaulted."[67] Judgment distorted by emotions is the only explanation for the 1885 rape conviction of Robert Campbell, because a year later the judge, commonwealth's attorney, and jury all certified that the evidence had shown only attempted rape.[68]

Most notably missing from the Virginia Reports are cases involving the rape of black women by white men.[69] This is

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[65] 82 Va. 654.

[66] Senate, Journal, 1887-1888, Governor's Pardon Report, S. Doc. 23, p. 10; Senate, Journal, 1893-1894, Governor's Pardon Report, S. Doc. 4, p. 17.

[67] Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 16.

[68] Senate, Journal, 1887-1888, Governor's Pardon Report, S. Doc. 23, p. 16.

[69] Schwartz v. Commonwealth, 68 Va. (27 Gratt.) 1025 (1876), touched indirectly on the subject. Schwartz was convicted of perjury for testimony given during the trial of James Turner for the rape of a black girl. The Schwartz opinion does not identify any of the parties by race, but see

also a subject about which commentators such as Bruce maintained a conspicuous silence. In fact, some juries did convict white men for sexual attacks on black women. In 1898 two white men stood trial in Augusta County for the attempted rape of a black woman. As one newspaper put it,

> The Brock woman whom these young men went to 'call' upon is a mulatto. She is not exactly a 'miss' and is yet not a married 'woman,' is not bad looking and has a child. No matter what her character she is a woman and the law protects her the same as it does the chief lady of the land.[70]

The men were sentenced to three and five years in prison.

Although the law may have protected "the Brock woman" in theory, the officers of the law usually did little to protect her sisters in fact. Sometimes authorities refused to issue or serve a warrant.[71] Even when officials tried to carry out their duty honestly they were unsuccessful. In an 1895 Danville case the commonwealth's attorney made a sincere effort to prosecute a white man charged with criminal assault on a ten-year-old black girl, but the wealthy defendant either bought off or frightened potential witnesses and the girl's family.[72] Such cases rarely progressed beyond the grand jury, and the occasional conviction meant little. White James Cannon paid ten dollars and costs upon conviction for

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Richmond Daily Dispatch, June 14, 21, 1876.

[70]Augusta County Argus, April 5, 1898.

[71]Richmond Planet, April 4, 1896; March 27, 1897.

[72]Ibid., February 23, 1895.

attempted rape of a black girl.[73] The hypocrisy in the different treatment of black and white interracial rapists was not lost on the black community and did little to encourage black respect for the law.[74]

Perhaps in no other aspect of the law did blacks have a slimmer chance for justice than in cases of rape. The white view of black sexual mores resulted in the assumption that any black man accused of rape was probably guilty. The "rape complex" among whites led to the even more iniquitous attitude that the specific guilt or innocence of the accused was immaterial. The Supreme Court was an honorable exception to this attitude, and a hearing before that bench usually insured an objective study of the facts. Few defendants, however, were fortunate enough to have their cases reach that level. Considering the possibility of unreported decisions, few more than twenty rape cases received full hearing before the court during the years 1870-1902. In contrast, during only the first decade of that period the state penitentiary received 118 prisoners convicted of rape or attempted rape.[75] Others were hanged at the county level. Aside from the few cases it chose to hear, the Supreme Court's actions had too

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[73] Ibid., August 26, 1899.

[74] See the frequent comments in the Richmond Planet, for example, April 4, October 31, 1896; July 16, 1898.

[75] Compiled from Board of Directors of the Virginia Penitentiary, Reports (published annually). There were 12 whites and 106 blacks.

little effect on the chronic injustice suffered by black men accused of sexual crimes in the remainder of the Virginia legal system.

VIII. THE CRIME OF MURDER

Murder, that most terrible of crimes, evokes strong emotions and threatens harsh penalties. The manner in which the Virginia legal system dealt with blacks accused of murder was an excellent indication of that system's commitment to the protection of black legal rights. Of the many homicide cases reported in the Virginia Reports during the years 1870-1902, in only seven did the opinion specifically identify the appellant as black. From reading the briefs or other sources, or from interpreting the circumstances of the crimes, the Supreme Court judges were aware of other such appellants. That the judges completely ignored the color of the defendants while deciding these cases is unlikely, yet the absence of racial identification in the opinions lent at least the semblance of color-blind justice.

When a black man named Straud Fosque was sentenced to hang for the murder of another black in 1901, the local whites favored a pardon for him. The blacks, however, wanted him to hang.[1] The incident illustrates the dilemma faced by blacks concerning murders within their community. Whites were more willing to be lenient in such cases than in interracial

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[1]Richmond Planet, August 3, 1901.

murders, and blacks appreciated any lessening in racially inspired harshness. The blacks realized, however, that such an approach not only showed condescension toward the worth of black lives, but also increased the dangers of violence within their community.[2]

In most murders committed by blacks against those of their own race the murderer and victim knew each other, and often were members of the same family. The saddest of such crimes was infanticide. In 1871 the Supreme Court considered the case of Newton Smith, convicted in Alexandria for the murder of his infant child.[3] Smith, a mulatto, fathered a daughter by a white woman named Harriet Ferguson. He took the child and promised to put her in the care of his mother. One week later the body of a mulatto baby girl was found drowned in a pond. The mayor of Alexandria summoned Smith and asked about his new daughter. Smith responded that she was with his mother, but he was unable to produce the child when ordered to do so. The mayor then charged that the body was that of Smith's infant and asked what had led him to do it. "He replied he did not know why he did it; that he hardly knew

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[2]Many writers have commented on the deleterious psychological and practical effects of leniency shown to black murderers solely because their victims were also black. Guy B. Johnson cites one quantitative study showing the relative leniency allotted black defendants in such cases. "The Negro and Crime," The Annals of the American Academy of Political and Social Science, CCXVII (September, 1941), 99.

[3]Smith v. Commonwealth, 62 Va. (21 Gratt.) 809 (1871).

what he was doing."[4] On this evidence an Alexandria Corporation Court jury found the prisoner guilty of first degree murder and sentenced him to hang.

The circumstantial evidence did point to Smith, and his admitted actions as the sexual partner of a white woman hardly gained him sympathy. But a unanimous Supreme Court reversed the conviction. In order to sustain a charge of murder, wrote Judge Christian, the prosecution had to prove both the death of the victim and the criminal agency of the defendant. Before using circumstantial evidence to establish the latter, it was imperative to prove the former. Christian saw no proof that the body was that of Smith's baby, and in fact he thought that it was not. He had come to this conclusion because Smith's child was the offspring of a mulatto man and a white woman, and therefore must have been almost white at birth. It had been described as a bright mulatto. The description of the dead child, however, was not that of a bright mulatto but "simply a mulatto."

Christian noted other weaknesses in the prosecution's case. A discrepancy existed between the descriptions of the clothes on the Smith child when last seen alive, and those found on the body. Why did the state not introduce a witness to identify the clothing? The evidence showed the age of the victim at the time of her death, but not how long the body had been dead before discovery. Why did the state not prove

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[4] Ibid., at 817.

when the child had been killed?

The most damaging evidence against Smith was his confession to the mayor. Conceding that Smith's statement aroused suspicion, Christian refused to accept it as a definite admission of guilt. Although Smith's response that he "did not know why he did it" may well have referred to his drowning the child, it may also have concerned his criminal sexual activities with a white woman, or the fact that he took his baby and left it in the custody of another woman. The confession was not specific enough to make out the corpus delicti without corroborating evidence.

Without independent proof of the crime's having been committed, Smith's failure to produce his daughter alive, an otherwise "overwhelming" point against him, became another inconclusive circumstance. The state proved neither the identity of the body nor that Smith's daughter was dead. Christian emphasized the importance of proving the fact of death before a defendant could be convicted of murder: "It is a rule adopted in the interest and for the protection of human life and liberty, and a principle that lies deep in the foundations of the criminal jurisprudence of every civilized country."[5]

A more common cause of murder within the family was the desire to eliminate an unwanted spouse. William and Susan Thornton, for example, enjoyed less than an ideal marriage.

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[5] Ibid., at 821.

She was engaged in an "improper intimacy and intercourse" with a neighbor named Ed Robinson, often staying the night at his house. William Thornton was disagreeably aware of the situation but continued to treat Susan as his wife. She, however, complained to others that he was too old for her and "she meant to get rid of him." One day Susan bought some arsenic and the next night William suddenly became ill with symptoms of severe poisoning. After his death she left the area but was found and returned. Authorities disinterred William's body and found arsenic in his stomach. A Charlotte County Circuit Court jury sentenced Susan to hang for first degree murder, a decision affirmed by the Supreme Court.[6]

Just as the actions of Robinson and Susan Thornton did little to divert suspicion when her husband died under mysterious circimstances, the behavior of James Lyles and Margaret Lashley pointed a circumstantial finger at them when George Lashley was shot to death. George was unhappy that whenever he was absent from home Lyles would visit his house and be intimate with Margaret. On several occasions Lyles threatened to kill George, a threat repeated on the night of the murder. According to one witness, Margaret led her husband to the door of the house, where Lyles shot him. Another

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[6]Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657 (1874). Thornton's death sentence was commuted to eighteen years in the penitentiary. According to the governor, "Evidence, not developed before the court and jury, strongly tends to lessen her connection with the crime, and to moderate the degree of her guilt." Virginia, House of Delegates, Journal, 1874-1875, Message of the Governor . . . Stating All Pardons Granted . . ., with the Reasons Therefor, [hereinafter cited as Governor's Pardon Report], H. Doc. 8, p. 5.

witness confirmed Lashley's complicity by testifying that Margaret had said that Lyles shot George at her urging. When asked whether George was dead, Margaret had replied, "Yes, and gone to hell." The Supreme Court held that there was sufficient evidence to warrant first degree murder convictions of both defendants.[7]

In Reed v. Commonwealth[8] the evidence against the defendant was again overwhelming. In January, 1899, Grant Reed came to Madison County to visit his estranged wife Minnie, but due to his drunken condition the family sent him away. Returning the next morning, he spoke in friendly terms with his wife and took a walk with her and their child, and then joined his father-in-law for a drink. A short time later the benign mood changed suddenly. Reed asked Minnie for possession of the child, she refused, and he shot her. When the father tried to come to her rescue there was a struggle and Reed shot him dead. The wounded Minnie ran from the house seeking help, but Reed pursued and caught her. Two neighbors tried to save her, but Reed threatened to shoot them also and finally killed his wife.

The Madison County Court convicted Reed of first degree murder, but the circuit court reversed the decision and awarded

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[7]Lyles v. Commonwealth, 88 Va. 396 (1891); Lashley v. Commonwealth, 88 Va. 400 (1891). The opinions do not mention race, but the petitions and briefs identify the parties as black. Lashley v. Commonwealth, in Supreme Court of Appeals, Records and Briefs, LIV, O.S., 379; Lyles v. Commonwealth, Records and Briefs, LIV, O.S., 411.

[8]98 Va. 817 (1900).

him a new trial. He fared no better the second time and was again sentenced to hang. The Supreme Court ruled that a jury could have found no other verdict. Wrote Judge Cardwell, "This was a fiendish murder, perhaps not surpassed in atrocity by any to be found in the annals of the Commonwealth. . . . His conduct when the horrible deed was committed was that of a cool, self-contained man, and when asked the cause of his murderous act, simply replied that the woman was his wife."[9]

The 1880 murder of Moses Young and the subsequent conviction of Littleton and Oliver Hatchett presented the court with a situation in which the issue of sufficiency of evidence was more than formalistic. The evidence against the Hatchetts was substantial. On the night in question Littleton gave his son Oliver a bottle of whiskey with instructions to take it to Young and induce Young to drink it. Young did so and soon felt severe pain. Before dying three hours later, he allegedly made a dying declaration that the stranger had given him poison whiskey. He supposedly made the declaration in the presence of his wife Sallie and neighbors Osborne and Charlotte Northington. The state claimed that Littleton had acted at the instigation of Henry Carroll, Sallie Young's lover.

Carroll and the Hatchetts were jointly indicted for Young's murder, Oliver Hatchett as principal and the others as accessories. Separate juries acquitted Carroll and sentenced Littleton to hang. The evidence against Hatchett

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[9]Ibid., at 831-32. For racial identification, see Richmond Planet, August 11, 1900.

included his confession to the coroner that Carroll had given him the whiskey bottle, saying it contained strychnine, and promised him payment if he would send it to Young. The Supreme Court reversed the lower court's decision. To convict Littleton Hatchett as an accessory, ruled Judge Anderson, it was first necessary to present evidence sufficient to connect the alleged principal with the crime. The court thought the evidence insufficient to convict Oliver Hatchett as principal in the murder.[10]

Within a year the court had the opportunity to decide first hand the question of Oliver's guilt, because he also was convicted and sentenced to hang. Much of the evidence was the same, although some question existed whether Oliver had known that the bottle contained poison. The evidence also showed that several weeks before Moses Young's death Carroll had given Sallie Young, in the presence of the Northingtons, a bottle of strychnine with instructions to put it in her husband's food. The court also noted several glaring omissions in the state's case. The doctors conducted no post-mortem examination of the body, determining the cause of death solely on the basis of the symptoms described by witnesses. Given the character of those witnessess--an unfaithful wife party to a conspiracy to kill the deceased, and two neighbors aware of the fact--their testimony was somewhat suspect. In addition, even though the prosecution had recovered the

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[10]Hatchett v. Commonwealth, 75 Va. 925 (1882).

whiskey bottle, it made no analysis of the contents.

The court found the case against Hatchett insufficient in almost all respects. No proof existed that Young had died of poisoning. No proof existed that the whiskey bottle had contained poison. No evidence showed that Hatchett had known or should have known of the alleged presence of strychnine in the whiskey. Wrote Judge L. L. Lewis, "It is true that the facts proved are sufficient to raise grave suspicions against the prisoner; but they fall far short of establishing his guilt clearly and satisfactorily, as required by the humane rules of the law."[11]

Not all killings within the black community involved domestic entanglements. Sometimes the parties were merely acquaintances, the violence sparking from spontaneous anger or long-simmering grievance. An example of the former was the 1883 murder of Randall Jackson by Joseph Barbour. Jackson and others were walking along a road when they met Barbour, who asked one of them to return to town with him for a drink. Jackson answered that he could not due to the lateness of the hour. Barbour turned to Jackson, asked what he had to do with it, and stabbed him in the throat. Barbour escaped but was soon caught, still covered with blood and holding the knife. The Supreme Court affirmed a verdict of murder in the first degree, ruling that the evidence showed

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[11]Hatchett v. Commonwealth, 76 Va. 1026, 1031 (1882). The opinions do not identify the defendants by race. The Hatchetts were acquitted at the second trials, but rearrested and confined to jail until finally released in August, 1883. Richmond State, August 24, 1883.

a willful, deliberate, and premeditated act.[12]

In Lewis v. Commonwealth[13] an absence of eye-witnesses placed the emphasis on circumstantial evidence. In December, 1884, Daniel Lewis, Jim Reed, Joe Rose, and three women, all black, took the train from Alleghany Station to Callahan's Depot, where they started on foot for a party. During the walk, Reed, who was quite drunk, decided to return to Callahan's. Lewis proclaimed his friendship for Reed and went back, ostensibly to take care of him. One of the women heard Lewis say, "If you don't quit cursing me, I'll kill you." She then heard a noise which might have been a shot, after which Lewis rejoined the group. Returning to Callahan's the next day, they found Reed's body in the road. Lewis examined the body and announced that Reed had frozen to death, and that he would inform the depot master and doctor.

In fact, Reed had died not from the cold but from a pistol shot in the chest, and Lewis did not inform anyone of the discovery of the body. At Lewis' trial for murder, one witness testified that before the group had left Alleghany Station he heard Lewis say that he intended to kill Reed at the first opportunity. The depot agent testified that he had sold Lewis a return ticket on the morning in question, and that Lewis had made no mention of a body in the road. The

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[12]Barbour v. Commonwealth, 80 Va. 287 (1885). Newspaper reports confirm that Barbour and Jackson were black. Petersburg Lancet, July 4, 1885; Richmond Daily Dispatch, May 16, 1884.

[13]81 Va. 416 (1886).

Alleghany County Court sentenced Lewis to fifteen years in the penitentiary for murder in the second degree. The Supreme Court affirmed.[14]

Although only circumstantial evidence pointed to Daniel Lewis' guilt, Randall Watson murdered Joe Robinson in front of witnesses. The two men had been bitter enemies for more than a month before their final, fatal encounter. During a previous fight Robinson had made remarks abusive of Watson's wife, in addition to charging Watson himself with having committed murder in North Carolina. Robinson had then retreated into a house and refused to come out. Threatening to kill Robinson unless he retracted his statements about Watson's wife, Watson remained outside all night until leaving the next morning. On another occasion he hid outside Robinson's house with a gun. On the third attempt Watson finally found Robinson outside. Rushing from the darkness, he yelled, "You G-d d-d son of a bitch, crack your lips, and I will blow your brains out!" Not waiting to see whether Robinson would accept the challenge, Watson immediately shot and killed him.

A Greensville County Court jury convicted Watson of murder and sentenced him to hang. After the Supreme Court over-

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[14]Lewis served his term until 1893, when he received a pardon on the ground of poor health. Senate, Journal, 1893-1894, Governor's Pardon Report, S. Doc. 4, p. 12. In another homicide case based on circumstantial evidence, the court affirmed the manslaughter conviction of Edgar Cash, who was seen at the scene of the crime holding a weapon that matched the description of the murder instrument and who later remarked that he had "fixed" the victim. Cash v. Commonwealth, 2 Va. Dec. 1 (1895). For racial identification, see Cash v. Commonwealth, Records and Briefs, CXXVII, O.S., 530, 542.

turned that conviction on procedural grounds, a second trial ended in a similar verdict. Watson contended that he had shot in self-defense, but the Supreme Court rejected that contention. It was Watson, noted Judge Lacy, who had made repeated threats against the deceased. It was Watson who had several times waited for Robinson with a gun. It was Watson who had possessed a motive for murder. Finally, despite the defendant's claim to the contrary, it was Watson who, according to witnesses, had rushed from ambush and shot the victim. The Supreme Court found this evidence sufficient to sustain the verdict of first degree murder.[15]

A murder in which the victim was white introduced a new factor into the appellate situation. White society considered the killing of a white man by a black to have implications beyond the actual murder. That blacks keep their place, that they be obedient and humble in all dealings with whites, was a southern imperative. Many whites therefore considered the murder of a white by a black to be a challenge to the entire structure of race relations.[16] Such a situation encouraged

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[15]Watson v. Commonwealth, 87 Va. 608 (1891). Govenor P. W. McKinney took a different view of the evidence when he commuted Watson's sentence to six years in the penitentiary. He saw Robinson as a troublemaker and Watson as a preserver of the peace who shot when Robinson approached him with a drawn pistol. House of Delegates, Journal, 1891-1892, Governor's Pardon Report, H. Doc. 5, p. 19. For racial identification, see Watson v. Commonwealth, Records and Briefs, XLV, 905.

[16]"Counsel for prisoner here humbly permits there are people in this world who believe a negro is not justified in killing at any time nor under any circumstances." Muscoe v. Commonwealth, Records and Briefs, LII, O.S., 33, 36.

the conviction of black defendants on less than overwhelming evidence. Even more dangerous, many whites desired only that some black be punished for the crime, regardless of the guilt or innocence of the specific defendant.[17] The duty of the Supreme Court was to insure that all such feelings were eliminated from the determination of guilt.

The case of Reynolds v. Commonwealth[18] demonstrated the court's willingness to overturn an obviously wrong verdict. Reynolds was a young black man who, with his brother Burwell Reynolds, had several heated arguments with a white man named Aaron Shelton. The trouble began with a childish rumpus between younger members of the families and escalated into serious threats of violence among the adults. The fatal encounter occurred when the Reynoldses came upon a log, which had been cut by Shelton's uncle, blocking a road. They moved the log despite a previous warning from Shelton not to do so. Shortly after removing the log, they met Shelton approaching in a wagon, and a fight ensued. At the time Lee Reynolds was carrying a stick and a gun. Shelton took the stick from him, and Lee retreated with Shelton in pursuit. Lee backed up fifteen feet while he and Shelton fought over the gun, until finally the white man took the stick and knocked him over a log. At that point Burwell Reynolds stabbed Shelton in the back.

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[17]"These prejudiced men go upon the theory that where a crime has been committed by a colored person, some member of that race, be they innocent or guilty must suffer." Richmond Planet, January 26, 1895.

[18]74 Va. (33 Gratt.) 834 (1880).

The circuit Court of Patrick County convicted Lee Reynolds of second degree murder and sentenced him to fifteen years in the penitentiary. The Supreme Court reversed the conviction and ordered a new trial.[19] The prosecution presented essentially the same evidence as it had at the first trial, and this time upon conviction the jury set the punishment at eighteen years. Again, the Supreme Court reversed.

President Moncure's opinion betrayed his disgust at the proceedings of the second trial. The unanimous court, he reminded his audience, had declared the evidence presented at the first trial insufficient to sustain the first verdict. At the second trial the state presented no additional evidence, yet not only did the jury find the defendant guilty, it added three years to his sentence. If the action of the jury was hard to understand, that of the trial judge in refusing to grant a motion to set aside the verdict was inexcusable. The judge was aware of the Supreme Court's decision in the first case, and was aware that the evidence in the second trial was the same as that in the first. Yet he allowed the verdict to stand. To emphasize the insufficiency of the evidence, Moncure reviewed the facts proved, stressing that Lee Reynolds had been on the defensive throughout the encounter.

The jury realized full well that Lee had not committed the murder. They knew, though, that he had been in a fight with a white man and that his companion had stabbed the white

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[19]This first hearing is not reported.

man to death. The jury no doubt believed this to be collective guilt. The Supreme Court refused to tolerate such thinking. As Moncure asked with more than a hint of impatience, "Now how can Lee Reynolds be made liable for this act which he did not commit, to which he did not consent, and of which he had no knowledge nor information until it was done [?]"[20] The evidence was so insufficient that once the proceedings had left Patrick County even the official charged with representing the state entertained no doubt where justice lay. Wrote Moncure, "When this case was placed in the hands of this court the learned attorney-general was so well satisfied that the judgment ought to be reversed that he said so to the court; which was very proper under the circumstances."[21]

The attorney-general felt no such compunction in Mitchell v. Commonwealth,[22] and Moncure's opinion agreed that the prosecution had presented a strong case. The crime involved was the robbery-murder of Charles Walton, a Louisa County storekeeper. Much of the evidence against Mitchell was circumstantial--his possession of a five-dollar bill known to have been taken in by Walton and of a gun exactly like Walton's. Mitchell,

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[20] 74 Va. (33 Gratt.) 843.

[21] Ibid. Lee Reynolds received a change of venue to Danville for his third trial, where the prosecutor declined to proceed further. His brother, originally convicted of first degree murder, was sentenced to five years in prison for manslaughter. Samuel N. Pincus, "Negroes on Juries in Post-Reconstruction Virginia: The Rives Cases" (unpublished M.A. thesis, University of Virginia, 1970), pp. 64-65.

[22] 74 Va. (33 Gratt.) 845 (1880).

arguments, and often the question concerned amount of provocation. The court's treatment of these cases, and the facts themselves, illustrate relations between the races and the conduct which white society expected of blacks during this period.

The evidence in Wright v. Commonwealth[24] showed that Peter Wright had a fight with his landlord, Carr Maupin, over Maupin's charges that Wright was withholding money due Maupin. When Maupin's son Robert asked Wright why he was beating his father, Wright picked up a piece of timber and hit both of them, killing Robert. Reviewing Wright's conviction for murder in the first degree, the Supreme Court found the killing willful and premeditated. President Moncure wrote that the evidence warranted the verdict.

Another Wright, Dock, earned a similar verdict when he too took a piece of timber to some white men. In a crowd which had gathered to watch a fight between a drunk old black man and a drunk old white, Wright took a stick and "ran around the crowd, striking at white men right and left." One of the whites died of a fractured skull. The defendant argued that the killing was not premeditated or deliberate murder. Judge Christian emphasized that Wright had continued to swing his stick even after being told to stop by a white man. When a man, with no provocation, kills a peaceful bystander, said Christian, he is guilty of first degree murder. "In his conduct thus exhibited, he represented the character of a malicious

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[24] 74 Va. (33 Gratt.) 880 (1880).

however, made a pretrial statement connecting himself with the crime. He said that two others had told him to come with them when they went to Walton's store, that they had told him to wait outside while they entered, and that they had returned with the stolen money and word of the murder. The three stood trial separately. The other two were acquitted, but Mitchell was sentenced to hang for murder in the first degree.

Once the Supreme Court had ruled that the confession was admissible, the question of sufficiency of evidence swung heavily against Mitchell. In fact, the statement showed that Mitchell, described as "not very intelligent," might have been the unwitting lookout for a crime about which he knew nothing until its commission. The jury and the Supreme Court felt otherwise. Concerning the acquittal of Mitchell's alleged accomplices, Moncure wrote,

> The case of the prisoner before this court, cannot be affected by the result which has taken place in regard to the case of the said Talley and Jackson. They, probably, made no confession, and the confession of the prisoner was not legal evidence against them. While there was, doubtless, insufficient evidence to convict them, there was sufficient to convict the prisoner.[23]

Many defendants whose cases were considered by the Supreme Court committed the homicides for which they were convicted. The issue of sufficiency in these cases dealt with whether the facts justified conviction for a specific degree of murder. Most of the killings were the outcome of interracial

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[23] Ibid., at 870 (Emphasis original). Curtis v. Commonwealth, 87 Va. 589 (1891), also involved the robbery-murder-burning of a storekeeper. Augusta County Argus, November 17, 1891.

murderer, who is described by a distinguished law writer as one who has 'a heart regardless of social duty, and deliberately bent on mischief.'"[25]

The issues of premeditation and provocation arose again in Honesty v. Commonwealth.[26] The facts linked Wesley Honesty's downfall to Grover Cleveland's rise. One November night in 1884 the Democrats of Winchester were celebrating Cleveland's recent re-election, with both the election and the celebration arousing bitterness in Honesty. He announced his intention "to kill some damned Democratic son of a bitch before morning." Witnesses at his subsequent trial described how he had done just that. When a white man named Joseph McFaul reprimanded Honesty and his friend Tabby Banks for being boisterous, they cursed him and tried to provoke him into a fight. After Honesty picked up a stone McFaul warned them to stay away or he would hit them with his walking stick. He tried to leave, but Honesty grabbed his collar. After another warning McFaul struck Honesty a "slight blow" on the arm, which Honesty followed with a "severe blow." McFaul died and Honesty was sentenced to hang for first degree murder.

On appeal, the Supreme Court rejected Honesty's contention that his action had been provoked by McFaul. Judge Richardson noted that the armed defendant had twice approached the deceased, followed when the deceased gave way, and ignored

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[25]Wright v. Commonwealth, 75 Va. 914, 921 (1882).

[26]81 Va. 283 (1886).

deceased's warnings. McFaul's use of his stick, slight as it was, was a reaction to Honesty's actions. Richardson believed that the evidence showed Honesty had committed the murder deliberately, and that the facts warranted the jury's verdict.

Mitchell v. Commonwealth,[27] decided in 1880, most clearly put the legal issue of provocation within a social context. Nelson Mitchell and John C. Gillespie held a heated argument concerning the money which Gillespie had paid for work done by Mitchell's sister-in-law. Mitchell declared, "I think it is d---- little pay." When Gillespie replied, "[Y]ou must not talk to me in that way," Mitchell answered, "I will talk as I d---- please." Gillespie picked up a four foot long oak stick and hit Mitchell with severe blows to the back and neck. Mitchell took a pole ax and hit Gillespie on the head, causing him to drop his stick and retreat ten feet. With Gillespie's back to him, Mitchell struck again and delivered a fatal blow.

At trial in Amherst County Court the evidence showed that all three blows had come in rapid succession, with the fatal stroke coming as soon as physically possible after Mitchell's first. Between those two swings of the ax the deceased had retreated ten feet and turned with his back to Mitchell. Other testimony indicated that the two men had been friendly before the fight, although the previous spring Mitchell had threatened to bust the deceased if "he fooled with him." The jury

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[27] 74 Va. (33 Gratt.) 872 (1880).

found the defendant guilty of murder in the first degree and sentenced him to hang, a judgment upheld by the circuit court.

President Moncure, writing for the Supreme Court, thought that the certified facts justified the verdict. They showed that Gillespie's language had been "mild and peaceful," while Mitchell's had been "harsh in the extreme." Moncure continued,

> The [defendant] must have intended to kill the deceased. He must have known that the violent blows inflicted by him with such a deadly weapon upon the deceased would produce his death. The provocation for inflicting this was wantonly brought on by the conduct of the prisoner which was wholly unwarranted. He provoked the blows which were given him by the deceased, but which did him no harm so far as the record shows; and he may have provoked them for the purpose of obtaining a pretext for the deadly violence he afterwards used to the deceased while the latter was running away from him.[28]

The evidence was not nearly so strong on the point of motivation as Moncure suggested. Especially arguable was his description of Mitchell's statements as having been "harsh in the extreme," while the victim's were "mild and peaceful." Is a warning such as, "You must not talk to me in that way," especially when followed by blows with an oak stick, truly "mild and peaceful"? Were the defendant's use of "damn," and his assertion that he would talk as he pleased, provocation enough to justify Gillespie's attack? They may well have been in a society that expected blacks to be obedient and respectful. Any black assertion of personal rights, much less a display of definite impertinence, seemed to whites

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[28] Ibid., at 878-79 (Emphasis original).

provocation in the extreme. That the law said nothing about such an interpretation meant little to the jury and judges who decided Nelson Mitchell's fate. The opinion nowhere identified the color of the participants, but the judges no doubt guessed from the facts in the record.[29]

Three years later the Supreme Court considered a similar case, also from Amherst County. The facts seem depressingly familiar. Frederick McDaniel, a black man, got into an argument with his landlord, J. C. Carter, over a borrowed horse. That both men had been drinking aggravated the situation. The words used were loud and violent, McDaniel calling Carter a liar, and the landlord using profane language. McDaniel walked off to tend to his business, but twenty minutes later saw Carter approaching with a walking stick. McDaniel picked up a stick of his own. Carter, who had told his wife that "he would not stand what the prisoner had said," asked McDaniel why he was holding the stick. The reply was, "If you come here I will show you." Carter raised the stick to McDaniel, who responded with two blows to Carter's head.

Speaking for the three man majority in the Supreme Court, Judge Hinton was almost apologetic in reversing the lower court's decision convicting McDaniel of first degree murder. The court, he said, disliked setting aside a jury verdict where the only ground for doing so was that the verdict was

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[29]The governor commuted Mitchell's sentence to life in prison, and he served seventeen years before being pardoned. Virginia, Board of Directors of the Virginia Penitentiary, Annual Report, 1897, p. 43. The prison report confirms that Mitchell was black. See, also, House of Delegates, Journal, 1897-1898, Governor's Pardon Report, H. Doc. 3, p. 13.

contrary to the evidence. But in this case, Hinton believed, the record did not contain enough evidence for a jury to find deliberation and premeditation. McDaniel not only showed no desire to strike Carter during their argument, he even left to carry on his business. Carter continued the quarrel and first appeared with a weapon. Hinton remarked that the stick McDaniel had chosen for his defense was comparatively light. As for the threat, "If you come here I will show you," Hinton thought that,

> in light of what subsequently happened, [it] can only be interpreted to mean something like this, namely, whilst I shall not seek you, yet if you shall attack me with that cane, I shall repel your attack with this stick. This language, instead of revealing a deliberate and preconceived purpose to kill, would imply . . . it was not his purpose to bring about a difficulty.[30]

In Brown v. Commonwealth[31] the Supreme Court did not consider directly the facts of the case, but in reversing a conviction on the ground of erroneous instructions it affirmed the right of a man to kill if acting in reasonable fear of his life or in self-defense. The principles enunciated by the court were well-accepted legal doctrine, but the defendant

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[30] McDaniel v. Commonwealth, 77 Va. 281, 287 (1883). President Lewis and Judge Lacy dissented. McDaniel was retried and convicted of murder in the second degree. He received an eighteen year sentence, the maximum allowed by law, and served fifteen years before being pardoned. House of Delegates, Journal, 1897-1898, Governor's Pardon Report, H. Doc. 3, p. 23. The briefs and record contain no racial identification, but the judges could have guessed from the circumstances of the crime. McDaniel v. Commonwealth, Records and Briefs, XXV, O.S., 76. Richmond Dispatch, March 16, 1883, confirms that McDaniel was black and Carter white.

[31] 86 Va. 466 (1890).

in the case was a black man accused of the murder of a white. The report of the case contains no facts, but the record of the trial submitted to the judges[32] showed that the killing was the outcome of a fight between blacks and whites, with the whites the instigators. At trial the two races gave conflicting testimony, and the evidence given by the whites showed discrepancies between their trial testimony and their earlier testimony to a coroner's jury. Unfortunately for Brown, it was the prerogative of the jury to decide whom to believe. Circuit Court Judge W. S. Barton, who affirmed the county court judgment sentencing Brown to fifteen years imprisonment for second degree murder, said that he himself would have preferred a finding of manslaughter, but that there was enough evidence to sustain a verdict of murder.[33] Because the Supreme Court reversed on the ground of erroneous instructions, it is doubtful that a second trial for Brown produced an appreciably different result.

The witnesses in Gaines v. Commonwealth[34] also gave conflicting testimony, with race again the determining factor. What set the case apart from other interracial murders of the period was the alleged motive. Percy Carlton was a white storekeeper whose written note, "Dear Miss: Come out to-night to see me after I close the store," found its way to a black woman named Mary Gaines. She angrily charged Carlton with

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[32] Brown v. Commonwealth, Records and Briefs, XLVI, O.S., 235.

[33] Ibid., p. 238.

[34] 88 Va. 682 (1892).

having insulted her. Carlton replied that it was not meant for her but had been delivered by accident. Gaines refused to accept this explanation, a position she shared with her husband George. He spent the next several days uttering threats and hunting for Carlton, finding him at last at the store.

Because of conflicting testimony, the details of what occurred are unclear, but the basic facts are known. The two men argued about the letter, with Gaines abusing Carlton and calling him "a low-life white man." Carlton ordered him to leave and threw a weight at him. At this point, according to the prosecution witnesses, Gaines drew a pistol and advanced on Carlton, who ducked behind the counter. Gaines reached over and shot him in the back. The defense witnesses contended that Carlton had hit Gaines with the weight and that the latter had staggered and fired. The jury believed the prosecution witnesses and returned a verdict of murder in the first degree, with which the Supreme Court majority agreed. Judge Fauntleroy wrote, "We are of opinion that the evidence plainly and fully proves a case of deliberate murder--if not, indeed, a systematic assassination--of young Percy Carlton, in his own castle, by the prisoner, George Gaines, who . . . provoked and necessitated a conflict, by refusing to be satisfied with a full and ample explanation and apology for a supposed wrong."[35]

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[35] Ibid., at 690. Judge Richardson and Hinton dissented.

If white society considered the killing of a white man a symbolic act against its authority, how much worse must it have seemed when a black killed a policeman, the official representative of that authority! Three such cases came before the Supreme Court, two complicated by the question whether the officers involved had the authority to make the arrest that each was attempting at the time he was shot. The question of resisting illegal arrest is a close legal problem. Given the racial structure of nineteenth century Virginia, especially the mania to keep blacks in their place, such cases contained considerations of means and ends entirely distinct from those which the letter and spirit of the law allowed. The demands of perceived social necessity hovered over the shoulders of the judges as they made their decisions.

William Briggs was, in the words of his attorney, "an humble colored boy from Albemarle." In September, 1895, as he and some companions were walking along the streets of Culpeper, M. B. Nalls, a county constable, tried to arrest him. Nalls did not display his badge, nor did he have a warrant for Briggs's arrest. Nalls grabbed Briggs by the arm and started to pull him across the street, while Briggs denied that Nalls had the right to make the arrest. Briggs freed himself, but then shot the constable in the back of the head before fleeing. A first conviction for murder in the second degree was set aside by the circuit court level, but retrial

resulted in a similar verdict and a sentence of eighteen years in the penitentiary.

In his opinion for a divided Supreme Court,[36] Judge Lacy conceded that Nalls had no authority to arrest Briggs. The officer lacked a warrant, and Briggs had committed no offense. Even the crime of carrying a concealed weapon, which Nalls had shouted at the time, was unlikely. If the weapon had truly been concealed, asked Lacy, how could Nalls have seen it on a man casually walking by in the dark? Nalls, therefore, lacked authority to make the arrest, and Briggs was not bound to submit to it. The amount of force the law allowed Briggs to use in resisting the illegal arrest was the issue. It did not permit him to be as forceful in such a situation as he could be in defending his life from a general attack, because the law was available to restore any wrongfully deprived liberty. Murder constituted unlawfully excessive resistance.

The key to determining the degree of homicide, said Lacy, was the state of Briggs's mind at the time he shot Nalls. If he acted under sudden passion, the killing would be only manslaughter. If, however, he acted with malice, the killing would be murder. Although Lacy was willing to begin with a presumption of passion, he felt that murder not justified by the nature of the original assault should lead to an inference of malice. Here, the constable did not act with brutality or violence. The defendant did not shoot while in actual duress.

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[36]Briggs v. Commonwealth, 82 Va. 554 (1886). The description of Briggs is from Briggs v. Commonwealth, Records and Briefs, XXXIV, O.S., 745, 752.

Having freed himself, the defendant no longer had reason to act against the deceased. To Lacy this indicated that the killing had been cool and deliberate, with no evidence of passion.

The court split three to two in the case. President Lewis concurred in Lacy's opinion and Judge Hinton concurred in the result, while Judges Fauntleroy and Richardson dissented.[37] The most telling fact against the defendant was that he had already freed himself before the shooting. Lacy made no effort to justify Nalls's action. He readily admitted that the officer had possessed no authority to make the arrest. Conceivably, under only slightly different circumstances, the court would have supported the forceful efforts of a black man to resist unlawful detention by a white policeman. The possibility is intriguing, but it never materialized.

What did materialize was Muscoe v. Commonwealth,[38] a case similar in many details to Briggs. The court never specifically discussed the evidence in Muscoe, but in the first of two decisions it demonstrated its intention to uphold the principles enunciated in Briggs. Ironically, Lacy, who had written the latter opinion, was the lone dissenter when the court reversed the conviction of William Muscoe. President

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[37]Lacy's opinion also covered several assigned errors in procedure, and the report did not indicate on which points Fauntleroy and Richardson dissented. Briggs spent very little time in prison. For reasons of ill health he received a pardon in August, 1887. Senate, Journal, 1887-1888, Governor's Pardon Report, S. Doc. 23, p. 10.

[38]86 Va. 443 (1890).

Lewis based reversal on procedural grounds, but he relied on the points treated when Lacy had discussed the evidence against Briggs in the earlier case.

William Muscoe was a transient "suspicious character" hanging around Charlottesville in December, 1888. He had the reputation of being a vagrant, gambler, carrier of concealed weapons, and possible thief. The mayor verbally ordered the police to arrest him, though no written warrant was issued. Policeman G. T. Seal had no warrant when he stopped Muscoe one night to ask about the theft of some jewelry. After denying any involvement, Muscoe began to walk away. Seal ordered him to stop and accompany him, and grabbed Muscoe's coat to enforce his desire. When Seal took out his handcuffs, Muscoe drew a pistol and fatally shot the officer. A corporation court jury found the assailant guilty of first degree murder and sentenced him to hang.

The Supreme Court limited its review to deciding whether the trial judge's instructions to the jury had been correct. The instructions concerned the validity of the attempted arrest and the jury's role in deciding the issue. The court ruled that the two relevant instructions were incorrect and tended to mislead and confuse the jury. Lewis considered the various possible ordinances and laws and concluded that the policeman had been acting beyond his authority when he attempted to arrest Muscoe. Seal possessed no proper warrant, and "[a]rrest without warrant where a warrant is required, is not due process of law, and arbitrary or despotic power no

man possesses under our system of government."[39]

So, for the second time, the court affirmed that an unlawful arrest could be legally opposed. It appeared willing to uphold this principle even when the resister was black. In Muscoe the majority proved that it would reverse the conviction of a black man accused of killing a white officer under certain conditions. But, while upholding the theory, the court in Muscoe still did not sustain the actions of a defendant based on the specific facts of a case. When the court again considered the case after retrial and a second conviction, it found that the evidence did support a verdict of first degree murder.[40]

The third case involving the killing of a policeman offered no such legal and social dilemmas. The shooting spree of William Davis, a black man known in Tazewell County as "Horsehead Bill," provided policeman Charles Jones with more than enough cause to attempt an arrest. Davis one day met his estranged wife and suddenly went beserk with rage. Some controversy emerged at trial later about his sobriety at the time, but no doubt existed about his actions. He pulled his pistol and chased his wife through a nearby house, shooting at her as they ran. He shot at a woman in the house, and at another occupant as she fled through the front door. After

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[39] Ibid., at 449.

[40] Muscoe v. Commonwealth, 87 Va. 460 (1891). See, also, Augusta County Argus, January 29, 1889, February 18, 1890; Charlottesville Chronicle, February 14, 1890; Richmond Planet, February 22, 1890.

pushing aside a man who tried to disarm him, Davis saw two policemen approaching and ran down an alley. One of the officers, Charles Jones, finally grabbed Davis by the collar and informed him that he was under arrest. Davis pointed the gun over his shoulder and fatally shot Jones.

The county court sentenced Davis to hang, and the Supreme Court affirmed.[41] Judge Lacy wrote that no doubt existed concerning Davis' guilt, and no excuse for his actions. Jones was wearing his uniform, and Davis knew him to be a policeman. Lacy dismissed the attempted defense of drunkenness, and agreed with the jury's belief that Davis had been conscious of and responsible for his actions. The decision sealed Davis' appointment with the hangman, but before he died his fate drew one unexpected comment from the local newspaper. "Perhaps he ought to be hung," editorialized the Tazewell Republican, "but we don't like to begin the hanging business on a poor ignorant negro when so many good subjects, deserving to be hanged have escaped the gallows in Tazewell County because they had the money."[42]

When representing black defendants accused of murdering whites, defense attorneys found it important to stress, where

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[41]Davis v. Commonwealth, 89 Va. 132 (1892). The opinion does not identify the defendant by race.

[42]Reprinted in Bickley Mills Post, March 10, 1892. See, also, John Newton Harman, Sr., ed., Annals of Tazewell County, Virginia (2 vols.; Richmond: W. C. Hill Printing Company, 1925), II, 104.

possible, the good reputation of their clients in race relations. The use of character witnesses in criminal trials was not unusual, but in these cases they were used specifically to alleviate any suspicions among the jurors that the defendant was a troublemaker. The attorneys wanted to remove the symbolic aspects of interracial murder so that the jury would try the case solely on the specific facts and parties involved. For example, the record in Brown noted, "It was further proved that the prisoner had borne a good character; that he was always polite and respectful to white people."[43] An Albemarle deputy sheriff touched the real point in his testimony for William Briggs, assuring the jury that Briggs had "always been obedient and polite and biddible."[44]

This survey of Supreme Court opinions does not give a complete picture of the treatment of black murderers. It does not show the cases in which trial judges or juries refused to convict blacks whom they thought innocent. Even more honorable were jurors who put aside racial feelings and recognized the human passions and motives of black murderers. James Smith, in the midst of a quarrel with a white man named Baker, fired a return shot which accidently struck and killed Mrs. Baker. Smith stood trial for murder, but the outcome was unexpected.

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[43]Brown v. Commonwealth, Records and Briefs, XLVI, O.S., 235, 243.

[44]Briggs v. Commonwealth, Records and Briefs, XXXIV, O.S., 745, 752 (Emphasis original).

Feeling that the deceased had been an accessory to her husband's attempt to kill Smith, the jury found the defendant guilty only of involuntary manslaughter, and sentenced him to serve one day in jail.[45] Similarly, the jury trying Miles Riddick in 1876 thought him guilty of first degree murder, but only technically so. "Several of the jurors refused to agree to the verdict except upon the condition that all should unite in recommending the case to executive clemency."[46]

Often, though, juries were willing to convict black defendants on questionable evidence. Many such cases either did not reach the Supreme Court or stood affirmed because of the nature of appellate decisions. In Dock v. Commonwealth,[47] for example, the court dismissed appellant's claim that his conviction for murder in the second degree was contrary to the evidence. President Moncure ruled that the record quoted all the evidence presented, not the facts proved. The question was for the jurors, and they had not believed Dock's testimony. The court did reverse the decision on a point of procedure, though Dock was retried and again convicted within two months. Four years later Governor James Kemper, in pardoning Dock, was less certain about the facts. He wrote, "The conflicting evidence in this case makes it difficult to determine whether the homicide was wilful or by misadventure." By

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[45]Richmond Planet, October 27, 1900.

[46]House of Delegates, Journal, 1877-1878, Governor's Pardon Report, H. Doc. 3, pp. 3-4.

[47]62 Va. (21 Gratt.) 909 (1872).

that time many others evidently felt the same way, because Kemper's action was urged by "a large number of petitioners, including [House of Delegates member] John Letcher and other leading citizens of Rockbridge."[48]

Dock's fate also illustrated the important position occupied by the governor in the criminal justice system. His powers of pardon and commutation constituted the final opportunity to redress unjust convictions. Political caution and an awareness of the separation of powers prevented the pardon of prisoners solely on the ground that the governor thought them innocent. Governors attributed pardons, therefore, to newly-discovered evidence or excessive punishment.[49] Trial judges, jurors, and even prosecutors sometimes requested the pardons, in addition to the usual petitions from family and friends.

In the case of Sally Jackson, a black woman convicted of infanticide in 1877, the commonwealth's attorney found new evidence after the trial that convinced him of her innocence, and he appealed successfully to the governor for her pardon.[50]

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[48]House of Delegates, Journal, 1876-1877, Governor's Pardon Report, H. Doc. 5, pp. 7-8. Letcher had served as Dock's counsel before the Supreme Court.

[49]For example, see Governor Kemper's statement about John Randolph that, "Although the prisoner was convicted on circumstantial evidence, which leading citizens deemed inconclusive, and although a large number of respectable petitioners believed him innocent . . ., I have hitherto refused to pardon him." The governor finally granted a pardon because of Randolph's good behavior in prison. Ibid., p. 3.

[50]Senate, Journal, 1879-1880, Governor's Pardon Report, S. Doc. 1, p. 4.

The commonwealth's attorney who had prosecuted Amos Tyler in 1880, and most of the jury who had convicted Tyler, requested his release when the man who had served as chief witness at the trial made a deathbed confession that he himself was the true murderer.[51] New evidence of false testimony earned Morris Hopkins a respite from the gallows until his attorney could investigate the matter.[52]

The efforts of trial participants to secure relief for prisoners were certainly welcome, but some pardons raised strong questions about the original convictions. For example, the prosecutor and jury who had sentenced Christopher Craft to hang for first degree murder petitioned the governor to commute his death sentence. According to the governor, "The killing occurred in a sudden quarrel and encounter, and under exasperating provocation. The facts are not deemed such as have been held to be necessary to establish a wilful, deliberate, and premeditated purpose to commit murder."[53] If not, how had the jury found him guilty of murder in the first degree at the trial? Similarly, in granting a pardon to Cornelius Collins, Governor Charles T. O'Ferrall reported, "Grave doubts were entertained at the time as to the correctness of the verdict, and now his pardon is asked for by the judge,

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[51]Senate, Journal, 1887-1888, Governor's Pardon Report, S. Doc. 23, p. 23.

[52]Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 29.

[53]House of Delegates, Journal, 1874-1875, H. Doc. 8, p. 1.

commonwealth's attorney, city attorney, clerk of the court, eight of the jurors, and many citizens."[54] Who had entertained those grave doubts? Certainly not the judge, commonwealth's attorney, or eight jurors, or Collins would not have spent ten years in prison.

In fact, it may have been those very people who were uncertain about his guilt. Consciously or subconsciously, they may have set aside an objective evaluation of the case while caught up in the excitement of trying a black man for murder. Every black defendant faced that danger. The letter of the law called for impartial treatment, and the institutions of the law provided the framework for justice. The ultimate decision in each case, however, rested on the honesty of the men involved as judges, jurors, and officers of the court. Many tried to be fair, and some succeeded, but the very nature of a race-conscious society added a dangerous uncertainty to the already subjective determination of guilt or innocence.

If the murder of a white man by a black had social connotations beyond the specific crime, so too did the murder of a black man by a white. It was not the killing itself that concerned whites so much as the disagreeable idea that a fellow white might be punished for actions taken against a black man. Whites carefully avoided explicit statements that

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[54]Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 5.

a black life was not worth as much as a white. They showed little inclination, though, toward guaranteeing the integrity of black men's lives by scrupulous application of the law. They saw instead a need to maintain at all costs the racial structure of their society--a structure based on the idea that in any confrontation the white man must remain supreme. Kelly Miller noted an important result of the failure of courts to punish whites guilty of murdering blacks:

> Where the Negro sees the white man made amenable to the requirements of the law he is apt to regard it with reverence and respect. On the contrary, in the South a white man is rarely punished for offense against his black brother. Of the thousands of cases of murder of blacks by whites since emancipation there has been scarcely a legal execution, and comparatively few prison sentences. . . . To say that these flagrant discrepancies have not their influence upon the black man's attitude toward the law, would be to deny that he is controlled by ordinary human motives.[55]

The inequity of the situation was not lost on the people involved. Throughout the 1890's editor John Mitchell of the Planet decried the contrast between the treatment of white and black interracial murderers, finally urging his fellow blacks to defend themselves by force. Wrote Mitchell, "Better hang from the gibbet for a manly defence of one's self than to be shot down like a cur."[56]

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[55]Kelly Miller, Race Adjustment: Essays on the Negro in America (New York: Neale Publishing Company, 1909), p. 82.

[56]Richmond Planet, December 26, 1896. Similarly, "Far better to hang for the killing of one of these worthless creatures [lower class whites] than to be ourselves ushered to our Maker unprepared." Ibid., February 26, 1898.

Mitchell had good reason for his bitterness. The Planet contained frequent reports of white murderers who received no or little punishment. In Lexington, Ira Dixon was convicted of killing a black man and ordered to pay a $50 fine. He suffered more than Edward Conway, convicted of a similar crime in Fredericksburg and fined $10. Both Dixon and Conway had less luck than a white man named Keyser who deliberately killed a black man and saw the case against him dismissed.[57] Young Crawford of Hanover was indicted for the murder of a black man, but only because a local magistrate took up the case after the original coroner's jury had ruled the shooting accidental.[58] At times, the black community itself applied pressure to force the law to act. In Norfolk the blacks employed counsel to prosecute Osiason Cook, a white man charged with interracial murder.[59]

In such an atmosphere a policeman claiming to have acted in the line of duty had little to fear after killing a black man. Policemen did have to answer to the bar of justice, but the outcome of such cases was seldom in doubt. Thomas L. Moyers, the police chief of Wytheville, shot and killed a black man named Thomas Johnson, allegedly for resisting arrest. Surprisingly, Moyers was tried and convicted, but his punishment

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[57] Ibid., August 28, 1897 (Dixon); September 16, 1899 (Conway); February 26, 1898 (Keyser).

[58] Ibid., January 22, 1898.

[59] Ibid., September 4, 1897. Cook already had served twelve months in jail and paid a $250 fine for the murder of another black man. Ibid., February 26, 1898.

was only thirty days in jail and a $100 fine.[60] Still, that he was convicted is notable. In Petersburg, railroad detectives Baldwin and Feltz were indicted for the killing of Henry Hawkes, but Baldwin won acquittal and Feltz escaped prosecution.[61] Similarly, Henrico constable A. C. Green shot and killed Mortie Wharton, whom he supposed to be an escaped convict. The supposition was erroneous, but a coroner's jury exonerated Green.[62]

The 1889 murder trial of Jessie H. Stubbs in Spottsylvania provided an excellent example of several aspects of the treatment of white murderers--the difficulties facing even a conscientious prosecutor, the extra-legal appeal to race consciousness by the defense, and the ambivalence of many whites toward such an appeal. Stubbs was on trial for killing a black employee, Thomas Comfort. The prosecutor's able speech to the jury included his apprehension that the defense would rely heavily on a racial argument, and expressed his hope that the jurors would consider only the facts of the case itself. The prosecutor's fears were well-founded. Defense attorney Saint George R. Fitzhugh proclaimed the superiority of the white man and referred to Comfort as "an insolent

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[60] Ibid., January 30, February 13, June 5, 1897.

[61] Ibid., October 29, December 3, 1898; Richmond Weekly Times, September 19, 1898. While free on $5,000 bail, Feltz had a scuffle with another black man and shot him, also.

[62] Richmond Planet, November 14, 1896. For further examples, see ibid., November 13, 1897; Augusta County Argus, November 11, 1890.

trespasser upon the rights of the prisoner." He assured the jurors, according to the press report,

> [t]hat that was an occasion in which the verdict of the jury should teach the surviviors of the dead negro what they may expect to become of them in such an altercation. . . . He went so far as to say that if the jury convicted Mr. Stubbs, that the negroes would put an interpretation upon it that would have to be wiped out with blood.[63]

The jury found Stubbs guilty of involuntary manslaughter and fined him one hundred dollars. That sum hardly would make Comfort's shade rest easy, but, given the fire-eating summation by Fitzhugh, any conviction at all was surprising. At the least, the verdict acknowledged that Stubbs was to blame for Comfort's wrongful death. Unfortunately, it acknowledged little else. Also of interest is the reporter's statement, "It was thought by many present that the argument made by Mr. Fitzhugh was unpolitic as it might have been from a standpoint of public policy, especially coming from him, a man who stands at the head of the bar of the State."[64] Whether the public dissatisfaction came because Fitzhugh used such tactics at all, or only because he used them so crudely, is unclear.

Despite such efforts as Fitzhugh's, some jurors did discharge their responsibility honestly. Not all white murderers escaped with fines and token imprisonment. In Hite v. Commonwealth[65] the Supreme Court considered the Mecklenburg killing

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[63]Fredericksburg Free-Lance, July 9, 1889.

[64]Ibid.

[65]96 Va. 489 (1893).

of William Bowers by George Hite. According to one report, "Hite is a white man and a wheelwright by trade. Bowers was a colored man with good property, and stood well in his community as a deserving and peaceable citizen.[66] Hite was also a violent drunk. The two men were usually on friendly terms, but one day after a mild disagreement Hite shot Bowers dead.

Despite the races of the killer and victim, the community evidently felt great anger at the murder. Hite's attorney swore that he had heard threats of lynching, and asserted the existence of great prejudice against the defendant. Even the whites of the county must have been somewhat exercised, because the jury returned a verdict of first degree murder and sentenced Hite to hang. On appeal, the petitioner pleaded poverty and ignorance, while the attorney general charged that the act was a "most foul murder . . . committed without one alleviating or extenuating circumstance."[67] The Supreme Court affirmed the decision. Judge John Buchanan wrote,

> The evidence showed that the defendant shot and killed the deceased, without the slightest provocation. When asked why he had killed the deceased he replied that the deceased said "that he was not afraid of his shooting him, and I be damned if any negro shall say that to me." No one would claim that the negro's statement was any provocation at all, much less an excuse for taking his life.[68]

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[66] Richmond Dispatch, April 28, 1898.

[67] Hite v. Commonwealth, Records and Briefs, LXXXV, O.S., 559, 574. The defense's contention about prejudice is at p. 560.

[68] 96 Va. 496.

The verdict of the jury, Buchanan thought, was "manifestly right."[69]

Three years later the court reviewed the case of William O'Boyle, a white man convicted of killing his pregnant mulatto mistress. O'Boyle was a violent bully, and his lover Alma Hamilton had a predilection for alcohol. This mismatched couple lived as man and wife, and O'Boyle claimed to be the father of Hamilton's baby, but the relationship was a stormy one. Testimony at the trial showed that he had beaten her previously, and that she may have precipitated the final, fatal assault by drinking heavily against doctor's orders. In her dying declaration she charged that they had had a fight, during which he hit her, knocked her down, kicked her, and stomped on her.

Relying mainly on the dying declaration, a Newport News Corporation Court jury found O'Boyle guilty of first degree murder and sentenced him to hang. This outcome led John Mitchell to marvel, "Another wonder has appeared in Virginia, another miracle has taken place upon the soil of the old commonwealth."[70] The scope of Mitchell's wonder soon extended to the Supreme Court, which affirmed the conviction.[71]

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[69]The governor having refused to commute the sentence, Hite was hanged in January, 1899. Richmond Dispatch, January 21, 23, 1899.

[70]Richmond Planet, November 3, 1900. Mitchell expressed similar disbelief one year later when white John Hitchcock was sentenced to eighteen years in the penitentiary for the murder of a black man. Ibid., August 3, 1901.

[71]O'Boyle v. Commonwealth, 100 Va. 785 (1901).

O'Boyle, however, never hanged. Responding to the petition of ten of the jurors and other citizens and officials, Governor A. J. Montague commuted the sentence to life in prison. He explained his action by noting conflicts in the prosecution's testimony and the existence of doubt whether the crime was indeed first degree murder. He also pointed out, "All of the witnesses to the homicide were intoxicated at the time, and are negro women of the most abandoned class."[72]

The convictions of Hite and O'Boyle for first degree murder were aberrations from the usual treatment of white interracial murderers. O'Boyle was a lower class white guilty of lascivious cohabitation with a black woman and the father of her unborn child. His crime itself was not one to evoke sympathy no matter what the races involved. The Hite conviction similarly involved a lower class white man, an ex-convict and perpetual drunk. Still, there was sincere anger that a "deserving and peaceable citizen," even though black, had been killed. The death sentence and subsequent affirmation on appeal demonstrated that at least some white men acknowledged the integrity of a black life and demanded due penalty for the taking thereof. Unfortunately, the treatment accorded Jessie Stubbs was the more common. That such men were brought to the bar indicates that the institutions of the law were functioning properly. It was the citizens upon whom those institutions depended to maintain their probity who corrupted the process of justice.

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[72]Senate, Journal, 1902-1904, Governor's Pardon Report, S. Doc. 6, pp. 21-22. For other murders growing out of interracial love affairs, see Richmond Planet, July 14, 21, 1900.

IX. MISCELLANEOUS CRIMES

In addition to reviewing convictions for the emotionally charged crimes of murder and rape, the Virginia Supreme Court also reviewed the cases of blacks charged with a variety of other offenses. These crimes, ranging from arson to petit larceny, entailed a slighter degree of moral transgression and carried a smaller burden of symbolic importance. Yet, the manner in which the Supreme Court treated these cases disclosed as much of its attitude toward the rights of black defendants as did its treatment of convicted murderers and rapists.

Among these miscellaneous offenses the most serious was arson, because under certain conditions the penalty for its commission was death. During the years 1870-1883 alone, the Virginia penitentiary received more than 100 blacks convicted of various forms of arson,[1] but relatively few such cases reached the Supreme Court. Of eleven cases in which the report or other sources identify the defendant as being black, six arose from one incident. One man appeared before the court on three separate occasions, while another appeared twice. In only four of the cases did the court consider the

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[1]Compiled from Virginia, Board of Directors of the Virginia Penitentiary, Reports (published annually).

question of sufficiency of evidence.

The court twice reviewed the case of Hillary Page, the most notorious arsonist of the time. A young black boy who set at least twelve fires in Chesterfield County in the 1870's, Page could explain his actions only by saying, "I had the devil in me." The Supreme Court based both its decisions, the first a reversal and the second an affirmation, on procedural questions.[2] Similarly, the court decided the arson cases of Howard v. Commonwealth and Bond v. Commonwealth[3] without discussing the evidence involved.

In Pryor v. Commonwealth,[4] on the other hand, the sole question under review was whether the evidence was sufficient to support the verdict. In October, 1874, James Pryor was living on the Thomas Farrar farm in Nelson County. Farrar interceded in a domestic quarrel between Pryor and his wife and ordered the man away. Threatening revenge, Pryor moved to another farm in the neighborhood. Two months later a fire destroyed Farrar's barn and its contents. The next morning Farrar found tracks to and from his barn which led one-half mile in the direction of Pryor's house. The tracks were caused by shoes similar to some known to have been worn previously by Pryor. At trial a witness testified that Pryor had

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[2]Page v. Commonwealth, 67 Va. (26 Gratt.) 943 (1875); Page v. Commonwealth, 68 Va. (27 Gratt.) 954 (1876). A detailing of Page's crimes, trials, and execution appears in Richmond Daily Dispatch, September 2, 1876.

[3]81 Va. 488 (1886); 83 Va. 581 (1887), respectively.

[4]68 Va. (27 Gratt.) 1009 (1876).

been wearing those shoes on the night of the fire. Pryor was convicted and sentenced to nine years in the penitentiary.

Speaking for the Supreme Court, Judge Christian found only two circumstances leading to even a strong suspicion of Pryor's guilt. He dismissed the first, Pryor's previous threat of revenge, as too ambiguous to be considered strong evidence. As for the tracks, the record contained no proof that they had been produced by Pryor's shoes. No measurements were made or accurate comparisons carried out. Although the tracks led one-half mile toward Pryor's house, they stopped one and one-half miles short. The court felt that such evidence was insufficient. Christian quoted with approval the assertion by Pryor's attorney, "If the liberty of the citizen, however humble, is to be taken away upon such evidence as this, and an infamous offence fastened upon him, the tenure by which the citizen holds his liberty and good name is slender indeed."[5]

Just how slender was that tenure, not only of liberty but of life itself, was shown in a series of cases arising from the burning of a Rocky Mount warehouse in 1889. The six cases, dealing with four defendants, provide a diverse and often conflicting picture of the alleged crime. Despite the numerous

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[5] Ibid., at 1016. On retrial Pryor was again found guilty. After a second reversal, the commonwealth's attorney declined further prosecution. Minute Book 1874-1878, pp. 255, 257, 295, in Nelson County courthouse, Lovingston. The only racial identification is a note on the indictment, found in the Pryor trial records, file drawer "Law Causes 1876-1877," Nelson County courthouse. Perhaps Pryor's convictions reflected the common white belief that arson was the weapon of vengeful blacks. Philip A. Bruce, The Plantation Negro as a Freeman (New York: G. P. Putnam's Sons, 1889), pp. 85-86, 89-90.

opportunities to relate the facts, the Supreme Court glossed over one important circumstance and omitted another crucial fact entirely. As a group the cases raise serious doubts about the nature and consistency of Virginia justice. They also prove that most tragic of legal truths--belated justice may come too late, indeed.

The first four opinions, delivered by President Lewis in June, 1890, give little notice about the questionable nature of the convictions and the cloud surrounding them. Early v. Commonwealth[6] discussed alleged procedural errors and affirmed George Early's conviction without bringing up sufficiency of evidence. In Woods [Bird] v. Commonwealth[7] Lewis needed only two pages to declare that any questions involved had already been answered in the Early opinion. The facts began to emerge, however, in Woods [Nannie] v. Commonwealth.[8] All of the defendants were sentenced to hang for setting fire to a warehouse, from which conflagration adjacent houses also had caught fire. The principal witness against Nannie Woods was George Early. He testified that on the night of the fire William Brown, another defendant, had told him that he (Brown) and Bird Woods had some business to conduct. Early later saw Brown, Nannie Woods, and Bird Woods set fire to the warehouse. Upon his first confession Early named Brown and Bird Woods,

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[6] 86 Va. 921 (1890).

[7] 86 Va. 933 (1890).

[8] 86 Va. 929 (1890).

only later adding Nannie Woods. Despite evidence proving an alibi for the defendant, the court ruled that Early's uncorroborated testimony was sufficient to warrant the verdict.

William Brown fared better than his comrades. The court reversed his conviction on the ground that the trial judge had allowed inadmissible evidence to go to the jury. That evidence, included in the opinion, added the element of alleged motive to the case. On the day of the fire a Rocky Mount officer had arrested a black man for disorderly conduct, and Early and Brown were among a group of blacks protesting the arrest. Two witnesses at the trial testified "that they heard Early say, in the presence of the prisoner, who was also cursing and swearing . . ., that the negro had no show in that town, and had had none since it was incorporated . . .; that he had offered to pay Smith's fine, but nothing would do but they must put him in jail; and that he added: 'I will have him out of there or burn the d--d town before morning.'"[9]

The first three affirmations and the Brown reversal raise several questions, in addition to doubts about the guilt of the defendants. Was there a conspiracy to set the fire? If so, who was involved? Was the arrest of the black man Smith the motive for the crime? What part did racial tension in the town play in the convictions? Most troubling is the role played by George Early. Why did he change his story concerning Nannie Woods? Why did he testify against his friends at all?

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[9]Brown v. Commonwealth, 86 Va. 935, 936 (1890).

How much of his testimony was to be believed?

An article in the Planet two months later resolves some of the questions, especially concerning Early's actions. The newspaper reported,

> George Early was taken from jail by a crowd of men and dragged behind a horse and buggy with shots flying around his head, and was told if he did not acknowledge that the other prisoners did the burning he he [sic] would be killed. The men then built a fire around him and told him that if he did not admit that he did the burning he would be consumed.[10]

Before his execution in August Early recanted his confession and admitted that he had lied about the guilt of the other defendants. His action came too late to save either himself or Bird Woods.

The Planet article contained another charge that reveals further the nature of the trials which took place in Rocky Mount. It charged that politics was the motive behind the prosecution of the blacks, something not even hinted at by President Lewis in his opinions. The Planet asserted that the two men were hanged because they were Republicans, and that the Democrats had hired a black detective to work up the case.

Early and Bird Woods were executed in August, 1890. Nannie Woods received a respite until September, at which time Governor P. W. McKinney commuted her sentence to life imprisonment.[11] Brown returned to the courtroom for a second

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[10]Richmond Planet, August 30, 1890.

[11]Virginia, House of Delegates, Journal, 1891-1892, Communication from the Governor . . . Transmitting List of Pardons, [hereafter cited as Governor's Pardon Report], H. Doc. 5, p. 18.

trial, which ended in July with another death sentence. For his second appeal Brown had a new attorney who stressed the effect of political atmosphere and racial tension on the conduct of the trial.[12] Judge Fauntleroy, writing for the majority, omitted any mention of the political background of the case in his opinion. He did, however, find the evidence against Brown so insufficient that he declared the verdict handed down by the jury "plainly wrong."[13]

Fauntleroy's opinion provides the first complete description of the fire. Prior to the fire the warehouse had been the site of a large political gathering. The excitement of the crowd and the extent of cigar smoking led to a fear of fire. The man who checked the warehouse after the meeting found no hint of danger, but he later testified that he had not searched thoroughly. Another witness testified that he had looked through a hole in the wall and seen a pile of trash gathered in the center of the floor and a line of oil leading to it. He also saw a small fire but left the scene to visit a sick relative. His observations convinced him that arson was involved, and the jury agreed.

His observations did not convince the Supreme Court. Fauntleroy expressed wonder at a man who could make such a careful observation of the scene and yet leave without trying to put out the fire. That such a man interpreted the evidence

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[12]Brown v. Commonwealth, in Virginia, Supreme Court of Appeals, Records and Briefs, LVI, O.S., 51-66.

[13]Brown v. Commonwealth, 87 Va. 215 (1890).

to mean arson carried little weight with the court. The prosecution, according to Fauntleroy, had failed to prove that a crime had been committed. The evidence was not sufficient to exclude the possibility of accident and thus did not prove arson beyond a reasonable doubt. Even if the evidence proved arson, Fauntleroy continued, it did not show that Brown was criminally involved.

The strong reversal led the Planet to remark, "This is a terrible arraignment of the jury who passed upon these cases. It tells in no uncertain tones the prejudiced conditions existing in that community."[14] The Planet described Fauntleroy as "impartial and fearless." So strong was Fauntleroy's opinion that the Planet predicted, "The far-reaching decision . . . makes it impossible to convict William Brown. With the evidence now adduced, no jury will be allowed to convict him."

The Planet underestimated the perseverance of the citizens of Rocky Mount. In August, 1891, they again convicted Brown of arson. For the third time the Supreme Court reviewed the case, and this time Fauntleroy could not conceal his impatience with the proceedings. Quoting the discussion of the evidence in his previous opinion, he wrote, "There is nothing in the record of this third trial . . . to alter the case, or to make inapposite the foregoing commentary of this court in reviewing the second trial."[15] The only new evidence was the

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[14]Richmond Planet, December 20, 1890.

[15]Brown v. Commonwealth, 89 Va. 379, 381 (1892) (Emphasis original).

testimony of two black detectives hired to gather evidence against Brown, and these men drew down upon themselves a scathing denunciation of their methods and their veracity.

Henry Edwards had been a witness in at least some of the earlier trials. In Early he had testified about the authenticity of Early's confession. At no time, however, had he mentioned any confession by Brown. Suddenly, after the second reversal, he remembered that shortly after the fire Brown had admitted to him his part in the affair. Edwards produced a memorandum supposedly written at the time of Brown's admission but then lost and forgotten over the intervening years. Fauntleroy was hardly convinced. He wrote, "And the so-called memorandum, which Edwards says he made, at the time, and never spoke of or referred to upon either of the two former trials, but conveniently found just before the third and last trial of his victim, is, obviously, upon its face, a fabrication."[16]

The second detective, Robert Clay, aroused even greater indignation. He had shared Brown's cell prior to the trial, posing as a fellow-prisoner, and then testified about alleged admissions made by the defendant. Fauntleroy not only challenged Clay's credibility but delivered some pointed comments concerning the prosecution's tactics. He declared angrily,

> This hired and subservient agent and creature, Robert Clay, was put into the cell of the prisoner (by whose authority, or with whose permission or collusion does not appear), and was kept there

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[16] Ibid., at 382 (Emphasis original).

> for three days and four nights, ostensibly as a murderer;. . . . Without dilating upon the modern iniquity and illegal inquisition of forcing prisoners (innocent in the eyes of the law, helpless in their cells, suffering the loss of liberty, and separated from their families and friends) to undergo attempts made upon their lives by reptile spies, whose paid and professional undertaking is to furnish ready-made and requisite admissions of guilt, it is enough to say that the new evidence is totally insufficient to warrant the conviction of the prisoner.[17]

For a third time the court reversed Brown's conviction, but his good fortune put into deeper perspective the fate of his friends. Though the prosecution was having severe trouble proving even that a crime had been committed, the state already had executed two men and consigned a woman to prison for life. At least the authorities could remedy the latter injustice. Two years after the third Brown reversal, Governor Charles T. O'Ferrall, on the recommendation of the trial judge, mayor, and other citizens, pardoned Nannie Woods. He explained, "This woman is pardoned because she was innocent of the charge." According to the Planet, O'Ferrall also remarked, "I have never read of a case in which, in my opinion, greater wrong was done."[18]

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[17] Ibid., at 381-82. Lacy again dissented. The use of private detectives was a common practice in Virginia, despite Fauntleroy's reference to their "detestable calling." Blacks were sometimes employed in cases where other blacks were suspected, but they were distrusted by both races. See, for example, the pardon of Amos Joyner, a black man convicted "on very questionable testimony--that of a negro detective whose remuneration depended upon a conviction of some one." Virginia, Senate, Journal, 1887-1888, Governor's Pardon Report, S. Doc. 23, p. 11.

[18] Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 15; Richmond Planet, February 9, 1895.

Given the rough-and-tumble nature of late nineteenth century society, it is notable that very few cases of assault and other crimes against the person committed by blacks reached the Supreme Court. Of course, where the victim was white, any armed force by a black man was likely to be considered attempted murder. Within the black community cuttings and shootings were common occurrences, if newspaper accounts are to be believed. Most of the culprits ultimately appeared before the bar of justice, but the courts no doubt considered their crimes less serious than if the victims had been white.[19]

Field v. Commonwealth[20] presented the unusual situation of a black man convicted of a crime less severe than that of which the court thought him guilty. A Culpeper County Court jury in 1892 found Henry Field guilty of the unlawful shooting of Andrew Gordon and sentenced him to two years in prison. The verdict rested solely on which of the antagonists the jury believed. President Lewis' opinion did not identify the participants by color, although the judges possessed that information from material in the record.[21] In fact, Field had

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[19]The only assault case before the Supreme Court in which I have been able to determine definitely that both parties were black is Hill v. Commonwealth, 88 Va. 633 (1892), affirming the conviction of a black man for shooting a young black girl. For racial identification, see Hill v. Commonwealth, Records and Briefs, LIII, O.S., 996.

[20]89 Va. 690 (1893).

[21]Field v. Commonwealth, Records and Briefs, LVII, O.S., 23, 32.

produced several character witnesses who testified that he was an honest black man and Gordon an untrustworthy white one.[22]

Gordon's testimony was that he and Field had been hunting together. When he bent over to take a drink, Field hit him with a stone and aimed his gun at Gordon's head. The white man got up and ran, but Field followed and discharged the gun, knocking Gordon to the ground. Field approached and fired again, this time just behind Gordon's ear. Gordon also testified that he thought that robbery was Field's motive. The defendant told a different story. He and Gordon had had a fight over a turkey. He hit Gordon and in turn was cut with a knife. When he finally let Gordon up the white man cocked and raised his gun. In response he did the same and fired. As Gordon turned to run, Field's second barrel discharged accidently, after which the two men ran off in different directions.

The jury and the Supreme Court rejected Field's claim of self-defense. In fact, wrote President Lewis, the evidence proved a case of malicious shooting. The jury's finding of unlawful shooting constituted a less serious offense. Perhaps, thought Lewis, this finding reflected some uncertainty due to the conflicts in the testimony. He also supposed that the jury had been moved by "the previous good standing of the prisoner as compared with that of Gordon."[23]

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[22] Ibid.

[23] 89 Va. 695.

Although the Supreme Court thought that Field's jury had been unnecessarily lenient, it had a different impression of the treatment accorded Daniel Montgomery. Three times Montgomery was convicted in Rockbridge County Court, and three times the Supreme Court reversed the conviction. The reversals rested on the ground of prejudicial instructions, but the judges' opinions revealed their sentiments about the adequacy of the evidence. Montgomery's first conviction for feloniously cutting William E. Davidson, white, came in November, 1899, when he was sentenced to four years in the penitentiary. So swiftly did the wheels of Virginia justice grind that the three trials and three reversals took place within barely more than one year, concluding in February, 1901.

No conflict existed concerning the facts. Montgomery entered Davidson's land to sell a gun to one of Davidson's hands. While Montgomery was talking with the purchaser and John Randolph, a Davidson tenant, on Randolph's premises, Davidson rode up. Randolph told his landlord that Montgomery intended to hunt on Davidson's land, evoking a warning against doing so from Davison. Montgomery replied that he was not hunting but had seen no posted signs and would have shot at game had he seen any. Davidson ordered Montgomery to leave his land after completing the sale of the gun. Montgomery answered that he would leave when ready. Davison dismounted and approached Montgomery, saying, "I will see about that." The black man retreated with his gun, warning, "If you hurt me I'll shoot you." Davison picked up a corn-cutter and ran

to Montgomery. The two scuffled, and Davidson received a cut on the head.

The trial judge instructed the jury that Davidson had the right to order Montgomery off the premises and to use the necessary force to eject him if he refused to leave. On appeal, Judge Harrison agreed that the judge had correctly stated the general rule that a man may defend his property, but he also felt that the instruction had omitted an important modification of that rule--that the owner cannot endanger life or do great bodily harm except in extreme cases. Considering the facts in this case, the instruction was misleading and prejudicial. Montgomery was a trespasser and should have left, but his refusal to do so did not justify Davidson's assault with a deadly weapon. The defendant had the right to defend himself, and the judge should have made that clear to the jury. The court reversed the conviction and remanded the case for a new trial.[24]

Within a month Montgomery was retried and again found guilty. This time Judge Cardwell delivered the Supreme Court's decision, and he was no more satisfied with the instructions upon the second trial than Harrison had been with those at the first.[25] The new instruction was that Davidson had the right to eject the trespasser with necessary force, but not to endanger life or do great bodily harm. Cardwell noted that this instruction was similar to the earlier one, with the addition

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[24]Montgomery v. Commonwealth, 98 Va. 840 (1900).

[25]Montgomery v. Commonwealth, 98 Va. 852 (1900).

of the final proviso, and was the result of an incorrect interpretation of Harrison's opinion. The court had intended to emphasize that a simple trespass of land did not justify assault with a deadly weapon.

Cardwell was also dissatisfied with two instructions given at the request of the commonwealth. The first stated that the need for self-defense must not arise from the defendant's own misconduct, and that Montgomery could not claim self-defense if the jury believed that it was his assault on Davidson that brought about the necessity for cutting his antagonist. The second instruction stated that if the jury believed that Montgomery had refused Davidson's legitimate order to leave and instead had cocked his gun, Davidson would have been justified in thinking that Montgomery was about to shoot and could use reasonable and necessary means to protect himself. Cardwell wrote that these instructions, taken together with the court's own, misled the jury into thinking that the defendant was at fault merely for refusing to leave and was wrong in resisting the force that Davidson attempted to use.

The real problem with the prosecution's instructions, Cardwell felt, was that they bore little relation to the evidence. They implied that Montgomery had assaulted Davidson before the cutting, but ignored the evidence that Montgomery had retreated until set upon with a deadly weapon. In the court's view the judge should have given two instructions requested by the defense, which set out a correct summation

of the law and the evidence. One stated that if Davidson approached in a threatening manner sufficient to raise the presumption of danger, Montgomery was justified in defending himself. The other instruction asserted that if the jury believed that the defendant had been approached by Davidson with his cutter, and had retreated and threatened to shoot if hurt, Davidson had been the aggressor from the start, and the defendant was not guilty because his actions had been in self-defense.

Considering the nature of the evidence, the court's approval of the rejected defense instructions left little doubt what the judges thought the outcome of the case should be. Without saying so explicitly, they were strongly hinting that Montgomery was guilty of nothing more serious than trespass, and that his actions against Davidson had been in justifiable self-defense. Rockbridge County officials did not take the hint. Once again they tried Montgomery, and once again convicted him. And once again the Supreme Court reversed on appeal.[26] This time Judge Phlegar took a turn at writing the opinion, wearily pointing out that the case was certainly no stranger to the court.

Again, the court ruled that the trial judge had erred in rejecting an instruction submitted by the defense. The theory of the instruction was that Davidson had made an assault which justified Montgomery's having presented his weapon with a fair warning that he would use it if Davidson continued the attack.

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[26]Montgomery v. Commonwealth, 99 Va. 833 (1901).

A man could lay hold of a trespasser in the proper manner to make him leave, but he could not commit assault and battery. "No reasonable conclusion could be drawn from Davidson's acts and demand," Phlegar believed, "than that he intended to make an attack."

By the end of Phlegar's opinion it was obvious that he and his colleagues had lost patience with the continuing series of convictions. Abandoning all subtlety, he finally stated explicitly the court's position on the case, and included a veiled rebuke to the trial judge and the prosecutor. He wrote,

> It is useless to consume further time on the facts of this case. In neither of the records which have been in this court, nor in all combined, is there sufficient evidence to warrant the conviction of the prisoner. The judgment must be reversed, the verdict set aside, and the case remanded to the County Court of Rockbridge for a new trial, if the court and prosecuting attorney consider that a better case can be made out.[27]

The most surprising assault case before the Supreme Court during the postwar period was undoubtedly Mesmer v. Commonwealth.[28] The incident involved was hardly unique. Amos Jackson was among a group of black men ordered by a Winchester saloon-keeper to move away from his door. All complied except

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[27] Ibid., at 836-37. Davidson was never able to gain satisfaction from the law's harassment of Montgomery. After the attack he became insane, supposedly from the head wound, and shortly after the first trial committed suicide. Augusta County Argus, January 30, October 16, 1900. The Argus also provides definite racial identity for Montgomery, something omitted in all three opinions.

[28] 67 Va. (26 Gratt.) 976 (1875).

Jackson, who began to dispute with the white man. John R. Mesmer, the town's chief of police, appeared and ordered Jackson away. He grabbed the black man's coat, but Jackson broke away. Mesmer then hit Jackson on the head twice with a billy club, after which Jackson knocked the stick from his hands. After a lengthy chase, Mesmer and another officer arrested Jackson.

Jackson appeared before a justice of the peace on the charge of resisting an officer, admitted he had done wrong, and asked the justice to be lenient. After Mesmer spoke in his behalf, Jackson received a fine of one dollar and costs. Subsequently, Jackson secured the chief's indictment and hired an attorney to further the prosecution. A Winchester Corporation Court jury found Mesmer guilty and assessed one cent damages, to which the trial judge added ten days in jail. The Supreme Court, with Judge Staples dissenting, reversed the decision on the ground that Mesmer had been doing his official duty and had employed only enough force as was necessary to arrest a violent and resisting offender.

That Mesmer was convicted in the first place is surprising because most such cases either resulted in dismissal before trial or ended in acquittal. For example, in 1892 a black man named Ed Jones brought assault charges against two policemen who had used clubs while arresting him. The case was dismissed.[29] Several years later in Staunton special

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[29]Augusta County Argus, January 5, 1892.

policeman Lushbaugh struck Bill Johnson, black, with his fist and caused him to lose an eye. The officer was indicted for assault, but the trial jury could not agree on a verdict, two jurors voting for conviction and the rest for acquittal.[30] Still, it is notable that during this period some blacks had the knowledge, courage, and hopefulness to bring charges against policemen for alleged mistreatment. That they did so speaks well for them. That their efforts were usually futile speaks less well for the legal system on which they depended.

Unlike such offenses as murder, rape, and assault, the various types of theft carried few social implications. Operating quietly and avoiding personal confrontation, the black thief posed no threat to the structure of race relations. If whites did not accept black thievery, they at least expected it. They thought that lack of respect for property rights, a holdover from the days of slavery, combined with the black man's supposed immorality to produce an entire class of thieves. Philip A. Bruce wrote that, despite certain obstacles, few blacks could resist the temptation to steal.[31] When, in 1876,

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[30] Ibid., October 23, November 13, 1894; January 15, 1895.

[31] Bruce, Plantation Negro as Freeman, pp. 86-87. Two obstacles suggested by Bruce, inherent fear of whites and the black man's lack of ingenuity, existed more in Bruce's mind than in those of the blacks themselves. The third, difficulty in disposing of stolen goods, did present some problems, but see Hey v. Commonwealth, 73 Va. (32 Gratt.) 946 (1879), appeal of conviction of a white junk dealer for receiving stolen goods from black thieves. The Supreme Court also reversed, in an unreported decision, the conviction of a black man named Williamson on a similar charge. Richmond Dispatch, December 6, 1895.

a constitutional amendment made petit larceny a cause for disfranchisement, the general belief was that "[t]his was the first time that discrimination had been made against the negroes through legislation striking at their peculiar characteristics."[32]

Despite this "understanding" of the black man's supposed compulsion to steal, and a tendency to take a light-hearted view of "the larcenous negro," the authorities prosecuted such cases seriously, and the resulting sentences were no laughing matter to the defendants involved. In September, 1882, for example, the 149 blacks confined in the state penitentiary for housebreaking were serving an average sentence of 5.6 years, with 26 sentenced to 10 years or longer. For the 51 convicted of burglary, the average sentence was 9 years, with 19 serving 10 years or longer. The mean sentences were 5 years for housebreaking and 7 years for burglary.[33] The figures do not include repeat offenders, whose sentences were considerably longer.

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[32]Richard L. Morton, The Negro in Virginia Politics, 1865-1902 (Charlottesville: University of Virginia Press, 1919), p. 92. See also Charles E. Wynes, Race Relations in Virginia, 1870-1902 (Charlottesville: University of Virginia Press, 1961), pp. 135-36. Robert R. Jones challenges this traditional interpretation, charging lack of proof that the action was a deliberate attempt to disqualify blacks. "James L. Kemper and the Virginia Redeemers Face the Race Question: A Reconsideration," The Journal of Southern History, XXXVIII, No. 3 (1972), 407-408.

[33]Board of Directors of the Virginia Penitentiary, Annual Report, 1881-1882, pp. 27-28. The 28 white housebreakers were serving an average term of 4.7 years, while the lone white burglar was guest of the commonwealth for five years.

Individual cases make the point even more sharply. In 1876 C. Banks was sentenced to fifteen years in prison for theft, ten years of which were for stealing a bag of guano.[34] In 1880 the Powhatan Circuit Court sentenced Bartlett Fisher to a twenty-six year term for burglary and robbery, even though "[h]is thefts were all small."[35] Also notable is the case of six black youths convicted in Wythe County Court of the burglary of a hotel dining room. As later reported by the governor, the defendants

> took therefrom sundry edibles, which they consumed on the spot. With every opportunity to do worse, they did nothing more. Their offence was in the nature of an impulsive and frolicsome freak of boyhood, wanting in some of the essential elements of burglary. . . . After serving at hard labor for three months in the penitentiary, they are pardoned on condition that, before being discharged, they receive each nine and thirty stripes well laid on according to law.[36]

If three months at hard labor and thirty-nine stripes seems harsh punishment for a "frolicsome freak of boyhood," consider that the original sentence had called for five years in prison for each boy.

In private the Supreme Court judges may have joined their friends in laughing at the latest joke about black chicken thieves, but they treated actual cases with due seriousness.

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[34]Senate, Journal, 1883-1884, Governor's Pardon Report, S. Doc. 15, p. 6.

[35]Senate, Journal, 1895-1896, Governor's Pardon Report, S. Doc. 4, p. 25.

[36]House of Delegates, Journal, 1876-1877, Governor's Pardon Report, H. Doc. 5, p. 7.

Their opinions betray no belief in any inherent larcenous instinct on the part of black citizens. On questions regarding sufficiency of evidence, the court was as demanding in cases of larceny as it was in cases of rape and murder. Specific statements within the opinions indicate that the judges were aware of the need to safeguard the rights of all defendants.

Nelly Taliaferro, for example, was found guilty in Lynchburg Corporation Court of housebreaking with intent to commit larceny and sentenced to two years in prison. The evidence showed that on the day after the theft of two quilts and a bolster a witness saw the stolen goods in a room occupied by Taliaferro and another woman. On the succeeding day Taliaferro sold the goods, with conflicting stories about how she had obtained them.

The Supreme Court thought the evidence insufficient for conviction.[37] President Lewis noted that possession of recently stolen goods was not prima facie evidence of guilt in burglary and housebreaking. In addition, the defendant did not have exclusive possession of the goods when they were first seen. Her sale of the goods on the succeeding day, coupled with the conflicting statements about how she had obtained them, did raise "strong suspicion," but this was not enough. As Lewis wrote, "The humane rule of the law is to presume every man innocent until his guilt of the offence charged is established clearly and to the exclusion of a

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[37] Taliaferro v. Commonwealth, 77 Va. 411 (1883).

reasonable doubt. Such has not been done in this case."[38]

Possession of stolen goods was again the central issue in Gravely v. Commonwealth,[39] decided in 1889. The Henry County Circuit Court sentenced John Gravely to prison for breaking and entering the kitchen of Abner Richardson and stealing 100 pounds of flour, 30 pounds of cornmeal, and two dozen eggs. On the day following the crime Richardson had followed tracks from his kitchen to Gravely's yard. He later found that Gravely's boots matched the tracks in size and distinctive features. Searchers found forty pounds of flour and a peck of cornmeal in Gravely's house. Gravely said that he had had the flour ground for himself, but the miller later testified that the flour ground for Gravely was of poorer quality than that found in the house. The discovered flour was similar, however, to that of Richardson.

Although the commonwealth had built its case on circumstantial evidence, the floundering attempts of defense witnesses to explain the circumstances did little to alleviate doubts about Gravely's innocence. The defendant admitted that the tracks were made by his boots but claimed that he had not been wearing them at the time. His witness Ada Eggleton testified that she had spent the night with Gravely and his family and that another man had borrowed and returned the boots, leaving the flour in payment. She also testified that

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[38] Ibid., at 413.

[39] 86 Va. 396 (1889). The opinion includes no racial identification, but see Board of Directors of the Virginia Penitentiary, Annual Report, 1889-1890, p. 26.

Gravely had not left the house. The defendant's father testified that he had given his son a peck of meal that night, though Eggleton claimed to have brought the meal with her.

President Lewis, writing for the Supreme Court, returned to the question of possession of stolen goods. While reiterating his Taliaferro ruling that such possession was not prima facie evidence of guilt, he noted that it was a material circumstance justifying conviction if reinforced by other circumstances. Among such other circumstances, Lewis noted pointedly, was a false explanation of how the defendant had obtained the goods. Identifying the flour as Richardson's also presented a problem. Again, the circumstances were to determine the degree of identification required. Discovery of property, similar to that recently stolen, in the possession of a suspect who had probably been present at the larceny would suffice as identification. Lewis added as a possible incriminating situation the vague and legally meaningless factor, "where all the circumstances are such as to render it morally certain that he came by the goods feloniously."

In the court's opinion the circumstances warranted the jury's belief that the flour found in the defendant's house had been stolen from Richardson. Added to Gravely's false explanation of how he had obtained the flour, the probability of his presence at the scene of the crime, and his conduct during the search, such possession raised a strong presumption of guilt. Lewis stopped short, however, of declaring the court's belief in Gravely's guilt. He emphasized instead

the duty of the court to reverse in such a case only where the verdict was plainly wrong. No such "plain deviation" from the evidence existed here.

The 1890 burglary of B. J. Taylor's property in Brunswick County also produced footprints and a question of possession, as well as a gaggle of suspects and refutation of the maxim concerning honor among thieves.[40] The burglary netted clothing, cheese, hog meat, and $80 cash. Taylor's son and another man, suspicious of a black family named Michael, went to the latter's house at 2 a.m. They heard the voices of Hannah and Charlotte Michael, the grown daughters of the family, and of John Boden, Charlotte's lover. They also smelled fried hog meat. The next morning a search by "four intelligent and respectable white men" disclosed tracks in a nearby field. Further search led to similar tracks with some of the stolen property abandoned nearby. One set of tracks matched Boden's feet perfectly. This and other evidence sent Boden to the penitentiary for five years.

That left the second set of tracks. One searcher said that they were similar to those made by Frank Hite, his former employee and a Michael son-in-law. The tracks were the only physical evidence against Hite, but his family was strangely willing to bolster the commonwealth's case with their testimony. Julia Michael, his mother-in-law, testified that both sets of tracks had been made by Hite. Hannah and

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[40]Hite v. Commonwealth, 88 Va. 882 (1892).

Charlotte Michael stated that Hite had left at 10 p.m. with the avowed intention of stealing Taylor's money, meat, and other goods. They also said that Hite had taken Boden's hat as a disguise. The family's testimony was the vital element in the prosecution's case. The jury sentenced Hite to ten years in the state penitentiary.

The Supreme Court disagreed. Judge Lacy discredited almost every assertion made by Hannah Michael and the others. They testified that all had gone to sleep after Hite left, but the two white men had heard voices and smelled the frying meat early in the morning. They testified that Boden had been with them all night, yet the physical evidence established that the burglar's tracks were his. Most damaging of all to their credibility was their testimony that upon leaving the house Hite had stated his intention to burgle Taylor's goods. At Boden's trial, however, they had testified that he declared only a desire to have some meat before going to bed. Neither did the court consider the footprints convincing. No one measured the prints. One man simply said that they looked like Hite's. Even less convincing was the claim by Julia Michael that Hite had made both sets of prints. Lacy hinted at another possibility, remarking that Charlotte Michael's shoes also appeared to match the tracks.

The judges saw the matter quite clearly. Boden committed the crime. By their testimony at the two trials, the Michael Family tried to obtain his acquittal by placing the guilt upon Hite. Some possibility existed that Charlotte

Michael had been an accomplice. Concerning Hite's conviction, Lacy said, "[I]t must be admitted that this verdict is not only plainly contrary to the evidence, but it is without evidence, and, in justice, it ought not to stand."[41] Lacy's opinion thus affirmed the necessity for the state to offer substantial evidence before depriving even a black citizen of his liberty.

One fact that emerged during the Hite trial was that Julia Michael was a former employee of Taylor. Whites believed that the theft of goods by black employees, especially house servants, was a common affair. Bruce thought petit larceny an accepted concomitant of having servants.[42] Gunnar Myrdal reported one-half century later,

> It has always been expected of Negro servants in the South that they should pilfer small things--usually food but sometimes also clothing and money. In fact, their money wages are extremely low partly because the white employers expect them to take part of their earnings in kind.[43]

The idea that all black servants were petty thieves is absurd, but the quoted attitude on the part of many whites no doubt became a self-fulfilling belief.

Catherine Bundick was a former employee of John Tankard of Northampton County. When thieves stole bonds and more than $300 cash from Tankard's house, suspicion centered on Catherine

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[41] Ibid., at 890.

[42] Bruce, Plantation Negro as Freeman, pp. 38-39, 89-90.

[43] Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (2 vols.; New York: Harper & Brothers Publishers, 1944), II, 975.

and her husband, Robert. Trial in the county court resulted in a fifteen year sentence for burglary for Robert and a five year sentence for housebreaking for Catherine. The evidence against Robert consisted only of footprints at the scene of the crime and a knife lost during the burglary which allegedly belonged to him. Catherine faced the additional problem of her possession of the stolen goods. The accumulation of such circumstantial evidence brought about conviction.

The Supreme Court did not consider the circumstances so strong as had the trial judge and jury.[44] In fact, the judges felt, some of the circumstances cited were evidence of nothing at all. The footprints, for example, were found at the burglars' point of entry, but no evidence existed that they belonged to either of the Bundicks. The tracks did not lead toward their house. The only information provided by the prints was that more than one person had walked on the ground below the window, and that one of them possibly had been a woman.

The only other evidence against Robert was the knife. A commonwealth witness identified the knife, apparently dropped by the burglar, as being one previously owned by Bundick. The witness was certain that it was Bundick's knife, although he could not distinguish it from a similar one and could not describe all of its features accurately. A second witness

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[44] Robert Bundick v. Commonwealth, 97 Va. 783 (1899); Catherine Bundick v. Commonwealth, 97 Va. 787 (1899). The opinions do not identify any of the parties by color, but the Bundicks were black. Bundick v. Commonwealth, Records and Briefs, LXXXIX, O.S., 246, 267, 272.

testified that on the day following the crime Bundick told him that he had lost his knife. This evidence did not satisfy the court. In still another strong statement affirming the basic rights of defendants, Judge Cardwell wrote,

> To warrant the conviction of a person accused of a crime, every fact necessary to establish his guilt must be proved beyond a reasonable doubt; and especially is this so where, as here, a conviction is sought upon circumstantial evidence alone, which is always to be acted on with the utmost caution. It is not sufficient, therefore, that the evidence creates a suspicion of guilt. The accused is entitled to an acquittal, unless the fact of guilt is proven to the actual exclusion of every reasonable hypothesis of his innocence.[45]

The evidence against Catherine Bundick, in addition to her status as a former employee, was her possession of a two dollar note and a handkerchief. In addition, searchers discovered near her house other articles previously having belonged to Tankard. A two dollar note had been among the items stolen, and the defendant had trouble explaining where she had obtained hers, but no evidence showed that her note was the one taken in the burglary. The other goods were definitely Tankard's, but the court noted the absence of any evidence that they had been taken in the burglary. Cardwell dismissed Catherine's former employment by citing Tankard's testimony that all of his employees knew where he kept his money. The court found the evidence "plainly insufficient" to sustain the verdict against Catherine Bundick.

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[45] 97 Va. 785.

In another case,[46] no doubt existed that the defendant had committed the act charged. At issue was the intent behind the act. Robert Hall, a black man sentenced in Danville to three years in prison for horsestealing, possessed an estimable character but for one common weakness--alcohol. One evening he appeared at Acree's tobacco warehouse, obviously drunk, mounted the horse of a man named Gravely, and rode off. Gravely, Acree, and others watched as Hall rode toward the rear of the warehouse, turned, and came back. When stopped by Gravely, Hall claimed that the horse was his and that he was going home. When Gravely threatened to knock him off the horse, he dismounted.

Perhaps influenced by testimony that the defendant's character was good except for his drinking habits, the Supreme Court looked benignly on the incident. The court was prepared to reverse the conviction on the procedural ground of undue delay in indictment, but thought that better reason for reversal existed. Judge Fauntleroy wrote, "[U]pon the merits as disclosed by . . . the record, the verdict of the jury was plainly wrong, and against the evidence, which plainly and undeniably shows that the horse had been gotten on a drunken spree, and without felonious intent, in the presence of the owner of the horse [and others]."[47] The court ordered Hall discharged from custody.

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[46] Hall v. Commonwealth, 78 Va. 678 (1884). For racial identification, see Hall v. Commonwealth, Records and Briefs, XXX, O.S., 677.

[47] 78 Va. 681-82.

The court took a similarly sympathetic view of the troubles of Peter Perrin, sentenced to two years in prison for stealing the pocketbook of R. C. Tinsley. Tinsley lost his pocketbook, containing $100 cash and a check for $10.79, while walking on a public road. Perrin, described by his attorney as "a negro, and an entirely ignorant man, and unable to read or write,"[48] later picked up two pieces of paper lying on the road. He did not know what they were, and he put them in his purse. Several weeks later a man to whom Perrin owed money noticed the check and demanded it in payment of the debt. After several expressions of reluctance at using the check, Perrin finally did so, with a false story about how he had come to possess the paper.

On this evidence the jury found the defendant guilty of stealing the pocketbook. Again the Supreme Court reversed, with Fauntleroy delivering the opinion.[49] He noted the absence of any evidence that Perrin had ever seen the pocketbook, much less taken it. Possibly someone else had found the pocketbook, taken the cash, and thrown away the check. Fauntleroy conceded that Perrin's delayed and reluctant passing of the check might have been a crime, but that would have been only for the value of the check and therefore petit larceny. The evidence was wholly insufficient to warrant conviction on the felony charged in the indictment.

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[48]Perrin v. Commonwealth, Records and Briefs, LII, O.S., 212, 213.

[49]Perrin v. Commonwealth, 87 Va. 554 (1891).

The same was not true concerning the conviction of Percy Whalen for larceny from the person in Staunton Hustings Court in 1893. Whalen was a member of an interracial gang charged with picking the pocket of a man in a hotel bar. A racially mixed crowd of men was drinking in the bar when two witnesses saw a white man lift the coattail of an inebriated patron while Whalen extracted the victim's wallet. On trial Whalen received eight years in prison, but his colleagues received directed verdicts of not guilty due to error in the indictments.[50] Whalen himself won a new trial and this time received a five year sentence. His appeal of this second conviction reached the Supreme Court, which ruled that the evidence sustained the verdict.[51]

Cases involving the conviction of black Virginians for arson, assault, and various types of theft followed a familiar pattern. Juries often returned guilty verdicts and lower court judges often upheld them, even though the evidence was insufficient or questionable. The few blacks whose cases received full hearings before the Supreme Court had a much better chance for justice. The court did not hesitate to reverse

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[50] Augusta County Argus, May 23, 30, 1893. Blacks usually did not receive equal treatment in Virginia bars and restaurants, but there were exceptions. Wynes, Race Relations in Virginia, pp. 68, 76. The bar in this case appears to have been an exception. The more common approach was that of R. W. Lawrence, discharged in Richmond Police Court after being accused of hitting with a beer mug a black man who had tried to obtain a drink in Lawrence's bar. Staunton Post, July 20, 1895.

[51] Whalen v. Commonwealth, 90 Va. 544 (1894).

judgment in cases of obvious innocence. It also was willing to reverse in cases of possible or even probably guilt where evidence, though incriminating, was not sufficient to meet legal standards of proof. As the second and third convictions of Daniel Montgomery demonstrated, however, the court's spirit did not always infect the criminal justice system as a whole.

X. CRIMINAL PROCEDURE

Speaking before the Virginia State Bar Association in 1895, R. Walton Moore of Fairfax warned of a widespread dissatisfaction with criminal procedure in the United States. An "undue exhaltation of the individual charged with crime" was allowing the "escape of many who should be punished." The problem, according to Moore, was that appellate judges too often reversed convictions on technicalities.[1] Moore was not alone in his belief. Several years later President James Keith dissented from his brothers on the Virginia Supreme Court when they reversed a conviction on the ground of what he termed "a mere dry, barren technical error." "Such judgments," he warned, "impair and undermine confidence in the law as a rational rule of conduct."[2]

The Supreme Court's treatment of procedural questions provided excellent evidence of the judges' attitude toward black defendants. Consistently categorizing all errors in such cases as inconsequential might have indicated unwillingness to extend full safeguards to blacks. On the other hand, a judge desiring just treatment for blacks, or believing in

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[1]R. Walton Moore, "Criminal Trials," Virginia State Bar Association, Report of the Seventh Annual Meeting (Richmond, 1895), pp. 251-67, especially pp. 258, 263-66.

[2]Jones v. Commonwealth, 100 Va. 842, 859 (1902).

strict adherence to technicality in all cases, would have been more willing to call for new trials. Reversals in such cases would have signified to lower courts that they should apply trial safeguards to black as well as to white defendants.[3]

Because of the complex technical nature of procedural safeguards, the assistance of competent counsel is not only a right but a necessity. Despite the right to counsel decreed by the Constitution, the attempts of defendants to avail themselves of that privilege have not always been successful. In the years after Reconstruction most black defendants in Virginia, but not all, were able to obtain counsel.

Not every defendant wanted professional assistance. John Miles, a black man on trial in Henrico County Court for breaking and entering, asked to conduct his own defense. Observers remarked that, although illiterate, he knew court procedure and "showed some shrewdness." Given a five year sentence, he moved for a new trial, but the motion was overruled.[4] Another black defendant refused counsel for a different reason. The prosecutor was John W. Riely, later a member of the state Supreme Court. When the trial judge

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[3]Cases reversed on procedural grounds were usually retried, but note the case of David Anderson, a black man whose conviction for burglary was overturned because the judge had refused to entertain a motion for continuance before arraignment. On retrial he was found not guilty. Anderson v. Commonwealth, 84 Va. 77 (1887); Richmond Dispatch, January 26, 1889.

[4]Richmond Daily Dispatch, June 21, 1879.

asked if he would like counsel assigned, the defendant "replied in the negative, saying that as long as Major Riely was on the other side he knew he would be treated with fairness and justice, and that it would be unnecessary to employ any counsel to defend him."[5]

Most defendants, however, let attorneys handle their defense. Lawyers in general practice, by far the majority in Virginia, were always happy to accept employment. Given the disproportionate number of black defendants, it was good business to accept such cases. Some names appear repeatedly in the sources. Samuel M. Page of Richmond had an extensive criminal practice among blacks.[6] George D. Wise, one time commonwealth's attorney of Richmond, also often appeared as counsel for black defendants.[7]

Although other attorneys may not have defended blacks as often as did Page and Wise, the list of defense counsel for black defendants included some of the most respected members of the bar. William B. Talliaferro, a leader of the Gloucester

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[5]Memorial to Judge John W. Riely, VSBA, Report of the Thirteenth Annual Meeting (Richmond, 1901), p. 77.

[6]Richmond Daily Dispatch, March 30, 1876; Richmond State, May 10, 1876; Christian v. Commonwealth, 64 Va. (23 Gratt.) 954 (1873); Randall v. Commonwealth, 65 Va. (24 Gratt.) 644 (1874); Page v. Commonwealth, 67 Va. (26 Gratt.) 943 (1875); Page v. Commonwealth, 68 Va. (27 Gratt.) 954 (1876); Robinson v. Commonwealth, 73 Va. (32 Gratt.) 866 (1879); Muscoe v. Commonwealth, 87 Va. 460 (1891).

[7]Lyon G. Tyler, ed., Encyclopedia of Virginia Biography (3 vols.; New York: Lewis Historical Publishing Company, 1915) III, 133; Richmond Daily Dispatch, January 29, 1876; ibid., July 1, 1876; Richmond Planet, May 8, 1897.

bar for fifty years, was as willing to take a local case of chicken-stealing as to argue before the Supreme Court.[8] H. D. Flood, A. D. Payne, J. M. Quarles, and Thomas Whitehead, all prominent enough to earn mention in the Encyclopedia of Virginia Biography, served as counsel for black defendants before the Supreme Court.[9] E. C. Cabell, sometime commonwealth's attorney for Richmond, served as cocounsel with Samuel Page in three cases involving black defendants before the high court.[10] Similarly, Meade F. White was at various times commonwealth's attorney for Augusta County and counsel for black defendants.[11] Rather than being all-inclusive, this list furnishes only some examples of the quality of attorneys often retained by blacks.

The true test of Virginia's commitment to the right to counsel came when defendants were unable to employ attorneys, due either to lack of funds or to the notoriety of the crime. In 1895 Supreme Court Judge John Buchanan urged upon the bar

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[8]John H. Gwathmey, Legends of Virginia Courthouses (Richmond: Dietz Printing Company, 1933), pp. 19, 21; Perrin v. Commonwealth, 87 Va. 554 (1891).

[9]Tyler, EVB, III, 117 and Glover v. Commonwealth, 86 Va. 382 (1889); EVB, III, 331-32 and Hill v. Commonwealth, 88 Va. 633 (1892); EVB, III, 125-26 and Kinney v. Commonwealth, 71 Va. 858 (1878); EVB, III, 133 and Talliaferro v. Commonwealth, 77 Va. 411 (1883), Wright v. Commonwealth, 73 Va. 941 (1879).

[10]Richmond Daily Dispatch, January 14, 1876; Christian v. Commonwealth, 64 Va. (23 Gratt.) 954 (1873); Page v. Commonwealth, 67 Va. (26 Gratt.) 943 (1875); Page v. Commonwealth, 68 Va. (27 Gratt.) 954 (1876).

[11]Chataigne's Virginia Gazetteer and Classified Business Directory, 1888-89 (Richmond: J. H. Chataigne & Co., Publishers, 1887), p. 144; Augusta County Argus, July 17, October 23, 1894.

its obligation to cooperate: "If a prisoner is unable to employ counsel the court may appoint some one to defend him, and it is a duty which counsel owes to his profession, to the court engaged in the trial, to the administration of justice, and to humanity, not to withhold his aid, nor spare his best efforts in the defence of one 'who has the double misfortune to be stricken with poverty and accused of crime."[12]

State judges tried to fulfill their responsibility, but their practice of seeking volunteers rather than making compulsory appointments left defendants at the mercy of sometimes unwilling bars. Many attorneys responded well. In 1897 M. L. Spottswood could not avert a guilty verdict against a black man charged with the assault of a white woman, but his efforts elicited from black editor John Mitchell the praise, "It was a striking proof of the make-up of Virginia white men, and explains why there is such a strong friendship existing between white and colored men."[13] In an 1881 murder trial in Chesterfield County, Stephen Coleman was found not guilty thanks to an attorney working without fee, but several years later in Augusta County Lawrence Spiller was not so fortunate. The jury took only five minutes to convict him of murder, perhaps because his court-appointed attorneys had presented no evidence or argument.[14] Judges often chose

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[12]Barnes v. Commonwealth, 92 Va. 794, 803 (1895).

[13]Richmond Planet, July 24, 1897.

[14]Richmond State, December 15, 1881; Augusta County Argus, May 8, 1894.

experienced and prominent members of the bar. R. S. Turk, one of Spiller's attorneys, had extensive experience as a criminal prosecutor.[15] J. H. Ingram, successful in gaining dismissal of arson charges against Mary Banks in 1886, was a prominent Richmond area attorney and sometime judge in the Chesterfield courts.[16] Despite Judge Buchanan's exhortation to professional responsibility, some defendants experienced difficulty obtaining counsel. In a 1900 Martinsville case, the judge called upon the bar for someone to defend Charles Hairston, charged with assaulting a white girl. All the attorneys refused and Hairston, tried without counsel, was condemned to hang.[17] Frank Benjamin, charged with a similar crime in Newport News, had better luck. Again, no attorney responded to the judge's request, despite a fee of $300 raised by Benjamin's family. Finally, two black attorneys reluctantly accepted the case.[18]

The Supreme Court discussed competent counsel in only two opinions.[19] In Early v. Commonwealth[20] the two attorneys

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[15]Tyler, EVB, III, pp. 324-25. Turk argued the case of another black defendant to the Supreme Court. Whalen v. Commonwealth, 90 Va. 544 (1894).

[16]Richmond State, April 27, 1886; Richmond Planet, May 15, 1897; Chataigne's Directory, 1888-89, p. 248.

[17]Richmond Planet, May 19, 1900.

[18]Ibid., March 17, 1900.

[19]In Reed v. Commonwealth, 98 Va. 817 (1900), the high court knew but did not mention in its opinion that counsel had been assigned by the trial court. Reed v. Commonwealth, in Virginia, Supreme Court of Appeals, Records and Briefs, LXXXV, O.S., 361, 372.

[20]86 Va. 921 (1890).

assigned to the defendant upon arraignment had lost property in the fire allegedly started by him. The two men at first refused the appointment, but then accepted and counseled the defendant to seek a continuance. The Supreme Court found no error. President Lewis pointed out that the defendant had accepted one of the two as counsel again at the next term, and that another defendant in the case had employed the second attorney. The two lawyers appear to have acted with integrity, but it is difficult to imagine a more obvious conflict of interest.

In Barnes v. Commonwealth[21] the court considered the case of a woman who had no counsel when she was condemned to hang. On appeal, her attorneys charged that the trial judge should have appointed counsel and insisted that the designated attorney carry out his responsibility. They argued, "It is believed that in the present case the mere fact alone of her being without the aid of proper counsel to advise her, in a proceeding involving her life and liberty, will cause this honorable court to set aside the verdict . . . and grant her a new trial."[22] Judge Buchanan responded with his ringing call to duty, but found no error in the case at hand because the record did not show whether Barnes had been denied her right to an attorney.

Pokey Barnes's lack of trial counsel created another

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[21]92 Va. 794.

[22]Barnes v. Commonwealth, Records and Briefs, LXVIII, O.S., 117, 154.

problem. Unadvised by anyone trained in the law, the defendant did not make necessary motions or take bills of exception. Never before had such a case gone to the Supreme Court, and some lawyers believed that in the absence of exceptions entered on the record an appellate court could not grant a writ of error.[23] The attorneys belatedly acquired by Barnes answered this contention with scorn: "What a farce it would be to say that she, in her helplessness and her ignorance, lost her rights by her failure to object to 'unauthorized methods' when on trial?"[24] They noted that the trial judge, on his own initiative, had entered a motion for new trial on behalf of the defendant, but had immediately overruled the motion. Why, they wondered, had he not also taken the initiative to grant her a bill of exceptions to that ruling? The Supreme Court granted a writ of error.

The issue again arose during oral argument. Asked whether the defendant had noted an exception on some point, attorney H. W. Flournoy protested, "It seems like a mockery to require or determine to take notice of such an error when it is known that these ignorant women were protected by no counsel."[25] The court nevertheless dismissed several possible errors because no objections had been made at the time. Ironically, the incompleteness of the record ultimately earned

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[23]Richmond Planet, December 14, 1895; November 14, 1896.

[24]Barnes v. Commonwealth, Records and Briefs, LXVIII, O.S., 117.

[25]Richmond Planet, December 7, 1895.

the defendant a reversal, because the clerk had not included certain formalized statements.

Black prisoners seeking benefit of another constitutional safeguard, release on bail, had mixed success. Wilson Boxley, a black man indicted for rape in Halifax County in 1874, "was allowed to give bail for his appearance at the Circuit court."[26] In 1895 two black men charged with assaulting a Charlottesville policeman were allowed bail of $250 each.[27] The bail set for Bob Crawford, charged with larceny, was $800.[28] Barney Johnson, charged in Richmond with receiving stolen goods, was released on bail and quietly left town.[29] Despite these reports, racial discrimination regarding bail did exist. In 1883 a black defendant in Brunswick County charged that he had been refused bail because of his color.[30] When bail was set at $500 for a white man accused of murdering a black, the Planet complained, "If Davis had been colored, every lawyer in Virginia would have had to advocate his cause before the question of bail would have been even considered."[31]

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[26]Boxley v. Commonwealth, 65 Va. (24 Gratt.) 649 (1874).

[27]Augusta County Argus, October 15, 1895.

[28]Ibid., December 8, 1896.

[29]Richmond Daily Dispatch, January 29, 1876.

[30]Petersburg Lancet, December 15, 1883.

[31]Richmond Planet, October 14, 1899.

In only one case did a black defendant challenge the constitutionality of a state law dealing with trial procedure. Woody Ruffin, a state penitentiary convict hired out to the railroad, killed a guard while trying to escape in Bath County. According to state law, the Circuit Court of Richmond had jurisdiction over crimes committed by convicts in the penitentiary. That court tried Ruffin and sentenced him to hang for first degree murder. Ruffin appealed on the ground that the state constitution guaranteed him the right to trial by a "jury of his vicinage,"[32] and that the law giving the Richmond court jurisdiction over him was unconstitutional. Because the alleged crime had occurred in Bath, either he should have stood trial there or the jury should have been summoned from there.

The Supreme Court affirmed the conviction. Judge Christian emphasized that the state's bill of rights was an affirmation of general principles to be given a "reasonable rather than a literal" construction. Ruffin was a convict in the penitentiary even though not confined within the walls of that institution, and he was subject to its rules. Christian also proposed a broader reason for denying Ruffin's appeal. The bill of rights, he said, did not apply to convicts. He wrote,

> A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject . . . to all the laws which the Legislature in its wisdom may enact for the government of that institution and

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[32]Virginia, Constitution (1869), art. 1, sec. 10; Jurisdiction was determined by Code (1860), ch. 215, sec. 1, p. 859.

> the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him.[33]

The Ruffin case illustrates well the question raised by appeals alleging lack of due process. At what point does the failure to follow prescribed procedure truly jeopardize a defendant's right to fair trial? The courts have traditionally ruled that any doubt on this issue redounds to the benefit of the defendant. To require strict adherence to the rules, even in cases of doubtful prejudice, best guarantees that all defendants receive procedural justice. But such an approach is not absolute, and some errors will be deemed too minor for retrial. Appellate rulings represent a continuing attempt to define and classify these errors.

In some cases the problem was one of interpretation. Virginia law, for example, provided that a person jailed on a criminal charge was to be released if not indicted "before the end of the second term of the court at which he is held to answer." The question arose whether a court in session at the time of arrest counted in the enumeration of terms. In

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[33]Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795 (1871). Governor Gilbert Walker commuted Ruffin's sentence to life in prison and, in 1885, Governor William Cameron pardoned him on the ground of sufficient punishment. Virginia, Senate, Journal, 1872-1873. Communication from the Governor Transmitting a Statement of . . . Pardon Granted [hereafter cited as Governor's Pardon Report], S. Doc. 20, p. 1; Senate, Journal, 1885-1886, Governor's Pardon Report, S. Doc. 13, p. 10.

Hall v. Commonwealth[34] the court decided that the defendant, a black man convicted of horsestealing, had not been indicted quickly enough, thus including the court in session at the time he had been remanded for trial by a magistrate. Five years later the same court specifically overruled Hall, with President Lewis writing that the earlier case had been decided "without mature consideration."[35]

The indictment was a common cause of appeal. Counsel often challenged the wording of indictments, traditionally the location of damaging technical errors. The Supreme Court generally dismissed challenges based on minor flaws. The state constitution, for example, provided that indictments were to end with the words "against the peace and dignity of the Commonwealth." The court upheld the indictment against Henry Brown for murder even though the document ended "of the commonwealth of Virginia."[36] The court did require strict adherence to formula on more relevant points. The judges found defective the indictment against Henry Randall for

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[34]78 Va. 678, 680-81 (1884).

[35]Glover v. Commonwealth, 86 Va. 382 (1889), affirming conviction of a black man for attempted rape. This interpretation did not invalidate the general requirement. In 1895 a black man named James Johnson was discharged from custody after two grand jury terms had passed without an indictment against him. Augusta County Argus, November 12, 1895.

[36]Brown v. Commonwealth, 86 Va. 466, 467-68 (1890). The court also approved the indictment even though the victim was identified only by his initials. In addition, the commonwealth's attorney had not signed the document.

unlawful shooting because it omitted the word "feloniously,"[37] and the indictment against Henry Christian for attempted rape because, although it included such terms as "by force" and "carnally know," it omitted the necessary word "ravish."[38]

Some indictments contained more substantive errors. Page v. Commonwealth[39] illustrated the court's willingness to reverse the conviction even of an infamous criminal because of a deficient indictment. Hillary Page, the most notorious arsonist in Virginia in the 1870's, was convicted on the third count of a three count indictment and sentenced to death. Page's attorney argued before the Supreme Court, and the attorney general agreed, that the third count was based on a section of the state code that did not create any offense but was merely descriptive of earlier sections. Even though the wording of the indictment would have supported a different charge, the court reversed because the count on which the verdict had been found was deficient.[40]

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[37]Randall v. Commonwealth, 65 Va. (24 Gratt.) 644 (1874). For racial identification of the defendant, omitted in the opinion, see Richmond Whig, November 14, 1873.

[38]Christian v. Commonwealth, 64 Va. (23 Gratt.) 956-57.

[39]67 Va. (26 Gratt.) 943 (1874).

[40]Some trial judges found indictments defective before appeal to the high court was necessary. Richmond Dispatch, March 10, 11, 1887; Thornton v. Commonwealth, 65 Va. (24 Gratt.) 657, 659 (1874). For unsuccessful challenges to indictments before the Supreme Court, see Smith v. Commonwealth, 62 Va. (21 Gratt.) 809, 811-12 (1871); Early v. Commonwealth, 86 Va. 922-23 (1890); Cunningham v. Commonwealth, 88 Va. 37, 38-40 (1891); Mitchell v. Commonwealth, 89 Va. 826, 828 (1893); Whalen v. Commonwealth, 90 Va. 544, 545 (1894). In Robinson v. Commonwealth, 88 Va. 900 (1892), the court ruled sufficient an indictment that failed to specify it had been found by a special grand jury. For racial identification of Robinson, a

Page was again tried and convicted on two other indictments. The wording of both was similar to that of one count of the original indictment. Because the Supreme Court had ruled that Page was acquitted of that count at the first trial, his counsel pleaded that the first verdict also served as an acquittal on the second indictment. The Supreme Court ruled that, despite the similarity in wording, the indictments referred to different fires.[41]

Samuel Page, Hillary Page's attorney, raised a similar claim of double jeopardy in his defense of Charlotte Robinson, a black woman convicted of larceny in Manchester Hustings Court.[42] Her first trial produced a variance between the indictment and the evidence presented, and the trial judge sustained a defense motion to exclude all the commonwealth's evidence. The judge then discharged the jury over the objection of the defendant, who asked that the jury return a verdict. Arraigned on a new indictment, the defendant pleaded that she already had been tried on an identical charge for the same offense by a jury discharged without her consent. The Supreme Court ruled that the discharge of the jury had caused Robinson no harm. Acquittal on the basis of variance was not a bar to retrial for the same offense, and therefore a verdict for the defendant would not have altered

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black man sentenced to hang for the murder of his lover, see Augusta County Argus, September 29, 1891.

[41]Page v. Commonwealth, 68 Va. (27 Gratt.) 963-74.

[42]Robinson v. Commonwealth, 73 Va. (32 Gratt.) 866 (1879). For racial identification, see Richmond State, July 15, 1878.

subsequent trial and conviction.[43]

Yet another variation of the double jeopardy plea arose in Briggs v. Commonwealth.[44] In 1885 a Culpeper County Court jury convicted William Briggs of second degree murder. The circuit court ordered a new trial. Briggs argued that his previous conviction for second degree murder constituted acquittal on the charge of murder in the first degree and barred retrial on that charge. The Supreme Court ruled that, by seeking a reversal, the defendant had waived his right not to be retried. The original verdict was "guilty of murder," and the new trial must again be on that charge. The new jury would determine the degree of homicide.

Beyond the stage of indictment and pleading, the opportunity for procedural errors expanded. Even the scheduling of the trial could cause problems. Two defendants raised the issue of timely trial, both unsuccessfully.[45] Hillary

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[43]In Jones v. Commonwealth, 86 Va. 740, 741-42 (1890), the defendant unsuccessfully argued double jeopardy because a first jury had been discharged, without his consent, when unable to reach a verdict. Jones was convicted of robbery and sentenced to ten years in prison. For racial identification, see Jones v. Commonwealth, Records and Briefs, XCVIII, O.S., 150, 158.

[44]82 Va. 554, 556-62 (1886).

[45]Smith v. Commonwealth, 85 Va. 924, 925-26 (1889); Davis v. Commonwealth, 89 Va. 132, 133 (1892). But Robert Cabell, a black man convicted of rape, successfully moved in Richmond Hustings Court for arrest of judgment because he had been held longer than the statutory limit before trial. Richmond Dispatch, May 23, 1886. Henry Curtis, on the other hand, argued unsuccessfully that the Circuit Court of Norfolk County had scheduled his trial too quickly. Curtis v. Commonwealth, 87 Va. 589, 594-95 (1891).

Page, the arsonist, contended that he had been remanded to the wrong term of court by the examining magistrate. He also was unsuccessful.[46] George Early appealed because the trial court had refused a continuance requested on the ground of absent witnesses. The Supreme Court ruled that the trial judge's decision could not be reversed except in the case of obvious error.[47]

Mitchell v. Commonwealth[48] demonstrated the importance of careless errors. A black man convicted of raping a white girl, Mitchell gained a new trial for reasons the layman would believe inconsequential. Yet the court reversed the conviction of a defendant accused of the most heinous crime known to southern society. In Amelia County Court, where he was indicted and arraigned, Mitchell asked for trial in the circuit court, as was his prerogative. The clerk of the county court, however, failed to certify the record of the county court proceedings to the circuit court, and without such certificate the circuit court lacked jurisdiction. The Supreme Court ruled that the clerk's oversight invalidated

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[46]68 Va. (27 Gratt.) 959-60.

[47]Early v. Commonwealth, 86 Va. 924-25. At least two other black defendants had better luck at trial. The case of Tom Adams, charged with shooting a black woman, was continued in Augusta County Court due to the absence of a defense witness. Augusta County Argus, March 12, 1895. The trial judge in Jackson v. Commonwealth, 64 Va. (23 Gratt.) 919, 922 (1873), also allowed a continuance due to the absence of a witness "on account . . . of its being a case in which the life of the accused was involved, and the court being willing to afford him every facility of defence."

[48]89 Va. 826 (1893).

Mitchell's trial.[49]

The physical presence of the defendant during trial was another contested issue. The law required that the defendant be personally present at every stage of the proceedings that might affect him. The record in Coleman v. Commonwealth[50] said only, "And at another day, . . . the 3d day of March, 1893, . . . the trial of this case is ordered to be continued." A unanimous court ruled that the record was "fatally deficient" because it did not state that the defendant had been personally present at the time.

Although the court required a positive averment of the defendant's presence, it allowed clerks some leeway in meeting that requirement. The record in Lawrence v. Commonwealth[51] noted that at the end of the day's proceedings "the said Charles Lawrence is thereupon remanded to jail." In Williams v. Commonwealth [52] the record omitted the closing note that the defendant had been remanded to jail but included the usual opening that "Charles Williams . . . was this day again led to the bar. . . ." The court ruled that the wording in both cases was

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[49]The court also held as reversible error the failure of the deputy who had served the writ of venire facias to add the name of the sheriff as well as his own to the return of service.

[50]90 Va. 635 (1894). The opinion does not identify either Coleman, sentenced to hang for murder, or his victim by color. Both were black. Coleman v. Commonwealth, Records and Briefs, LX, O.S., 382, 387.

[51]71 Va. (30 Gratt.) 845, 850-53 (1878).

[52]93 Va. 769, 770-71 (1896). For racial identification of Williams, a black man sentenced to hang for murder, see Senate, Journal, 1897-1898, Governor's Pardon Report, S. Doc. 4, p. 41.

sufficient to show presence. Ironically, in the only case in which the defendant was absent in fact as well as on the record, the appeal failed. On two occasions George Bond was absent when his attorney made motions for new trial. The trial court overruled both motions but afterward realized its mistakes and rescinded the rulings, offering to entertain new motions in the defendant's presence. The Supreme Court ruled that the judge had thereby corrected the irregularity and refused to reverse the convictions.[53]

Juries were a consistent source of problems. Defendants appealed because juries had not been sworn properly[54] and because the clerk had charged them erroneously.[55] In Barnes v. Commonwealth[56] the record failed to show that during trial adjournments the jury had been in the custody of the sheriff and that the officer had been instructed not to speak to them, nor allow others to do so, about the case. The record said only that the jury had adjourned, without mentioning the sheriff or instructions to him. The court ruled that this failure merited a reversal. Several years later the court

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[53]Bond v. Commonwealth, 83 Va. 581 (1887). The opinion does not note Bond's race, but he was a black man convicted of arson. For racial identification, see Virginia, Board of Directors of the Virginia Penitentiary, Annual Report, 1898, p. 23.

[54]Lawrence v. Commonwealth, 71 Va. (30 Gratt.), 848-50; Brown v. Commonwealth, 86 Va. 468. Both appeals were unsuccessful on this point.

[55]Thornton v. Commonwealth, 65 Va. (24 Gratt.) 261-63.

[56]92 Va. 803-808.

ruled that where the record showed the necessary instructions to have been given the sheriff at the start of the trial, the failure of the record to note daily instructions was not fatal.[57]

Among the most common, yet unsuccessful, appeals was a challenge to the venire facias summoning the jury. Appealing the writ that had called the grand jurors was usually in vain because such questions were supposed to have been raised before the defendant pleaded to the merits of the case. Thus, even though two grand jurors in Reed v. Commonwealth belonged to a class specifically excluded from such service by statute, the Supreme Court held that the challenge to them had come too late.[58] In Lyles v. Commonwealth[59] the court admitted that the venire facias was irregular but again ruled that the objection was untimely. Other appeals, all unsuccessful, included challenges to the jurisdiction of the court issuing the writ,[60] the number and qualifications of the veniremen summoned,[61] the manner of choosing the jury,[62] the specificity

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[57]Reed v. Commonwealth, 98 Va. 830. For an unsuccessful appeal grounded on actions of the jury outside the courtroom, see Wright v. Commonwealth, 75 Va. 914, 916 (1882).

[58]98 Va. 819-20. The men were overseers of the road.

[59]88 Va. 396, 398 (1891).

[60]Wilson v. Commonwealth, 86 Va. 666 (1890). The opinion does not give Thomas Wilson's race. He was a black man sentenced to hang for murder. Augusta County Argus, June 18, 1889.

[61]Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 847-48; Mitchell v. Commonwealth, 74 Va. (33 Gratt.) 845, 848-51 (1880); Lawrence v. Commonwealth, 81 Va. 484, 485 (1886); Brown v. Commonwealth, 87 Va. 215, 216 (1890); Curtis v. Commonwealth, 87 Va. 595; Barnes v. Commonwealth, 92 Va. 801-802.

[62]Honesty v. Commonwealth, 81 Va. 283, 285-88 (1886).

required of the record,[63] and even a date mistakenly inscribed on the writ.[64]

Technicalities of summoning aside, the important substantive question was whether the jurors finally impaneled gave the defendant a fair trial. Considering the antipathy of whites toward accused black criminals, relatively few appeals concerning fairness of the jury reached the Supreme Court. Two cases discussed possible change of venue, and five others challenged the competence of individual jurors.

The Supreme Court was markedly unreceptive to requests for change of venue. Wright v. Commonwealth[65] demonstrated both the court's reluctance to acknowledge the necessity for such a change and the difficulties faced by defendants in overcoming that reluctance. In 1879 the Bedford County Court sentenced Peter Wright to hang for the murder of a white man. The Supreme Court reversed the conviction because of an incompetent juror, but on retrial Wright was again sentenced to hang. At the second trial he moved for a change of venue on the ground that local prejudice against him was so great that he could not receive a fair hearing. Everyone in the county, he argued, had already expressed an opinion about his guilt.

Wright submitted three affidavits to support his motion,

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[63]Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 847-48; Watson v. Commonwealth, 87 Va. 608, 610-13 (1891); Robinson v. Commonwealth, 88 Va. 900.

[64]Davis v. Commonwealth, 89 Va. 133.

[65]74 Va. (33 Gratt.) 880, 882-88 (1880).

but all three reflected only his or his attorney's beliefs. He explained his failure to submit affidavits from other citizens on the ground that,

> he is a poor colored man that has been unable, on account of extreme prejudice, to obtain such affidavits; that his counsel have made oft and repeated efforts to obtain from citizens of this county their affidavits to the truth of these statements; that in nearly every case these citizens have openly expressed the opinion that a fair and impartial trial cannot be had within the county by a jury of the county, but on account of public opinion they decline to allow their affidavits to be used in this case, so great is their prejudice against this affiant.[66]

Wright's counsel similarly swore that he had been unable to convince anyone in Bedford to say on the record that public prejudice made a fair trial impossible.

The Supreme Court upheld the judge's denial of a change of venue. Had it truly been impossible to summon an impartial jury locally, wrote President Moncure, the defense might have moved to call the jurors from some other county. It never did so. The court also believed that Wright had failed to prove his contention that an objective Bedfore jury could not be found. In fact, a county jury was impaneled without objection to any of the twelve jurors.

The question of change of venue also arose in the second trial of William Muscoe, convicted of the murder of a Charlottesville policeman. To support his motion, the defendant pointed out inflammatory newspaper articles, including a notice by the mayor at the time of Muscoe's arrest assuring

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[66] Ibid., at 884-85.

the town that Muscoe was the murderer and would hang within thirty days of sentencing. Despite the mayor's pledge, it had become necessary to call out the militia to protect the prisoner. Muscoe thought these facts proved the impossibility of his receiving a fair trial in Charlottesville. Some of the commonwealth's own witnesses, called to rebut Muscoe's contentions, could swear only that he would get as fair a trial as any other murderer.[67]

The Supreme Court, however, felt that the circumstances did not require a change of venue. Judge Hinton wrote that the defendant must prove that "the community has been so warped by passion or prejudice that there is danger of the jury being influenced by the opinion of the public, and not entirely and exclusively by the evidence, in reaching a verdict."[68] Hinton conceded that some public expression in Charlottesville had been "both ill-judged and ill-timed," but ruled that Muscoe had failed to support his motion adequately.[69]

Challenges to individual jurors called for even more subjective judgments by trial judges than did motions for change of venue. A series of Supreme Court decisions demonstrated that the guidelines by which the judges were to make

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[67]Muscoe v. Commonwealth, Records and Briefs, LII, O.S., 33, 34.

[68]Muscoe v. Commonwealth, 87 Va. 460, 462 (1891).

[69]In fact, it had proved impossible to obtain an impartial jury in Charlottesville, and the judge had summoned a venire from Staunton. Charlottesville Chronicle, February 14, 1890.

their rulings provided little help. In two cases the court did not explain its decisions. In Page v. Commonwealth[70] eight jurors trying the case on the merits had also been on a panel that had tried a special issue in the same case. Although they had already heard testimony about the defendant's alleged confession, they asserted that they held no impressions about his guilt. The Supreme Court ruled the jurors competent.[71] More understandable was the ruling in Lyles v. Commonwealth,[72] wherein the court found acceptable a juror who had heard news of the crime but held no opinion concerning the defendant's guilt.

The most complete discussion of juror competence came in Jackson v. Commonwealth.[73] Venireman Graham had heard about some of the evidence presented at the coroner's inquest. He believed the people who had told him about the evidence, and had expressed an opinion about Jackson's guilt. He nevertheless felt no prejudice toward the defendant and thought that he could listen to the evidence and render a verdict "uninfluenced by his preconceived opinion." The defense challenged him, but the judge held him to be a competent

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[70] 68 Va. (27 Gratt.) 977.

[71] But Harvey Bell, a black man convicted of murder in Charlottesville, received a new trial because one juror also had been on the grand jury and had expressed an opinion about Bell's guilt. Augusta County Argus, March 2, 1897.

[72] 88 Va. 397.

[73] 64 Va. (23 Gratt.) 919, 922-23, 927-33 (1873). Jackson was a black man sentenced to hang for the murder of his wife. The opinion contains no racial identification, but see Jackson v. Commonwealth, Records and Briefs, I, O.S., 54, 55.

juror.

The Supreme Court affirmed that decision. President Moncure wrote that a venireman was incompetent if he had formed "a decided or substantial opinion" about the defendant's guilt. A "merely hypothetical" opinion did not disqualify a juror. A man who had heard only rumors would be considered to have a hypothetical opinion, "even though he speak of it as a decided or substantial opinion." The determining factor would be whether the venireman thought he could give the defendant a fair hearing. Here, Graham evidently had not formed a decided or substantial opinion but a hypothetical one. Moncure thought that the trial judge, who had heard Graham testify in person, was the best interpreter of Graham's fitness.

Six years later the court thought differently about the interpretation made by the trial judge in Wright v. Commonwealth.[74] Venireman Charles W. Hardy testified that "he had made up and expressed an opinion in the case; that the opinion . . . was still upon his mind; that he did not think he could do the prisoner justice."[75] This position was plain enough, but Hardy immediately qualified it. He stated that new evidence could change his mind and that he could render a fair verdict. The defense challenged him for cause, but the trial judge overruled the objection.

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[74] 73 Va. (32 Gratt.) 941 (1879).

[75] Ibid., at 942 (Emphasis original).

For the Supreme Court, Judge Staples emphasized that the determining factor was the strength of the venireman's opinion. A "decided opinion" rendered a venireman incapable of hearing a case impartially. Staples declared, "If there be a reasonable doubt whether the juror possesses these qualifications, that doubt is sufficient to insure his exclusion. For, as has been well said, it is not only important that justice should be impartially administered, but it should also flow through channels as free from suspicion as possible."[76]

Hardy himself did not know where his true feelings lay. He said that he did not think he could do the prisoner justice, but also that he could serve with an unprejudiced mind. Such uncertainty was a sign of danger to the court. Staples wrote, "A man who could assert in one breath that he had prejudiced the accused, and could not do him justice, and in the next assert that his mind was free from all prejudice, is not to be trusted with the grave and responsible duty of passing upon the guilt or innocence of a fellow being."[77] Such a man might consider himself a competent juror, but the law did not.

In Washington v. Commonwealth,[78] decided in 1889, a new high court found that two incompetent jurors had served on

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[76] Ibid., at 943.

[77] Ibid., at 944.

[78] 86 Va. 405 (1889). Jordan Washington was a black man sentenced to eighteen years in prison for second degree murder. For racial identification, see Fredericksburg Free-Lance, July 9, 23, 1889.

the same panel. Juror Scott said that his opinion of the defendant's guilt was "right positive," but that he could give an impartial hearing to new evidence. Juror Adams testified, "I have formed an opinion thus far, that the prisoner should be punished." He said that he would require evidence to change his opinion. The court ruled that the trial judge should not have accepted the two jurors. By entering the trial with a belief that the defendant was guilty and requiring him to prove otherwise, they were in conflict with that most important of legal tenets--the presumption of innocence.

The judges erected a fine model assigning competency or incompetency according to the words expressed by potential jurors. But the model depended upon those words having precise meaning, a dependence that was not merited. Short of disqualifying those with any opinion, however, no other way existed to solve the problem. The system did manage to weed out many prejudiced jurors. The judge in Brown v. Commonwealth,[79] for example, issued a second venire facias because he found only two qualified jurors on the first venire. Similarly, the judge in Curtis v. Commonwealth[80] summoned a second venire when only six of sixteen in the first group were acceptable.

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[79] 87 Va. 216.

[80] 87 Va. 595.

The substance of a trial began with the introduction of evidence. Both prosecution and defense were wary lest the other side place inadmissible evidence before the jury and on the record. Sometimes counsel challenged the entire testimony of a witness. The importance of a judge's rulings in such situations is obvious. The law required juries to base their verdicts not on what was known but on what was officially on the record. An otherwise incriminating piece of evidence not admissible by law could carry no legal influence.

The most incriminating evidence possible was the confession of the defendant. Nineteenth century Virginia jurists laid down strict requirements for the acceptance of confessions.[81] A confession was inadmissible if extracted by a threat or promised benefit offered by a person in authority. Confessions were to be truly voluntary, not the result of fear or expectation. Although the requirements were exemplary in theory, the extent to which authorities followed them in practice is not known. The situation was especially tenuous for black suspects. Often ignorant about the law and conditioned to fear and accept the authority of white officials, they were vulnerable to police threats and promises. It was also difficult for a black to challenge successfully a white official's version of events if any conflict arose

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[81]See the general discussion in Virginia Reports, Jefferson--33 Grattan, 1730-1880. Annotated under the supervision of Thomas Johnson Michie (Charlottesville: Michie Company, 1901), pp. 775-77.

at trial.[82]

The appellants in a group of cases before the Supreme Court failed to win any reversals on the ground of improperly admitted confession, but the cases show that some officials did observe defendants' rights in this area. Horace Venable, accused of murdering his lover in Richmond in 1873, confessed to anyone who would listen to him. He first admitted his guilt to a policeman, who advised him to get an attorney. At a hearing before the police justice, both the justice and his new attorney cautioned him not to make any further statements. Upon reaching jail, however, Venable told his story to the cook and a fellow inmate. Both testified against him at trial.

On appeal, Venable's counsel challenged the testimony of the two witnesses from the jail. He contended that his client, "an ignorant colored man," was alarmed and upset at the time of the confessions.[83] The Supreme Court affirmed the conviction, holding that such fright did not disqualify a confession.[84] Despite Venable's misfortune, the facts indicate that the officials did their best to afford him the law's

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[82]Although the Virginia courts did not acknowledge these factors, other jurisdictions have held that a black defendant's race in itself should be considered when determining the voluntariness of a confession. Jack Greenberg, Race Relations and American Law (New York: Columbia University Press, 1959), pp. 314-15, and cases cited therein.

[83]Venable v. Commonwealth, Records and Briefs, VI, O.S., 443.

[84]Venable v. Commonwealth, 65 Va. (24 Gratt.) 639 (1873); House of Delegates, Journal, 1874-1875, Governor's Pardon Report, H. Doc. 8, p. 3.

protection. Both his attorney and the police justice warned him against making any statements.[85] It is also notable that the trial judge excluded the confession to the policeman because it had been obtained illegally.

Hillary Page, the arsonist, also possessed a loose tongue. He twice admitted his crimes, once as the result of fraud. John Wren, a private detective, tricked Page into revealing his criminal history by pretending to be in the market for an experienced arsonist. During his first trial Page also discussed details of his crimes with the sheriff, who duly joined the commonwealth's witnesses at Page's second trial. The Supreme Court held that both conversations were valid evidence. The sheriff, although a law officer, had offered no inducement for the admission. The court accepted Wren's fraud because he was a private detective who held no official position.[86]

Wren seems to have been involved whenever a contested confession was at hand. In Mitchell v. Commonwealth[87] the defendant argued that the prosecution had failed to prove that Mitchell's two confessions were voluntary. Wren, who had induced the first confession, testified that the defendant had received no promises and had been told that his

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[85]In Hatchett v. Commonwealth, 75 Va. 925, 930 (1882), the coroner warned the defendant that any confession made should be voluntary.

[86]Page v. Commonwealth, 68 Va. (27 Gratt.) 978-81.

[87]74 Va. (33 Gratt.) 851-59.

confession must be voluntary. The defense elicited testimony that threw suspicion on Wren's credibility, but other witnesses supported the detective's story. Mitchell's two cohorts, who had actually planned and executed the crime with Mitchell as a minor accomplice, won acquittals because of insufficient evidence. Mitchell's confession was not admissible against them.

In Early v. Commonwealth,[88] decided in 1890, the defendant testified that Wren had promised to use his influence with the authorities for Early's benefit if he confessed. Wren did not take the stand, but two other witnesses refuted Early's story. The testimony of these men was suspect, because one was a victim of the crime and the other was Wren's employee, but the Supreme Court ruled the confession admissible. Even if Early's story were true, President Lewis wrote, Wren had no official standing and therefore there had been no inducement by anyone in authority.[89]

Much important information did not appear in Lewis's Early opinion. There is no reference to the treatment allegedly suffered by Early:

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[88]86 Va. 927-28.

[89]Wren's colleague, black detective Henry Edwards, surfaced again in Brown v. Commonwealth, 89 Va. 379, 381-82 (1892). He testified that Brown had admitted his part in the crime to him. The Supreme Court accepted the alleged confession as admissible, but accorded it no credibility. Similarly, in Smith v. Commonwealth, 62 Va. (21 Gratt.) 816-19, the court acknowledged that authorities had obtained an admission legally, but ruled that its weight as evidence was not so strong as claimed by the prosecution.

> George Early was taken from jail by a crowd of men and dragged behind a horse and buggy with shots flying around his head, and was told if he did not acknowledge that the other prisoners did the burning he he [sic] would be killed. The men then built a fire around him and told him that if he did not admit that he did the burning he would be consumed.[90]

If the allegation was true, such an experience certainly would cast doubt upon the voluntariness of any admissions made by Early.[91]

Defendants appealed the presence, or absence, of witnesses on a variety of grounds. In the rape case of Smith v. Commonwealth[92] the defendant charged that the prosecutrix was too young to understand the oath, but the Supreme Court ruled that the trial judge had specifically examined the twelve year old girl's capacity and found her competent. In Barbour v. Commonwealth the court decided that a conviction for petit larceny did not disqualify a witness,[93] and in Reed v. Commonwealth[94] it accepted the testimony of the deputy sheriff in charge of

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[90]Richmond Planet, August 30, 1890.

[91]Willis Thompson, a black man accused of the rape and murder of a black woman, confessed under fear of lynching by a black mob. Afterwards, he was "under the impression that if he retracted his confession he would be taken out of the jail by the negroes and hung." Thompson v. Commonwealth, Records and Briefs, II, O.S., 386, 387.

[92]85 Va. 924, 926-27.

[93]80 Va. 287, 288-90 (1885). Allegations of bad character were not sufficient to make a witness incompetent. Legal conviction for an infamous offense was necessary. Briggs v. Commonwealth, 82 Va. 562-63.

[94]98 Va. 830.

the jury concerning previous events. Charles Lawrence, convicted of rape, challenged the introduction of two prosecution witnesses of whose testimony the defense had no prior notice. The court found no error.[95] Two defendants appealed on the ground that the commonwealth had not called as witnesses all parties present at the alleged crimes. Both times the court ruled that the prosecution could call whomever it wanted. If the defense desired other witnesses, it could summon them.[96]

Appeals involving specific points of evidence were usually unsuccessful. Enough exceptions and ambiguities existed in the rules of evidence to give trial judges considerable latitude in making their decisions. The Supreme Court reversed only in cases where the evidence was specifically inadmissible or obviously prejudicial. Responding to one appeal concerning admission of evidence, the court stated that the decision was within the trial judge's discretion unless there was manifest abuse of that power.[97]

In the murder case of Dock v. Commonwealth the court ruled that the prosecution's introduction of evidence showing the peaceable character of the deceased was irrelevant because the defense had not first attacked that character.[98] More

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[95]Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 853.

[96]Hill v. Commonwealth, 88 Va. 633 (1892); Gaines v. Commonwealth, 88 Va. 682, 691 (1892).

[97]Reed v. Commonwealth, 98 Va. 824.

[98]62 Va. (21 Gratt.) 909, 910-12 (1872). But in Coleman v. Commonwealth, 84 Va. 1, 4-7 (1887), the court allowed

obviously prejudicial was a witness's testimony that immediately after the crime the victim told him that the defendant had knocked him down and robbed him. Judge Fauntleroy declared, "It would be dangerous . . . to permit a party making a criminal charge . . . to support his own evidence by proof of declarations made by him, subsequent to the alleged crime. The adjudication of the rights, and the protection of the liberties, of the citizen, require that mere hearsay evidence should be excluded."[99] William Brown earned a reversal because the trial judge had allowed testimony concerning statements made by Brown's alleged coconspirator.[100]

By interpreting certain acts or statements to have been part of the res gestae, i.e., the circumstances of the crime itself, the court allowed much evidence otherwise inadmissible. In Reed v. Commonwealth[101] the defendant was charged with murdering his wife and his father-in-law during the same argument. During trial for the murder of the wife, Reed objected to a reference to the other killing. The court held that the father-in-law's murder was part of the res gestae of the crime at issue. The court ruled similarly concerning testimony that a murder victim had declared prior to the crime his intention

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evidence showing a rape victim's reputation for chastity because the defense had indirectly attacked her character.

[99]Jones v. Commonwealth, 86 Va. 742-44.

[100]Brown v. Commonwealth, 86 Va. 935, 936 (1890). The testimony was inadmissible because the record contained insufficient proof of a conspiracy between the two defendants.

[101]98 Va. 823.

to visit the defendant.[102] The court also held admissible the testimony of a witness that after a shooting he had heard one man say to another, "Will, you have killed him."[103]

Judges decided questions of relevance quite broadly. In Reed the court accepted evidence that the defendant had been drunk two days before the crime, saying that it was relevant to rebut Reed's claim that he had reformed.[104] Threats made by George Bond against William Franklin were admissible because Franklin's house was close to a barn allegedly set on fire by Bond.[105] But James Mings, on trial for rape, was not allowed to introduce the reason for the victim's father's declared hatred of him.[106] In the second William Brown arson case the court ruled admissible testimony that formed a link in the chain of circumstantial evidence connecting the defendant to the crime.[107] Randall Watson, having testified that he murdered Joe Robinson partly in response to insults about his wife, had to answer on cross-examination whether he and the woman were legally married.[108]

Efforts to confirm or impeach testimony brought about

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[102]Dock v. Commonwealth, 62 Va. (21 Gratt.) 913-14.

[103]Briggs v. Commonwealth, 82 Va. 562.

[104]98 Va. 823.

[105]Bond v. Commonwealth, 83 Va. 588.

[106]Mings v. Commonwealth, 85 Va. 638, 639 (1889).

[107]Brown v. Commonwealth, 87 Va. 216-17. The court then reversed the conviction on the ground that the circumstantial evidence was insufficient to warrant the verdict.

[108]Watson v. Commonwealth, 87 Va. 613-14.

other appeals. In Jackson v. Commonwealth[109] the Supreme Court upheld the trial judge's refusal to allow defense counsel, during final argument, to point out discrepancies between the testimony of certain witnesses at the trial and their previous testimony at the coroner's inquest. President Moncure wrote that the defense should have submitted the inquest testimony during the questioning of the witnesses, giving them the opportunity to explain any discrepancies. In Barbour v. Commonwealth[110] the defense objected to the admission of evidence that the defendant's hand and knife had been stained with blood, because there had been no chemical analysis of the substance. Judge Lacy declared that there was no need for analysis "to ascertain the obvious and indubitable fact that it was blood." When Beverly Howard challenged the veracity of a witness because events subsequent to the crime had made it opportune for him to lie, the judge allowed otherwise inadmissible testimony to show that the witness's story had not changed. The Supreme Court affirmed.[111]

The Supreme Court often ruled upon requests for new trial because of newly discovered evidence, but was exceedingly reluctant to grant such requests. The court required that the new evidence be so substantial that, had it been presented at

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[109] 64 Va. (23 Gratt.) 933-34.

[110] 80 Va. 290-91.

[111] Howard v. Commonwealth, 81 Va. 488 (1886). For racial identification of Howard, a black man convicted of arson, see Board of Directors of the Virginia Penitentiary, Annual Report, 1887, p. 24, and Senate, Journal, 1887-1888, Governor's Pardon Report. S. Doc. 23, p. 8.

trial, it might have produced a different verdict. That the scene of the crime had been examined by lamplight, as well as the originally stated moonlight, obviously did not meet this requirement.[112] Neither did the discovery that stains in the snow originally thought to be blood were not, because the stains had played little part in the prosecution's case.[113] Similarly, that a hat had been moved between the time of its loss during the crime and its discovery by a witness was inconsequential.[114]

The court did order a new trial when the new evidence was obviously important. Boxley v. Commonwealth[115] was a prosecution for rape in which the commonwealth's most important witness was prosecutrix Martha Spencer. After conviction, Boxley's counsel moved for a new trial to introduce an affidavit from the committing magistrate that Spencer's testimony at trial differed materially from the testimony she had given before him. Because the evidence against the defendant was questionable, the court ruled that Boxley should

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[112]Wheeler v. Commonwealth, 86 Va. 658, 659 (1890). For racial identification, see Wheeler v. Commonwealth, Records and Briefs, XLIX, O.S., 903.

[113]Lewis v. Commonwealth, 81 Va. 416, 420-21 (1886).

[114]Field v. Commonwealth, 89 Va. 690, 692-94 (1893). Although the court was probably correct in this instance, President Lewis also argued that, "even were it made distinctly to appear [by the new evidence] that Gordon was not pursued by the prisoner at all," that fact would not have caused a new verdict. But such fact would have proved that the victim had perjured himself when he claimed to have been chased, an important point when the jury's decision rested mainly on deciding which of the parties to believe.

[115]65 Va. (24 Gratt.) 654-56.

have been granted a new trial.

The murder case of Williams v. Commonwealth[116] presented a unique situation. During the trial the defendant, commonwealth's attorney, and jury traveled to the scene of the crime, while defense counsel and the judge remained behind. In answer to a question from a juror, a trial witness who was also present stated a number of facts, including one not previously in evidence. When the party returned to court the prosecutor told the judge and defense counsel what had occurred and allowed the defense to question the witness. The defense attorneys neither questioned the witness nor objected to the proceedings. After the verdict, however, they asked that the fact of the trip and its incidents be put on the record, something not previously done. Their purpose was to lay the groundwork for a motion for new trial.

The Supreme Court declared that the witness's testimony was not improper, only given irregularly. In addition, the defense should have noted its exception before the verdict and not waited until afterward. Defense counsel's tactics particularly irked the judges. The court believed that counsel knew, or could have known, enough to have acted earlier than they did. As President Keith warned, the defendant could not "sit mute in the presence of the court, with the knowledge that some mere irregularity has taken place during the trial, ready to take advantage of it in case of an adverse verdict. . . . Neither a party to a civil case, nor the prisoner in a

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[116] 93 Va. 771-74.

criminal case, will be permitted to play fast and loose with the court."[117]

The trial judge's duty to instruct the jury before sending them to consider their verdict was a frequent source of appeals. Such instructions were to clarify for the jurors the issues for their consideration--to define the elements of an offense or explain the level of proof required by law. The intricacies of the criminal law made this one of the most vexing tasks that judges faced. Prosecution and defense could submit possible instructions, each wording its suggestions to its own advantage.[118] From these the judge chose any, all, or none, or he could compose his own.

The wording of an instruction could point the jury in a certain direction, or even force a specific verdict. In the Montgomery assault cases, for example, the instructions submitted by the defense in each case would have made a guilty verdict virtually impossible. The Supreme Court ruled in each case that the trial judge should have given the instructions.[119] More often, however, a defense attorney suggested instructions that put his case in the best possible light and

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[117] Ibid., at 774.

[118] See, for example, Honesty v. Commonwealth, 81 Va. 288-302, where the court gave ten instructions requested by the defense and thirteen requested by the commonwealth.

[119] Montgomery v. Commonwealth, 98 Va. 840 (1900); Montgomery v. Commonwealth, 98 Va. 852 (1900); Montgomery v. Commonwealth, 99 Va. 833 (1901).

hoped that the jury would interpret the evidence accordingly.[120]

Montgomery was an exception even among cases in which the Supreme Court ordered new trials because of erroneous instructions. Most reversals were the result of misstatements of law and did not imply innocence. In Watson v. Commonwealth[121] the court ruled the trial judge's instructions improper because they did not state accurately the prosecution's responsibility to prove degree of homicide. The instructions in Brown v. Commonwealth[122] contained several errors, including the statement that a killing done in fear of bodily harm was not excusable unless an actual danger existed.[123] Also unacceptable was an instruction, given at the commonwealth's request, that a killing done with malice aforethought, but in sudden passion, was murder in the second degree. The Supreme Court noted that malice and passion were inconsistent motives, and that to suggest that one act could result from both confused "elementary principles of criminal law."[124]

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[120] In Mitchell v. Commonwealth, 74 Va. (33 Gratt.) 873-74, the court gave an instruction submitted by the defendant that attempted to steer the jury toward a verdict of manslaughter, but the jury returned one of first degree murder nevertheless.

[121] 85 Va. 867 (1889).

[122] 86 Va. 468-74.

[123] Ibid., at 468-69. The fear need only have been reasonable. In Field v. Commonwealth, 89 Va. 691, defense counsel erred in the opposite direction by submitting an instruction that the fear need only have been sincere. The Supreme Court upheld the judge's refusal to give the instruction.

[124] 86 Va. 473-74.

Muscoe v. Commonwealth,[125] decided in 1890, showed the importance that the Supreme Court placed on erroneous instructions. Muscoe was guilty of the murder of a white policeman, yet the Supreme Court refused even to discuss the evidence. It reversed solely on the ground of misdirection by the judge, who had stated that a policeman could make an arrest, without a warrant, "in pursuance of legal ordinances of the city." Because no such legal ordinance had supported the officer's action, the court ruled that the instruction was misleading.

In most cases, however, appeals on the ground of erroneous instruction were unsuccessful. Some challenges had little to recommend them. In Lawrence v. Commonwealth[126] the judge refused to give obviously wrong instructions concerning the law on statutory rape, while in Glover v. Commonwealth[127] the rejected instruction would have misled the jury into the false belief that they could not find the defendant guilty of attempted rape. Defense counsel in Briggs v. Commonwealth[128] could convince neither the trial judge nor the Supreme Court of the validity of his instruction that the previous good character of the defendant was sufficient to raise doubts about his guilt. In Mings v. Commonwealth[129] the Supreme Court ruled that the challenged instruction not only was

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[125] 86 Va. 443 (1890).

[126] 71 Va. (30 Gratt.) 853-55.

[127] 86 Va. 382, 383-84 (1889).

[128] 82 Va. 563.

[129] 85 Va. 639-641.

acceptable, but was more favorable than necessary to the defendant. Other appeals raised more competent, if not more successful, issues.[130]

The Supreme Court sometimes conceded that mistakes had been made but decided that they were not serious enough to merit reversal. In the second Muscoe[131] case Judge Drury Hinton acknowledged that one instruction was erroneous but did not reverse the conviction because "the record shows that it could not have prejudiced the prisoner." In another case, the court ruled that an irrelevant instruction was acceptable because it had not confused or misled the jury.[132] Similarly, the judge presiding at the trial of George Dock had rendered one of his instructions incomprehensible by omitting an important clause, but the Supreme Court held that the jury had probably understood its meaning anyway.[133]

Finally, even the simple act of returning the verdict could lead to an appeal. The jury trying Henry Randall for the statutory offense of malicious shooting with intent to maim, disfigure, disable, or kill, returned a verdict of guilty of "malicious shooting." The defendant argued that

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[130]Smith v. Commonwealth, 62 Va. (21 Gratt.) 812-13; Thornton v. Commonwealth, 65 Va. (24 Gratt.) 667-72; Page v. Commonwealth, 68 Va. (27 Gratt.) 965-68; Watson v. Commonwealth, 87 Va. 616-19; Gaines v. Commonwealth, 88 Va. 692-93.

[131]87 Va. 464.

[132]Reed v. Commonwealth, 98 Va. 828-29.

[133]Dock v. Commonwealth, 62 Va. (21 Gratt.) 912-13.

the verdict named no offense. So egregious was this error that the attorney general agreed it was sufficient to require reversal.[134] The failure of a verdict to specify a defendant by name, however, was not so serious. As President Moncure remarked in one such case, there was no doubt to whom the jury referred.[135]

President Keith, in a statement quoted earlier, referred to a "mere dry, barren technical error." But at what point did an error become meaningful? Keith's predecessor as president, Lunsford L. Lewis, expressed the more liberal view:

> Where any legal right has been denied . . ., or any of the safeguards thrown around him for his protection have been disregarded . . ., it is not for this court to say what might or might not have been the effect upon the case of the accused; . . . the law will intend prejudice, if it be necessary to enable him to exercise his right to have the judgment of the court reviewed in the appellate tribunal, and will hold it impossible in such a case to say that a fair and impartial trial has been had.[136]

Lewis's statement came in an opinion reversing the conviction of a black man, and the question arises whether black defendants received an equal measure of the justice advocated by Lewis. In the absence of a detailed survey of the treatment of white defendants, it is not possible to make comparisons by race. Even so, the cases involving black defendants yield

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[134] Randall v. Commonwealth, 65 Va. (24 Gratt.) 645-46.

[135] Thornton v. Commonwealth, 65 Va. (24 Gratt.) 665-66. For a similar ruling, see Hairston v. Commonwealth, 97 Va. 754, 756 (1899).

[136] Muscoe v. Commonwealth, 86 Va. 450.

valuable information.

The appeals that reached the Supreme Court illustrate the quality of defense given many black prisoners. Grounds for procedural appeal were numerous and varied, from the denial of major safeguards to minor technical errors. The appeals show that defense attorneys were competent and willing to summon the full panoply of procedural safeguards on behalf of their black clients. That attorneys first raised most issues at trial indicates attention to detail at all levels of the system. By carrying appeals to the Supreme Court, counsel demonstrated their belief that the court would protect the rights of all defendants.

The court did so. It reversed enough convictions to indicate a willingness to act on the merits of each case. Even blacks guilty of interracial rape and murder received new trials because of procedural mistakes. Not all appeals were successful, but egregious failures to enforce trial safeguards were few. In no case was the court's refusal to reverse obviously the consequence of the defendant's race. The appellate reports do not record how many cases of faulty indictments, prejudiced jurors, incompetent witnesses, and erroneous instructions never reached the Supreme Court. In those that did, the judges carefully protected the right of fair trial, even when the defendant was black.

XI. THE OFFICIAL RESPONSE TO LYNCHING

The numbers register clearly in the mind. Their very abstractness, bloodless and efficient, emphasizes the horror they represent. The individual accounts, stories of madness and death, too quickly blend into one another. Repetition breeds dullness, and the impact lessens. Thus, ironically, it is the cold numbers that restore a horrible perspective to the subject. From 1880 through 1897, sixty-four men and women were lynched in Virginia. Fifty-one were black.[1]

Perhaps the most disturbing aspect of lynching is the ease with which good men explained and defended it: The rationale was necessity--the necessity to control black conduct and the necessity to protect white women. In 1893 Governor P. W. McKinney traced the necessity to the evils of Reconstruction. He recalled,

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[1]"List of Lynchings in Virginia from 1800 to 1897 Inclusive," from the Governor's Message, in Virginia, House of Delegates, Journal, 1897-1898, p. 51. No definitive list of lynchings in the United States exists. The governor's list is probably most accurate for Virginia, but it supplies only the raw numbers. The Chicago Tribune throughout the 1880's and 1890's published in its annual review issue (usually January 1) a listing of all those lynched or legally executed in the nation the previous year. Also useful is National Association for the Advancement of Colored People, Thirty Years of Lynching in the United States, 1889-1918 (New York: NAACP, 1919), pp. 99-101. A complete statistical analysis of lynching is in James Elbert Cutler, Lynch-Law: An Investigation into the History of Lynching in the United States (New York: Longman's, Green, and Co., 1905), pp. 155-91.

> A large proportion of our population were suddenly made citizens, and were turned loose without their accustomed restraints, ignorant and reckless, uncultivated in their morals, regardless of the rights of others, with no respect for society and regardless of the law. It therefore became necessary that the people should protect themselves.[2]

McKinney's point, in what was actually a strong anti-lynching message, was that such self-protection was no longer necessary. Yet the incidence of lynching was steady throughout the 1880's, with a sudden rise at the end of the decade. In the nine years prior to 1889 there were twenty-six lynchings, an average of less than three per year. Eight, or 30 per cent, of the victims were white. In the next five years thirty-five men were lynched, only five of whom (14 per cent) were white. The year 1893, when McKinney delivered his message, was the worst of all. Twelve lynchings occurred, all of whose victims were black.[3] The native whites had been in control of the state's police and courts for more than twenty years.

The rationale of necessity had another aspect. Whenever a southern white talked about lynching, the subject of rape was not far behind. According to Richard L. Morton, the number of rapes by black men began to increase "at an alarming rate" beginning in 1888, thus accounting for the corres-

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[2]Senate, Journal, 1893-1894, p. 46.

[3]The statistics are from the governor's list previously cited. Richard L. Morton, The Negro in Virginia Politics, 1865-1902 (Charlottesville: University of Virginia Press, 1919), pp. 136-38, quotes the same set of figures, but with different emphasis.

ponding rise in lynchings.[4] The fear of interracial rape haunted the southern mind. For many, lynching was the only solution, a fit punishment and effective deterrent. As one Virginia newspaper editorialized,

> The lynching of the Negro James . . ., awful as it was, is another warning to that race that our white women will be protected--that death sure and swift will overtake the brutal and blackhearted man who commits this crime of crimes. When men go unmasked in the light of day and lynch a culprit from the officers' hands it is evident that they are determined to break up this foul crime and the people generally will say it is well when no doubt as to guilt exists. They do not wish the women subjected to being witnesses in court trials in such cases.[5]

Two things were wrong with the excuse that lynching was a punishment-deterrent for rape: It often followed crimes other than rape, and it was ineffective as a deterrent. Of the sixty-four victims lynched during the period 1880-1897, only twenty-six were accused of rape or attempted rape.[6] As one black scholar wrote,

> The Negro complains because of the insistent statement that lynching is resorted to only as a punishment for rape, when the plain facts of record show that not more than one case in four can

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[4]Morton, Negro in Virginia Politics, pp. 136-38. Charles E. Wynes effectively challenges Morton's interpretation in Race Relations in Virginia, 1870-1902 (Charlottesville: University of Virginia Press, 1961), p. 142.

[5]Augusta County Argus, July 19, 1898. For an excellent analysis of the supposed rape-lynching connection, see Kelly Miller, Race Adjustment: Essays on the Negro in America (2d. ed.; New York: Neale Publishing Company, 1909), pp. 68-86.

[6]The largest category was murder with twenty-seven. The remaining eleven victims were distributed among various categories, including being "a terror to his neighborhood." The figures are from the governor's list.

> plead the allegement of rape in extenuation. The causes run the whole gamut of offenses, from the most serious of crimes to the most trifling misdemeanors. Indeed, lynching is coming to be looked upon as the proper mode of punishment for any offense which the Negro commits against a white person; and yet every time a Negro is lynched or burned at the stake the race is held up to the world as responsible for the execrable crimes.[7]

Attentive whites also noticed the discrepancy between theory and fact. Governor Charles T. O'Ferrall told the General Assembly in 1895 that in only one-third of the state's lynchings in the previous fifteen years had the victims been charged with rape or attempted rape.[8] Morton, despite his emphasis on the rape-lynch connection, noted in 1918, "But there was only a short step between lynchings for rape and lynchings for murder--and for even lesser crimes."[9] As W. J. Cash has observed, the "rape complex" of the South was only tangentially related to the act of physical rape. To white southerners, any assertion or aggression by a black man was an assault on southern tradition, and thus on the woman who was its pride and its personification. Cash's insight identifies the psychology behind the southerner's approach to rape, but does not explain why intelligent men continually used rape to rationalize lynching when the facts so easily

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[7]Miller, Race Adjustment, p. 74.

[8]Senate, Journal, 1895-1896, p. 33. Two years later O'Ferrall reported again, "These [newspapers] assert that the lynchings have been almost exclusively for criminal assaults, or attempted assaults, or for 'the usual crime,' as they term it, which is far from being correct." House of Delegates, Journal, 1897-1898, p. 20.

[9]Morton, Negro in Virginia Politics, p. 136.

proved them wrong.[10]

The argument that lynching was a deterrent held no more validity. Even at that time, informed men questioned the efficacy of lynching. Governor McKinney reminded the legislature, "Lynching is an expedient which has been often appealed to as a remedy, but it has never proven a preventative."[11] Others saw that the excesses of lynching had become counter-productive. Thus, a Chicago physician challenged his Virginia colleague's defense of the "unwritten law" of the South. Referring to the recent burning of a black man, G. Frank Lydston argued, "To the negro population of the country, however, an impression was conveyed to the effect that a barbarous discrimination against one of their race had been exhibited. The justice of the punishment in that case will ever be obscured by the barbarity of its execution."[12]

In response to pleas that justice be allowed to take its course, lynching's defenders argued that the law too often

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[10]W. J. Cash, The Mind of the South (New York: Alfred A. Knopf, 1941), pp. 114-17. For a discussion of the psychology of lynching and mob violence, see Walter White, Rope and Faggot: A Biography of Judge Lynch (New York: Alfred A. Knopf, 1929), pp. 3-18. For an example of the peculiar blindness of intelligent southerners, see the section on rape in Thomas Nelson Page, The Negro: The Southerner's Problem (New York: Charles Scribner's Sons, 1904), pp. 86-119. Page acknowledged that charges of rape and attempted rape accounted for less than one-fourth of lynchings. Yet for the rest of his discussion he persisted in linking the two subjects.

[11]Senate, Journal, 1893-1894, p. 47.

[12]"Sexual Crimes Among the Southern Negroes Scientifically Considered--An Open Correspondence between Hunter McGuire, M.D., LL.D., of Richmond, Va., and G. Frank Lydston, M.D., of Chicago, Ill.," Virginia Medical Monthly, XX, No. 2 (1893), 121-22.

was unequal to the task. Many blamed lynching on the deliberate speed and thoroughness of legal procedure. An 1890 editorial in The Virginia Law Journal argued, "[P]ublic feeling will not wait for the slow and uncertain process of law. . . . But if the due execution of the law were more certain, there would be many less lynchings."[13] Yet the state's chief prosecutor disagreed. Attorney General R. Taylor Scott reported, "So far as I have knowledge and information, the trial and appellate courts have done their duty promptly and faithfully, without unnecessary delays."[14]

Such hunger for immediate conviction, even among those sworn to uphold the law, emphasizes an often overlooked concomitant of lynching: Even those who escape the noose suffer from the atmosphere it creates. As Charles Mangum has written,

> Nowhere is the spirit of mob violence so strong as it is in the courtroom or just outside while a person who is accused of some particularly heinous crime is being tried. The air is charged with an undercurrent of tension and there is a feeling of suspense, as if some exciting incident may occur at any moment. Under circumstances of this kind it is rather difficult for the jury or even the judge to escape being influenced by the feeling which permeates the throng.[15]

Sometimes the spirit of the mob presents itself in ways more substantial than mere atmosphere. During the 1889 robbery

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[13]"Murders, Legal Executions, Lynchings," The Virginia Law Journal, XIV (1890), 462 (Emphasis original).

[14]Virginia, Attorney-General, Annual Report, 1893, pp. 45-46 (Emphasis original).

[15]Charles S. Mangum, Jr., The Legal Status of the Negro (Chapel Hill: University of North Carolina Press, 1940), p. 274.

trial of a black man named Noah Finley, the jury was slow to come to a decision. A "party of citizens" informed the jury that if the verdict were not delivered by a specified time the defendant would be lynched.[16]

In other cases the effect of the lynching spirit was less direct. In 1894 Lawrence Spiller, accused of the murder of a white girl, faced a strong threat of lynching. Quick action by the authorities prevented violence. Yet the trial itself may have been an example of what Mangum and others call "judicial lynching." The time span from the crime to the sentence of death was sixty-four hours.[17] Another black man, Moses Christopher, was similarly indicted, tried, convicted, and sentenced to death in one day.[18] Also questionable was the conviction of William Muscoe, following a pretrial declaration by the mayor that Muscoe would surely hang.[19] An attempted lynching, during which he was shot and wounded while in his cell, no doubt influenced Elisha Johnson's guilty plea in Prince Edward County in 1896.[20] Certainly, the atmosphere was not

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[16]Richmond Planet, August 12, 1899.

[17]Augusta County Argus, May 1, 8, 1894.

[18]Ida B. Wells, A Red Record. Tabulated Statistics and Alleged Causes of Lynchings in the United States, 1892-1893-1894, reprinted in On Lynchings: Southern Horrors. A Red Record. Mob Rule in New Orleans (New York: Arno Press and New York Times, 1969), p. 69.

[19]Muscoe v. Commonwealth, 87 Va. 460, 461 (1891). Whatever its ethics, the mayor's action prevented a lynching. For similar attempts that were unsuccessful, see Richmond Planet, May 1, 1897, March 31, 1900.

[20]Richmond Planet, November 21, 1896: Herbert Clarence Bradshaw, History of Prince Edward County, Virginia (Richmond: Dietz Press, Incorporated, 1955), p. 588.

conducive to cool deliberation in any trial where troops were necessary to protect the defendants.

The cases of William H. Wilson and Henry Robinson demonstrated another way in which lynch mobs defeated procedural safeguards. Wilson, accused of the attempted rape of a white woman in Nottoway County, barely escaped one mob because of the forsight of the sheriff. A trial proceeded apace, with troops in the courtroom and rumors that some of the jurors had previously been members of the lynch mob. Even defense counsel needed military protection. Despite such circumstances, the conviction was not appealed. Wilson's attorney feared that a second trial would end in lynching.[21] Similarly, counsel for Henry Robinson withdrew a plea for a new trial after Robinson's conviction for attempted assault because he thought his client safer in the penitentiary than out of it.[22]

Such thinking was not groundless. In March, 1893, the Supreme Court ordered a new trial for a black man named Jesse Mitchell. A second trial on the rape charge again resulted in a verdict that the defendant hang. On September 13 the trial judge set aside the new verdict and ordered yet another trial, but the entry in the court record for September 15 notes, "The prisoner having departed this life it is ordered that this

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[21]Richmond Planet, February 16, 1901.

[22]Ibid., July 27, 1895. For the same reason counsel for Mary Barnes withdrew a petition already before the Supreme Court. Ibid., December 7, 1895; Richmond Dispatch, December 6, 1895. The case is discussed at length below.

case be struck from the docket." Mitchell had been lynched.[23]

In a society so imbued with the mob spirit it is not surprising, though seldom mentioned, that not all lynchers were white. After the arrest of Willis Thompson, a black man accused of the rape-murder of a black woman, he was met by "an infuriated mob of negroes, some declaring their purpose of hanging him." Thompson failed to retract a subsequent confession because he feared "he would be taken out of the jail by the negroes and hung."[24] When Edmund Wilkes killed a fellow black man, "[i]t was with some difficulty that the colored people in the vicinity of the crime could be induced to refrain from procuring a rope and hanging him on the spot."[25] When a white man named Richard Booker raped a young black girl in Amelia County, some local blacks wanted to lynch him.[26]

No black mob rushed Booker's cell, but in 1900 black men did lynch a white man. The only offense of which the victim, Brandt O'Grady, was guilty was being a Yankee tramp whose path crossed that of Walter Cotton. Cotton was a black escaped murderer who killed twice again before being captured in Greensville County. O'Grady also was placed in the Emporia jail under suspicion of having been involved in the two murders.

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[23]Mitchell v. Commonwealth, 89 Va. 826 (1893); Amelia County--Circuit Court Common Law Order Book, September, 1889-April, 1907, pp. 84, 86, 89, in Amelia County courthouse, Amelia; Richmond Planet, November 23, 1895.

[24]Thompson v. Commonwealth, in Supreme Court of Appeals, Records and Briefs, II, O.S., 386, 387.

[25]Richmond Dispatch, September 26, 1873.

[26]Richmond Planet, January 9, 1897.

Fearing a lynching, the sheriff and judge requested troops to protect the prisoners. Major Solomon Cutchins soon arrived with a militia company from Richmond. Cutchins suggested that he take the prisoners to Richmond, but local officials refused because such action would inflame the mob. In fact, Judge Goodwyn and Sheriff Lee now suggested that Cutchins and his men leave. The major, doubting the desire of the local citizens to aid Lee in case of attack, proceeded slowly. His prudence proved correct when later that night his men dispersed a mob at the jail.

The next morning, after Cutchins had wired for reinforcements on his own initiative, county officials ordered him to leave. He immediately sent another wire to Governor J. Hoge Tyler describing the situation and emphasizing that his withdrawal would almost certainly result in the lynching of the prisoners. Tyler responded that he had no authority to order the troops to remain against the wishes of county officials. Cutchins made one last attempt to convince the local citizens that he should remain, but failed. He assembled his men and left. Within a short time Cotton and O'Grady lay dead.

An interracial mob first hanged Cotton from a sturdy branch. The mob then went for O'Grady. Some leaders tried to stop them because his guilt was not certain. Indeed, Cotton had earlier affirmed O'Grady's innocence. But when the leaders emerged from the jail empty-handed, the black men outside "began to clamor for the blood of the white man. 'You have lynched the Negro,' they said, 'and we helped you do it; now give us

the white man.'" G. P. Barham, a mob leader despite being an attorney and former judge, told the blacks, "I don't think you ought to hang this man yet, but if you must have him, take him." The black men took O'Grady from jail and looped the rope over the same branch used earlier for Cotton. His body fell across that of his black fellow victim.[27]

A direct relationship existed between the presence of the troops and the actions of the mob. One newspaper reported before the lynching,

> While some of the most influential citizens of the community are heartily in favor of lynching, they are not willing to shed innocent blood in order to accomplish their purpose. They realized that the troops are determined, Major Cutchins having assured them that he will protect the prisoners as long as he has a man left standing. He has warned the leaders of the people that he will fire upon any mob that approaches the jail, and that he will shoot to kill. This has had the effect of dampening the zeal of the would-be lynchers, and it is thought . . . that the law will prevail.[28]

If Cutchins performed his duty well, the same cannot be said for Goodwyn and Lee. Their motives remain obscure, although the lives of both men were threatened. Perhaps Goodwyn believed the assurances of community leaders that reputable

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[27]The story of the Emporia lynchings is contained in several articles in Richmond Planet, March 31, 1900 (all quotes ibid.), and Virginia, Adjutant-General, Report, 1900, pp. 29-33. On Governor Tyler's response, see Thomas E. Gay, Jr., "The Life and Political Career of J. Hoge Tyler, Governor of Virginia, 1898-1902" (unpublished Ph.D. dissertation, University of Virginia, 1969), pp. 231-32. According to Gay, Tyler's action provoked the severest criticism of his governorship. Tyler explained the "terrible mishap" by charging that local authorities had misled him, but this defense ignored Cutchins' explicit warnings.

[28]Richmond Planet, March 31, 1900.

citizens would aid the sheriff. One report held that the judge dismissed the troops in return for a promise that the mob would restrain itself. At best, county officials were guilty of negligence. A strong case can be made for complicity. When the mob came to lynch the prisoners, it gained access to the jail when a deputy "accidently" dropped the keys in the road.

The vacillating response of Greensville officials raises an important aspect of lynchings that has received little study--the role played by the legal authorities in such situations. The officials had precedent for more exemplary behavior. Quick transportation of prisoners was often a successful deterrent to lynchings. In 1895 a black man named Kit Leftwich, accused of assaulting a white girl, was taken from Bristol before a mob could take action.[29] Augusta County officials in 1887 took two suspected barn-burners to Rockingham County to forestall a lynching.[30] The 1891 killing of a white man by a group of blacks led Augusta officials to rush them to Charlottesville barely ahead of a mob.[31] Similar action in Chesterfield County in 1901 kept Solomon Taylor out of the hands of lynchers.[32] Unfortunately, transporting prisoners was neither a fool-proof nor a permanent solution. Officials safely removed John Henry James from

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[29]Staunton Post, September 9, 1895.

[30][New Market] Shenandoah Valley, June 10, 1887.

[31]Augusta County Argus, September 29, 1891.

[32]Richmond Planet, May 11, 1898.

Charlottesville to Staunton for a time, but on the way back for trial he was taken off the train by a mob and lynched.[33]

Conscientious authorities took a variety of other actions to prevent lynchings. A show of determination was often sufficient, as demonstrated by the Mecklenburg constable who stood off a mob by drawing his pistol and declaring his intention to defend his black prisoner "to the last extremity."[34] The sheriff of Nottoway County showed foresight as well as dedication to duty. Recognizing the possible dangers while transporting a black alleged rapist, he hid with the prisoner in the train's restroom. Lynchers searched the train but did not find them.[35] Augusta County officials worked in concert to prevent the lynching of Lawrence Spiller. While the sheriff arranged for extra guards, the mayor of Staunton closed all establishments serving liquor.[36] More vigorous action prevented the lynching of Henry Robinson in Clarke County. Deputies had to fire their weapons before a crowd around the jail dispersed.[37]

Not all local officials acted with such rectitude or effectiveness. A number of lynchings occurred after the victims were already in custody. A lynch mob entered Petersburg jail

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[33] Ibid., July 16, 1898.

[34] Ibid., May 5, 1900.

[35] Ibid., February 16, 1901.

[36] Augusta County Argus, May 1, 1894.

[37] Ibid., July 2, 16, 1895; Staunton Post, July 9, 1895.

to seize Robert Bland, and William Smith was taken from the hands of the Wythe County sheriff.[38] When lynchers in 1897 murdered Joseph McCoy, the alleged rapist of a young white girl, Alexandria police evidently made a sincere but unsuccessful effort to protect him.[39] Despite the police effort, Governor Charles T. O'Ferrall was incensed that the lynching had succeeded. He publicly blamed the city's mayor for refusing to call for reinforcements. The governor reported to the General Assembly,

> In the city of Alexandria, I regret to say, that, in my opinion, there was dereliction of duty somewhere. . . . [The mayor] took no step to protect the prisoner, notwithstanding the excited condition of the city, of which he had full notice. . . . [The prisoner] was in the custody of the law officers, safely confined, and yet a mob was permitted in a city of 18,000 population, with a strong military force at the command of the Mayor, to bid defiance to the law and trample down the authority of the Commonwealth. There can be no possible excuse offered for the success of the mob.[40]

O'Ferrall's belief that a timely call for troops would have averted the tragedy was well-founded. Major Cutchins' behavior during the Emporia episode was only one example of the integrity with which militia officers carried out their duties in such situations. O'Ferrall, perhaps the most dedicated of all anti-lynching officials in Virginia, felt that the absence of lynchings during the first two years of his governorship was due to "the utmost vigilance and free use of

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[38]Augusta County Argus, December 3, 1889, July 24, 1888.

[39]Richmond Planet, May 1, 1897.

[40]House of Delegates, Journal, 1897-1898, p. 19.

the military."[41] Throughout this period sheriffs anxious to protect their prisoners requested troops whenever necessary. A mere show of force did not always suffice. At times troops had to indicate a readiness to use their weapons before they convinced mobs to keep their distance. Responding to a summons from the sheriff of Norfolk in September, 1888, Captain Binford and his men cleared a crowd off the streets near the jail by advancing with fixed bayonets.[42] The twenty-seven men under Captain Lassiter also used fixed bayonets to escort the sheriff of Mecklenburg and his two black prisoners to trial in 1890.[43] A decade later troops returned to Mecklenburg to protect the life of Stephen Baptist, a black man charged with the murder of a white. Sergeant W. B. Johnson and his fifteen men escorted the prisoner as the court traveled around the county to visit various sites relevant to the trial. At each stop were groups of men mumbling threats, but the sergeant and the county sheriff declared that they would

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[41]Charles T. O'Ferrall, Forty Years of Active Service (New York: Neale Publishing Company, 1904), p. 235. There is disagreement about the number of lynchings in 1894 and 1895. O'Ferrall's claim reflects the governor's list cited above. The Chicago Tribune, January 1, 1895, January 1, 1896, listed seven Virginia lynchings for 1894 and three for 1895. Thirty Years of Lynching, p. 100, lists six for 1894 and three for 1895.

[42]Adjutant-General, Report, 1888, pp. 60-62.

[43]Adjutant-General, Report, 1890, pp. 60-61. One of the prisoners, John Phillips, was soon executed for murder, remaining under the protection of troops until the end. Ibid., pp. 63-64; Chicago Tribune, January 1, 1891. The second man, John Irving, charged with being an accessory, needed troops at his trial also. Adjutant-General, Report, 1891, p. 7.

use their weapons if necessary. There was no violence.[44]

Would white troops have fired on fellow white Virginians solely to protect the life of a black criminal? The dedication to duty demonstrated by the soldiers in the previous examples leads to the belief that they would have fulfilled their duty to the utmost. Given the nature of nineteenth century Virginia society, such a possibility may seem unlikely. But consider the events that took place in Roanoke on September 20, 1893.[45]

In the late morning word spread through the city that a black man had savagely beaten a white woman. Thomas Smith, a young man matching the assailant's description, was arrested by detective W. G. Baldwin. A mob had already started to gather. Baldwin placed Smith behind him on his horse and raced through the crowd, revolver in hand. They reached the jail safely, but it was soon apparent that even that place was in danger of falling to the mob. Mayor H. S. Trout summoned Captain John Bird and his Roanoke militia company to protect the prisoner.

At 4:30 Bird and sixteen men arrived at the jail and

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[44]Adjutant-Genera, Report, 1900, pp. 33-35.

[45]The most complete account of the incident is that of the Roanoke Times, September 21-24, 26, 27, 1893. The issue of the 27th contains a reprint of all the previous articles. The official military version is Acting Adjutant-General, Report, 1893, pp. 10-11, 61-65. The only secondary study is John Anderson Waits, "Roanoke's Tragedy: The Lynch Riot of 1893" (unpublished M.A. thesis, University of Virginia, 1972), especially helpful for its background information. So confused and at times contradictory are the sources that inevitably some discrepancies of fact exist between this narrative and that of Waits.

cleared the street and sidewalk in front of the building. The early evening passed without incident except for the arrival of more troops. By 7:30 both the size of the crowd and the urgency of its threats had increased to the point where Lt. Col. Wilbur S. Pole, Bird's superior, telegraphed the nearby Salem militia company to come at once. When he returned to the jail, Pole saw that the mob had broken through the guardlines and that Bird had withdrawn his troops to the building itself. Estimates of the size of the mob ranged from 1,500 to 5,000 people. Appeals throughout the day by the mayor, commonwealth's attorney, and other officials did little to dampen the lynching spirit. One attempt to force entry into the jail failed only because of the bayonets of the militiamen.

The mob contained a substantial number of men intent on taking Smith from jail by force. They began to batter down the door. Rocks crashed through the windows. Bird shouted warnings that his men would shoot if necessary. Another rock crashed in, someone in the crowd shot his pistol, and Bird gave the order to fire. The mob immediately returned the fire. When the exchange was over, eight members of the mob lay dead or dying and more than twenty were wounded. None of the troops or police was wounded, but Mayor Trout, who had been standing with the militia, was shot in the foot.[46]

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[46]Controversy existed over almost everything that occurred during this episode. Each witness had a different version. Waits, "Roanoke's Tragedy," pp. 35-38, gives the sequence of events surrounding the shooting in more detail.

The shooting may have shocked the lynchers, but it did not bring them to their senses. The leaders repaired to a hardware store, where they commandeered weapons and ammunition for the mob. After receiving emergency treatment Mayor Trout left town, barely ahead of the mob. Community leaders urged Bird to withdraw his men before all were killed by the frenzied citizens. The captain refused, citing his orders to protect the prisoner in the jail. Bird's response was but one of many acts of heroism and integrity by Roanoke officials that day. Unfortunately for Thomas Smith, it was also the last.

The violence did nothing to dampen the passions of the mob, but it stunned city officials. They wanted no more citizens killed. Before leaving town, the mayor ordered that Smith be removed from the jail. Trout probably thought, or hoped, that the prisoner could be taken to Salem for better security. At the least, removing him from the jail might defuse a potentially explosive situation. Three policemen took Smith from his cell and, amid the confusion, spirited him away through a rear door. When Bird felt that the escape party had had sufficient time to reach a place of safety, he dismissed his men with a warning to shed their uniforms and go home quietly.

The tragic irony of the Roanoke episode is that, despite the courage and dedication of Bird and his men, despite Trout's willingness to suffer the enmity of his constituents to uphold his oath of office, despite the deaths of eight men and

the wounding of a score of others, the escape party never reached a place of permanent safety. The most extreme effort by Virginia officials during the postwar era to protect the life of a black prisoner was, in the end, unsuccessful. As the Roanoke Times reported,

> When the first bright and peaceful rays of the glorious autumn sun fell on the quiet city, hushed in sleep Thursday morning the mutilated body of the negro fiend, Thomas Smith, was dangling at the end of a hempen rope from the hickory three [sic] near the corner of Franklin road and Ninth avenue n.w. silent and alone.[47]

The police had escaped with the prisoner but for some reason, perhaps at the order of the police chief, they tried to return him to the jail. A party of lynchers took Smith from them at five in the morning.[48] A quickly convened coroner's jury found that the deed had been done "by persons unknown to this jury." After Smith's death popular wrath turned against city officials and the militia. A "citizens' committee" demanded that Trout, Chief of Police J. F. Terry, and two other officers be removed from office. The coroner's jury, having disposed of Smith's murder with little fuss, reconvened for a more thorough study of the shooting of the white men by the soldiers. The inquest lasted several days, and many witnesses reflected local hostility toward their militiamen neighbors. Even Col. Pole, although defending the shooting, remarked, "[I]t was a great pity we should lose our

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[47] Roanoke Times, September 22, 27 (reprint), 1893.

[48] Ibid., December 12, 1893; Waits, "Roanoke's Tragedy," p. 42. Whether the officers offered any resistance, or were in league with the mob, is uncertain.

citizens on account of a worthless negro."[49] The jury's verdict was that the grand jury should investigate the entire episode.

When the special hustings court grand jury convened a week later, the emphasis shifted dramatically. Judge John W. Woods was in no mood to concentrate blame on the soldiers and overlook the actions of the mob. On the night of the shooting he had attempted to disperse the mob but had been shouted down. In the quiet of the courtroom he made himself heard. He angrily charged the grand jury,

> Such, so-called, administration of justice has no place in our Virginia code of laws, should have none and must not be tolerated. . . . It is a withering, blighting curse wherever engaged in, and the time will never come when the city of Roanoke can wipe away the disgrace it has heaped upon her. [The lawless element] creates and fosters an utter disregard for all law. . . . It is a question of power pure and simple. Shall the law put down the element or the element override the law?[50]

Unlike many who were indignant about the Roanoke incident, Woods did not forget that the mob's violent defiance of legal authority was only part of the outrage. He said,

> That a man to whom the constitution of the land had guaranteed the right of trial by jury has been hanged by a very small body of devil inspired men, who have seen fit to take the law into their own hands, and that his body was afterward mutilated and burned in an inhuman manner, must be admitted by all. That he was a black man cuts no figure in the case. His relation to the Government has been fixed by law, and his citizenship moulded into the very constitution of our country. He stands forth as a fully adopted citizen, and as such is entitled to the protection of that law, which every legalized

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[49] Roanoke Times, September 24, 27, 1893.

[50] Ibid., October 3, 1893.

voter has sworn to maintain and every good citizen will strive to uphold.[51]

The grand jury did not disappoint the judge. It returned thirteen misdemeanor and six felony indictments against sixteen men. Most of the misdemeanor indictments were for participating in the riot, about which the jury said, "Notwithstanding the claim that only innocent citizens were shot and killed, the evidence shows beyond doubt that a portion of the killed and wounded were taking active part in the attack on the jail." Three men were indicted for hanging Smith. Chief Terry and police Sgt. H. H. Griffin were indicted as accessories before the crime in Smith's lynching. The jury also censured those who took charge after the mayor was wounded for their inability to protect Smith from the mob.[52]

The petit juries that tried the accused did not share Woods's perception of the seriousness of the crimes. Although witnesses testified that James G. Richardson had led the attack on the jail and urged the mob to kill the soldiers, conviction brought a sentence of only one month in jail and $100 fine. The two others convicted of participating in the riot received penalties of one day and one dollar. In a later

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[51] Ibid. Compare McKinney's report to the General Assembly, Senate, Journal, 1893-1894, pp. 45-46, a strong defense of the troops and attack on mob violence, but with little reference to the fact that a black man's rights had been fatally abrogated. This impression is confirmed by Bernice Bryant Zuckerman, "Philip Watkins McKinney, Governor of Virginia, 1890-1894" (unpublished M.A. thesis, University of Virginia, 1967): "[McKinney's] concern over the Roanoke riot was not so much that the Negro was lynched but that the mob had defied the military authority and anarchy prevailed." P. 67.

[52] Roanoke Times, October 24, November 15, 1893.

series of trials a group of men convicted of burning Smith's body received sentences of one year each in jail and fines. A jury acquitted Edward Page, who before trial had boasted of his part in the lynching. The panel trying Terry and Griffin acquitted the officers without leaving their seats.[53]

Trout did not accept the jury's verdict. His risking of life and political career, plus a bullet in the foot, had gone for naught as the chief allowed Smith to be lynched. The mayor charged Terry with conduct unbecoming an officer for his failure to take proper care of the prisoner and for aiding and abetting the lynchers. Griffin and Terry told conflicting stories about the chief's orders regarding Smith's removal from the jail. Terry said that he had thought it safer to bring the prisoner back. He denied telling others Smith's whereabouts. After hearing the evidence Trout formally dismissed Terry from his position.[54]

The failure of the Roanoke juries to convict Smith's lynchers was no surprise. That they were indicted at all was unusual. Even for those who faced trial, acquittal was a foregone conclusion. When a mob lynched five blacks for robbery in Tazewell County, those involved were indicted but not convicted.[55] In 1897 a mob of fourteen men, including one

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[53]Ibid., November 16, 18, 21-23, 26, 1893; Augusta County Argus, January 23, 1894; Richmond Dispatch, January 16, 1894. Woods expressed displeasure over the light sentences given to some of those convicted. Roanoke Times, December 2, 1893.

[54]Roanoke Times, December 12, 13, 1893.

[55]The story appears in Richmond Planet, August 8, 1896.

black, tried to lynch William Clements for allegedly beating a white man named Rosser. Although wounded, Clements managed to escape the mob. County officials tried Rosser for attempted lynching but, despite a sincere effort by the commonwealth's attorney, he was acquitted.[56]

Just as lynching was no deterrent to rape, state laws were no deterrent to mob violence. Virginia had no specific statutes against lynching but depended on the sanctions against murder and assault. The 1890's saw a movement in the South to combat lynching with new legislation,[57] and Governor O'Ferrall tried to lead Virginia in the same direction. In 1895 he recommended to the General Assembly a group of anti-lynching provisions intended to force local officials to stop mobs. The legislation provided that local jurisdictions would be subject to fines for lynchings within their borders, in addition to being liable for costs incurred in calling out the militia. O'Ferrall also wanted officers who gave up prisoners to be subject to summary suspension and jury investigation. A prisoner or his heirs would have a right of action for damages against the officer. In case of jury trial for removal or

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The lynching supposedly took place in 1892, but none of the sources lists five blacks lynched for robbery in Tazewell in that year.

[56]Clements soon was pardoned by the governor and later brought suit against Rosser in federal court for malicious prosecution. Ibid., March 30, May 29, September 18, 1897; January 15, 1898. The Chicago Tribune, January 1, 1898, wrongly included Clements in its list of lynching victims.

[57]Cutler, Lynch-Law, pp. 230-46; White, Rope and Faggot, pp. 199-207; Mangum, Legal Status of the Negro, pp. 290-307.

civil suit for damages, the burden of proof would be on the officer.[58]

When the legislature refused to enact his proposals, O'Ferrall tried again. In 1897 he submitted the same program, without the provision for civil changes. This time he warned the lawmakers,

> [T]he spirit of lynching will never be fully eradicated in any State until there are stringent laws against it, so enacted as to be enforceable, and then behind the law stands a warm, living, sustaining public sentiment, and this sentiment will never assert itself until the people fully realize that "where law ends, tyranny begins," and the public press no longer caters to the spirit and condones the crime of lynching as some of the papers in Virginia, be it said to their shame, have done recently.[59]

Again, the governor's pleas aroused no legislative action.

Considering the popular excitement engendered by lynching, and the constant debate over its continuing existence, the Virginia Supreme Court had little to say about it. Perhaps the only reference to the subject in the official reports came in President Keith's dissenting opinion in Jones v. Commonwealth, in which he assailed his colleagues for reversing a conviction on minor technical grounds. Keith argued, "Such judgments . . . impair and undermine confidence in the law as a rational rule of conduct, and tend to encourage resort to tumultuary and violent methods for the punishment of crime which all deplore as a blot upon our

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[58]Senate, Journal, 1895-1896, pp. 33-34. O'Ferrall's message to the General Assembly on lynching, pp. 32-34, was an eloquent appeal against mob violence.

[59]House of Delegates, Journal, 1897-1898, p. 20.

civilization."[60] Although the judges did not discuss lynching in their opinions, they had due notice of its existence. In several cases defense counsel alluded to the subject in briefs and petitions, usually to support arguments alleging lack of fair trial or to explain damaging confessions.[61] In the case of a black man convicted of interracial rape, counsel cited lynching as an example of the inability of white men to consider such a charge objectively.[62]

II

The lack of mention of lynching in the opinions serves as a reminder that a published report does not always tell the full story of a case. In one instance the court faced squarely the issue of lynching, in a case replete with mystery and drama. Yet the entire story was hidden behind bland and technical opinions. In its details, the case of the Lunenburg murderers is one of the strangest in the annals of Virginia legal history, yet it also serves as an excellent example of the treatment accorded black defendants in the Virginia legal system during the years 1870-1902. As well as

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[60] 100 Va. 842, 859 (1902).

[61] Thompson v. Commonwealth, Records and Briefs, II, O.S., 386, 387; Muscoe v. Commonwealth, Records and Briefs, LII, O.S., 33, 34; Hite v. Commonwealth, Records and Briefs, LXXXV, O.S., 559, 560 (white defendant convicted of the murder of a black man).

[62] Hairston v. Commonwealth, Records and Briefs, XC, O.S., 42, 45.

any other case, it demonstrated the strengths and weaknesses of that system and of the men who executed it.

On June 14, 1895, in the rural southside county of Lunenburg, Mrs. Lucy Pollard was brutally murdered and more than $800 stolen from her home. Authorities shortly arrested four blacks and charged them with the crime. The prisoners were immediately taken to Petersburg as a precaution against lynching. The sheriff, judge, and commonwealth's attorney requested state assistance, and Governor O'Ferrall responded with a unit of militia from Richmond. On July 12 the prisoners returned for trial.[63]

Three of the defendants were county women. Mary Abernathy was a large woman weighing 250 pounds, the mother of nine live children and pregnant again. She bore a good reputation among both whites and blacks in the area. Pokey Barnes was a twenty-four year old widow, as slim as Abernathy was fat, the mother of one. Mary Barnes, accused of being an accessory, was Pokey's mother. The fourth suspect was William Henry Marable, known as Solomon. He was twenty-two years old, a native of North Carolina working in the Lunenburg area. He had a wife and two children. The women were arrested the day after the crime but discharged after a search of their homes and clothing produced no evidence of guilt. They were rearrested after Marable's statement implicating them in the murder and robbery.[64]

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[63]Attorney-General, Annual Report, 1895, p. 5; Adjutant-General, Report, 1895, pp. 64-65; Senate, Journal, 1895-1896, p. 119; Richmond Planet, July 20, 1895.

[64]Richmond Planet, July 27, August 3, 1895; Richmond Dispatch, September 13, 1895.

Marable faced trial first, without counsel, before a jury of ten whites and two blacks. He declared himself innocent of the murder, charging that Pokey Barnes had hit the deceased with a stick and that Mary Abernathy had wielded the fatal axe. The women had then taken the money from the house and given him $40. Several other witnesses also testified, but the truly incriminating evidence was Marable's admission that he had been with the women when they committed the murder and his possession of the $40. The jury needed only nine minutes to find a verdict of murder in the first degree.[65]

Mary Abernathy was tried without counsel by a jury of eight whites and four blacks. Marable testified that he and the women had conspired a week before the crime to rob the victim. He held her while the others ransacked the house for money. When they came out he let her go, but Abernathy killed her with an axe. The defendant denied any part in the crime, but after some indecision the jury found her guilty of first degree murder.[66]

The jury trying Pokey Barnes consisted of one black man and eleven whites. Marable again was the principal witness for the prosecution. Barnes cross-examined him and caught several discrepancies in his testimony. Abernathy testified that she had not seen the defendant for two weeks prior to the murder. Other witnesses were introduced to prove the defendant's whereabouts on the day of the murder. Barnes

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[65]Richmond Planet, July 20, 1895.

[66]Ibid.

herself took the stand to deny any involvement in the crime.

After Barnes's testimony, prosecutor George S. Bernard informed Judge George C. Orgain that earlier in the day Marable had told him a story completely different from his previous testimony. Bernard requested that the judge recall Marable on behalf of the defendant, and Orgain did so. Marable now claimed that the murder had been committed in his presence, not by the women, but by a white man who had forced Marable to accompany him to the Pollard farm at gunpoint. At the house Marable held the woman while the man killed her with an axe. The man then entered the house, took the money, and gave Marable $40 with a warning never to say anything about the crime.

Bernard questioned Marable closely throughout his statement. Finally, after reminding him of his earlier testimony, the prosecutor asked Marable which of the stories was true. Marable said nothing until the judge ordered him to answer. Slowly, he replied that the women had committed the crime. In response to another question, Marable admitted that someone had told him that if he implicated a white man and exculpated the women he would be freed. He refused, however, to identify the person who had talked to him. A member of the jury then told the judge that he had noticed someone in the audience prompting Marable. Orgain cleared the courtroom, but Marable stuck by his story that the women were guilty.

In his closing argument Bernard admitted that his star witness was hardly a paragon of truth, but he did not concede

that this in any way damaged the effect of Marable's testimony. Despite the lack of defense counsel and the general hostility toward the defendant, the jury at first could not reach a verdict. Finally, though, it convicted Pokey Barnes of first degree murder.[67]

The final trial was that of Mary Barnes. Marable gave the version of his story implicating the women, and Orgain cautioned the jury that the witness had told different stories at different times. Several defense witnesses, including Mr. Pollard, rebutted details of Marable's testimony. Although the prosecution asked for a conviction of first degree murder, the jury returned a verdict of murder in the second degree and a sentence of ten years in the state penitentiary. Orgain refused motions for new trial by each of the defendants. He sentenced Mary Barnes to serve ten years in prison and the others to hang on September 20.[68]

Troops were on guard throughout the trials to prevent a lynching. Major J. H. Derbyshire later reported,

> From all the facts and circumstances within my knowledge while in command of the troops at Lunenburg Court-house, I was . . . under the impression that the prisoners were in great danger of lynching during the entire time, in spite of the presence of the military, and that without their presence the lynching of all of them would have been a foregone conclusion. And further, that threats were openly made that in the event of the acquittal of any of them . . . they would certainly have been lynched had they been without the protection of the troops.[69]

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[67] Ibid., July 27, 1895.

[68] Ibid.

[69] Senate, Journal, 1895-1896, p. 119.

Immediately after the last trial the militia brought the prisoners to Richmond, where they were placed in the city jail for safety. Mary Barnes was placed in the state penitentiary.[70]

Once the defendants were safely in Richmond, various parties began working to reverse the obvious injustice of the trials. Planet editor John Mitchell, Jr., approached George D. Wise to serve as counsel for the women. Wise "was highly indignant over the alleged trial and declared their treatment to be an outrage."[71] He now undertook the case in association with Henry W. Flournoy. The two lacked neither ability nor prestige. Wise was a seven-term United States congressman and former Richmond commonwealth's attorney. Flournoy was former secretary of the commonwealth and had twice been judge of the Danville Corporation Court.[72] A third attorney, A. B. Guigon,[73] soon joined the legal team, and Mitchell began a fund drive to pay the costs of the defense.

Defense efforts received support from an unexpected source. Some doubts already existed in the capital about the women's guilt, but this feeling grew stronger when the Richmond troops returned from Lunenburg and aired their opinion.

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[70]Ibid.; Richmond Planet, July 27, 1895; Adjutant-General, Report, 1895, pp. 66-67.

[71]Richmond Planet, July 27, 1895.

[72]Lyon Gardiner Tyler, ed., Encyclopedia of Virginia Biography (3 vols.; New York: Lewis Historical Publishing Company, 1915), III, 133, 264.

[73]Guigon, son of a deceased Richmond judge, served as a member of Richmond City Council and School Board and was a captain in the state militia. Lyon G. Tyler, ed., Men of Mark in Virginia (5 vols.; Washington, D. C.: Men of Mark Publishing Company, 1909), V, 189-194.

According to the Daily Times,

> Capt. Cunningham, and others who heard all of the evidence, are of the opinion that the evidence was insufficient to convict the women of the crime. While the officers in command are careful in their criticisms of the court and jury they are satisfied that the desire of the people for vengeance, and the demand of public opinion caused the conviction of the Negro women, and that if they had been represented by counsel they would have been released.[74]

Marable's constant changing of stories, plus the prompting incident during the Pokey Barnes trial, led to "the belief in the minds of the Richmond military that Marable was under some intimidating influence, and that the white man's complicity in the deed was being covered up by citizens of the county."

In fact, as soon as he had left Lunenburg, Marable switched versions again. He returned to the story of the white man, whom he identified as David J. Thompson. Thompson had committed the crime, he reasserted. The white man forced him to go along and grab Mrs. Pollard. After the murder Thompson asked him who lived nearby, and Marable answered by naming Abernathy and the Barneses. Thompson then told Marable that if caught he should say that the women had committed the crime. Marable identified the man who had winked at him in the courtroom as Lucius Pettus, Thompson's relative and a leader of the mob. Marable stuck to this last version,

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[74]Richmond Daily Times, July 23, 1895, reprinted in Richmond Planet, July 27, 1895. Cunningham did more than spread the word. Joe Barnes, Mary's husband, left Lunenburg with the troops because he feared for his life in the county. "On arrival in Richmond the old darky was cared for by Captain Cunningham in his own residence." Ibid.

exonerating the three women, for the rest of his short life.[75]

News accounts of the trials and of the troops' comments aroused great interest. While the defense team worked up its case, the Daily Times sent its own investigator, attorney William M. Justis, to Lunenburg to examine the facts. Justis soon decided that the women's convictions were unjust, and he said so without equivocation. His aggressive reporting no doubt convinced many Richmond whites that the quality of Lunenburg justice was less than exemplary. His detailed study of the evidence challenged Marable's testimony and other portions of the commonwealth's case.[76]

Justis elicited Pollard's opinion that a white man was behind the crime. Pollard refused to be specific, but he did not dispute Marable's claim that the man involved was David J. Thompson. Pollard was on bad terms with both Thompson and Lucius Pettus, yet Pettus had been a leader of the mob wishing to lynch the defendants. As the Planet suggested, "The persistency of the mob was, too, something remarkable. It indicated that the real murderer wanted some one hanged in order to stop the pursuit of himself."[77] Other unanswered questions included the location of the money, which had not been recovered, and the absence from the scene of the stick allegedly used by Pokey Barnes to beat the victim.

In addition to the doubtful sufficiency of the evidence,

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[75]Richmond Planet, July 27, August 10, 1895.

[76]Ibid., August 10, 24, 1895.

[77]Ibid., August 3, 1895.

Justis and others also protested the proceedings at trial. All critics challenged the morality, if not the legality, of sentencing defendants to death without the aid of counsel. The Planet charged that some jurors had served in more than one of the trials. That sixteen of the first nineteen veniremen called were found acceptable was remarkable in a case in which local hostility to the defendants was so great that military protection was necessary. One of the jurors in the Pokey Barnes trial announced that he had voted for a guilty verdict due solely to "the excitement of the occasion to go with the majority," and stated that the other jurors had been abusive of any one or thing tending to prevent conviction.[78]

Most questionable were the events at the conclusion of the Mary Abernathy trial, as related by one of the jurors. After all the evidence had been presented, but before closing argument, the jury discussed the case over dinner and decided that the evidence was not sufficient for conviction. Upon returning to the courtroom they asked that Marable be questioned again. When the prosecution realized that the jurors were not ready to convict, it sought and received an overnight adjournment. The next day the commonwealth presented yet another witness who testified about previously undiscussed facts. The Times recognized that Orgain's rulings gave the prosecution two extra chances to persuade the jury after it

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[78] Ibid., August 3, 17, 24, 1895.

had once, and then twice, failed to do so. "If our laws fail to afford any means by which this flagrant abuse of judicial power can be corrected and set aside," argued the Times, "then our laws may be made the instrument for working the most horrible injustice that can shock the sensibilities of man."[79]

On September 12, S. L. Coleman, judge of the circuit court, held a hearing on the petition of the women for a writ of error and supersedeas. Although such a petition was usually ex parte, presented and heard without the adverse presence of the commonwealth, Lunenburg Commonwealth's Attorney W. E. Neblett appeared with associate counsel to argue against the application. This appearance startled the defense lawyers, and when Amelia Commonwealth's Attorney Robert G. Southhall asked for a continuance to study the record Wise erupted in anger. He thundered,

> What a farce? The Commonwealth's Attorney . . . prosecuted an innocent woman and gave her an ex-parte trial. When he had her in Lunenburg Co., he gave her no fair trial. He comes here when these women have but eight days to live and asks for a continuance to refresh his memory. If he is not prepared, who is? He knows all about the case.
>
> This woman, she asked for a privilege guaranteed by the constitution, and was denied it, and he comes here talking about a record.[80]

The defense argument balanced precise legal challenges with general references to the injustice of the convictions. Time and again Wise, Flournoy, and Guigon emphasized the

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[79]Richmond Times, August 20, 1895, reprinted in Richmond Planet, August 24, 1895.

[80]Richmond Planet, September 14, 1895.

lynching atmosphere of the trial. Although Coleman ruled that he could not consider the various affidavits presented by the defense, such as Maj. Derbyshire's report of the trial, he did at first allow them to be read. Wise and Flournoy made indirect but unflattering allusions to the honor and integrity of officials who would allow women to be condemned to death under such conditions. They expressed their disbelief at the conviction of anyone on the testimony of Marable, whom the prosecution itself had called "the prince of liars."

The defense faced a major stumbling block. Due to the absence of defense counsel at trial, no exceptions had been taken to irregularities and therefore none appeared on the record. Flournoy made as strong a plea as possible under the circumstances, arguing that the record showed enough irregularities even without exceptions having been taken. He contended that the record failed to show that the jurymen were free from exception, and that during adjournments the jury had been put in the custody of the sheriff with proper instructions to that officer. The record also lacked a declaration that, though indicted jointly, the defendants had asked to be tried separately. Finally, the defense charged that Orgain had given incomplete instructions to the jury.

This final charge demanded notice not so much for the law involved but for the manner in which Wise argued it. The Virginia bar was a gentleman's club characterized by restraint in court. Yet Wise charged not only that Orgain had given incomplete instructions, but that he had done so

purposely to mislead the jury. Standing in open court Wise declared, "I will show you that this [the omitted section of the instructions] was left out for a purpose. The jury was in doubt and it was done to make conviction sure."[81]

Wise's extraordinary statement was but one example of the power and emotion with which the defense attorneys argued the case. They were deeply committed to their cause. Wise, especially, was incensed that the law could be used to condemn innocent women so unjustly. He heaped scorn on Orgain, the trial prosecutors, and the commonwealth's counsel at the current hearing. He invoked the Crucifixion to damn the spirit of mob violence. And he challenged Judge Coleman,

> I beg your Honor not in the name of this commonwealth, but in the name of humanity. I ask you in the name of that God before whom we are to appear. I beg you to search that record and render a decision in keeping with justice and humanity.[82]

Flournoy's rhetoric was less emotional but no less powerful. He declared his personal commitment, "I stand here between these poor helpless creatures and the gallows. If I do not discharge my duty with all of the power of my ability and they meet death on the gallows it will make me miserable until my death." Flournoy also saw the case in the broadest social and legal perspective. He declared,

> We know that there is a growing and perplexing question in this country. It is the Negro question. One way to settle it, the best and the right way to settle it is for the white people to do justice

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[81] Ibid.

[82] Ibid.

> to them even though the heavens fall. Standing in the temple of justice, I do not fear to say that I am in favor of the same rights and privileges before the law as is accorded the white man. . . . Let justice be done though the heavens fall.[83]

Judge Coleman was not one to test the stability of the firmament. Throughout the hearing he asked for precedent, demonstrating an obvious reluctance to break legal ground. After the final argument he announced, "I had hoped that I could find some ground on which I could grant the writ, and I am sure that were I to grant it I would satisfy the greater majority of the people, but I can't do so without uprooting the whole system of criminal practice in this State."[84] In effect, Coleman passed the case to the Supreme Court. Wise and his colleagues made immediate plans to carry the case to the high court.

The court accepted the petitions on the sixteenth without hearing any argument, and the next day granted the writs of error and supersedeas to the women.[85] The court agreed to hear arguments on the case at the upcoming November term. According to the Richmond Dispatch, "The people [of Lunenburg] feel very much aggrieved at this action, while some of them

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[83] Ibid.

[84] Richmond Dispatch, September 13, 1895. Coleman later told defense counsel that he personally thought the women should receive new trials, but reiterated his belief that it was not within the power of a circuit court to authorize such a departure from precedent. Ibid., September 14, 1895.

[85] Ibid., September 15, 17, 18, 1895; Richmond Planet, September 21, 1895.

went so far as to denounce the court."[86] Sheriff M. C. Cardoza had already arrived in Richmond to escort the prisoners back to Lunenburg for execution when he learned of the court's action.

Cardoza soon had a second surprise. While Mitchell and the others were fighting on behalf of the women, another man had been waging a lonely battle to save Marable. Fr. L. J. Welbers, a white Catholic priest who had become Marable's spiritual advisor, had failed to interest O'Ferrall in granting a reprieve. With the women safe for the moment, Mitchell joined Welbers in pleading for at least a short delay in the execution. The governor was reluctant to act because of Marable's obvious guilt. Mitchell argued that, with the strong possibility of retrial for the women, it was imperative that the most important witness remain alive. On the eighteenth, less than forty-eight hours before the scheduled execution, O'Ferrall respited Marable's hanging until October 22.[87] Welbers then procured the services of attorney William L. Royall to file a petition for a writ of error on Marable's behalf.[88]

Except for the widespread interest evoked, the case to this point was little out of the ordinary. The danger of lynching seemed past, and the Supreme Court would decide any

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[86]September 20, 1895.

[87]Richmond Planet, September 21, 1895; Richmond Dispatch, September 19, 1895; Senate, Journal, 1895-1896, Communication from the Governor . . . Transmitting List of Pardons, S. Doc. 4, p. 29.

[88]Richmond Dispatch, October 2, 1895.

question of legal error. A series of events soon followed, however, which raised new legal questions and lifted the drama to new heights. Commonwealth's Attorney Neblett, worried by the weaknesses in his case pointed out by the defense, asked Orgain to order the prisoners back to Lunenburg for a nunc pro tunc hearing to correct the deficiencies in the trial record. On October 19 Orgain did so, setting the hearing for November 11.[89]

Counsel for the women wrote to Orgain that their clients feared for their lives should they return to Lunenburg. Instead, they waived their right to be present at the proceedings. O'Ferrall declared that he would not let the prisoners return to Lunenburg without military escort, and hoped to avoid that danger and expense if possible.[90] Sheriff Cardoza, however, stated that he would not request any troops and would handle the matter himself. Such announcements led some of the women's supporters to suspect a conspiracy among Lunenburg officials to maneuver the prisoners into a position in which they could be lynched. There is no evidence to substantiate this idea, and the actions of county officers can be attributed to less suspicious motives. Still, even those who rejected the conspiracy theory felt that the prisoners' fears of lynching were reasonable.

On November 8, Cardoza arrived in Richmond to retrieve

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[89]Ibid., October 23, 1895; Attorney-General, Annual Report, 1895, p. 9.

[90]Richmond Dispatch, October 23, 1895.

the prisoners for the November 11 hearing. The next day O'Ferrall, bolstered by an opinion from Attorney General R. Taylor Scott that the presence of the prisoners in Lunenburg was not necessary, ordered Richmond City Sergeant Charles H. Epps not to release the prisoners.[91] He did so under a law giving the governor power to protect prisoners in danger of lawlessness. As he explained in a letter to Judge Orgain,

> [The prisoners] are in mortal terror, and overwhelmed with fear of being lynched if returned to your county jail. They and their counsel assure me that they verily believe that if returned they must die, and demand at my hands protection. My sense of personal responsibility and public duty, and my obligation to protect the lives of these convicts . . ., compel me to retain them in the city jail, notwithstanding your order for their return, and I have so instructed the city sergeant.[92]

Defense counsel did not reply solely on the executive order. They applied to the Circuit Court of the city of Richmond for a writ of habeas corpus. They claimed that the Supreme Court had granted the writ of error and supersedeas cognizant of the fact that the defendants were in the Richmond jail and intending that they should remain there until the appellate hearing. Thus, counsel insisted, the Supreme Court had ordered implicitly that the prisoners remain in Richmond. Judge B. R. Wellford awarded the writ, directing Cardoza and Epps to produce the prisoners in his court on the morning of November 12.[93] The effect of this action was to keep the

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[91] Ibid., November 8, 9, 1895.

[92] O'Ferrall to Orgain, November 11, 1895, reprinted in Attorney-General, Annual Report, 1895, p. 7.

[93] Attorney-General, Annual Report, 1895, pp. 9-11.

prisoners in Richmond until that date, despite the hearing in Lunenburg on the eleventh.

On the eleventh Cardoza entered Orgain's court empty-handed, but counsel were out in full force. Southall suggested that Epps be cited for contempt, while his cocounsel William Mann avowed his certainty that the fine people of Lunenburg posed no danger to the prisoners. Flournoy agreed that the local citizenry were the salt of the earth, but argued that it simply was not necessary for his clients to appear. Wise disdained the polite approach of his colleague. He dared Southall to forget "the dwarf," Epps, and to challenge instead "the giant," O'Ferrall. He chided Orgain for needing to amend the record two months after the date originally set for execution, and demanded to know why the defense had not received official notice of the attempt to amend. Orgain, however, stood firm, ordering Cardoza to bring all four prisoners back to the county.[94]

It was easier for Orgain to order than for Cardoza to act. Attorney General Scott informed the penitentiary superintendent that the habeas corpus issued by Orgain to obtain Mary Barnes was irregular and that the superintendent should keep her in custody.[95] Concerning the other prisoners, on November 12 Wellford extended his writ for another day. At

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[94]Richmond Dispatch, November 12, 1895; Richmond Planet, November 16, 1895.

[95]Richmond Dispatch, November 14, 1895; Attorney-General, Annual Report, 1895, pp. 25-28.

the hearing the next afternoon Southall argued that the Richmond jail was simply serving as the jail for Lunenburg County and that the prisoners had never left Cardoza's jurisdiction or custody. Cardoza promised to do "everything in his power" to protect the prisoners. Mann asserted that Wellford had issued the writ illegally in the first place. The defense, on the other hand, asked that the writ be enlarged. Wellford acknowledge the need for caution in his action, but stated his belief that the lives of the prisoners would be in danger if they returned to Lunenburg. He extended the writ for one week, specifically noting that the prisoners should not be taken to Lunenburg in the interval.[96]

Wellford's actions drew applause from the Planet. Reporting the proceedings carefully, Mitchell exclaimed,

> It is becoming all the more manifest that there are men in this Commonwealth, white men, who are conscientiously carrying out their oaths of office, even though their own prejudices are called into question.
>
> They love justice and admire fair play. Realizing that the machinery of the law was never intended to operate in promoting the perpetration of felonious intentions, they never hesitate when they can to respond to a citizen's cry of distress, and find a remedy in the labyrinthic [sic] confines of the recesses of the law.[97]

Wellford responded to that cry of distress by extending his writ until the Supreme Court ruled him in error. And then he extended it one more, crucial day.

The Lunenburg counsel, meanwhile, did not wait the week

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[96]Richmond Dispatch, November 14, 1895; Attorney-General, Annual Report, 1895, pp. 12-13.

[97]Richmond Planet, November 16, 1895.

prescribed by Wellford in his latest order. On the fourteenth Cardoza applied to the Supreme Court for a writ of mandamus ordering Epps to hand over the prisoners.[98] In response Epps claimed that the writs of error awarded by the high court had operated to transfer the cases from the Lunenburg court to the Supreme Court, and that Orgain could enter no order affecting the rights of the prisoners or changing their status. The city sergeant also cited the instructions given him by the governor and the order served upon him by the Richmond Circuit Court. Attorney General Scott, representing Epps, argued that Wellford possessed authority to issue the habeas corpus because the purpose of such writ was to protect life, and the record in the case showed that this was its use here.[99]

The issue of the prisoners' safety drew a remarkable exchange. In reply to Scott's statement that O'Ferrall had acted to prevent a lynching, Southall claimed, "If I believed for one moment that one hair on their heads would be touched by the people of Lunenburg, there is not enough money in this Commonwealth to get me to advocate their return." This noble sentiment did not impress Scott. "Mr. Southall," he responded, "said that he was satisfied not a hair of the convicts' heads would be harmed. Of course he believed it; but who could guarantee their safety? No one." Then, as the newspapers reported,

> [t]he Attorney-General produced a profound sensation, when turning towards him with a withering

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[98]The pleadings are reprinted in Attorney-General, Annual Report, 1895, pp. 5-13.

[99]Richmond Dispatch, November 16, 1895.

> look upon his countenance he added: "In Mr. Southall's own county (Amelia), Jesse Mitchell, a negro, who had obtained from this court a new trial, was taken out and hung without warrant of law. In the county of Nottoway, while the ermine was worn by Judge Mann who will conclude this case, there was a like violation of law and order. With such precedents to guide him, it is clear the Governor acted wisely and well."[100]

Judge John A. Buchanan delivered the court's decision on November 21.[101] He quickly dismissed two of Epps's defenses. That the sergeant had been acting under the governor's instructions carried no legal weight because O'Ferrall did not have the authority to act as he had. The court also decided that its issuance of the writs of error and supersedeas did not bar the Lunenburg court from issuing further orders affecting the prisoners. If the prisoners questioned the county court's power to take a particular action, they could bring the matter to court. The sergeant's job was to execute the orders, not question them.

Epps fared better with his third defense, that he was acting under the order of the Richmond Circuit Court. Unfortunately, the prisoners did not share his good fortune. The judges ruled that the prisoners' petition did not allege facts sufficient to warrant a writ of habeas corpus. Wellford had erred when he issued such a writ, but because he had acted

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[100]Richmond Dispatch, November 16, 1895; Richmond Planet, November 23, 1895. The "withering look" description is from the Planet. For the Mitchell lynching, see the text above at note 23.

[101]Cardoza v. Epps, 2 Va. Dec. 133 (1895). Despite the notoriety and legal novelty of the issues involved, the case was never officially reported in Virginia Reports. At the circuit court hearing on the twentieth Wellford had extended

within his general authority the Supreme Court would not declare his action void. The proper challenge to the order would have been a proceeding in error. The order of the circuit court was therefore still in effect. Because Epps was acting under that order, the Supreme Court refused to issue the mandamus.

The court's refusal meant little to the prisoners. The court did not order Epps to hand them over directly but did make clear that the circuit court writ was in error and should be suspended. The sergeant must then yield them to the Lunenburg authorities. Later that day Southall asked Wellford to suspend the writ and remand the prisoners to Epps, so that he could relay them to Cardoza. Defense counsel asked for a one day continuance to study the authorities and prepare arguments why the writ should remain in force. Surprisingly, and to the vexation of the Lunenburg counsel, Wellford granted the continuance.[102]

On the following day Wellford remanded the prisoners as expected, but defense counsel produced yet another surprise. As Mann contentedly drew up the necessary order for Wellford's signature, Guigon hurried to the Supreme Court with new petitions asking for enlargement of the original writs. The papers read,

> Your petitioner . . . believes, and has good reason for believing, that if she is taken back to

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his writ for another day. Richmond Dispatch, November 21, 1895.

[102]Richmond Planet, November 30, 1895; Richmond Dispatch, November 22, 1895.

> Lunenburg county by the said Sheriff without adequate military guard she will be seized and summarily executed without process of law by said mob, and the said Sheriff proclaims and declares publicly that he will not request the Governor to send a military guard with your petitioner, but, on the contrary, protests against the same; and your petitioner is informed . . . that the Governor will not order a military guard upon his own motion, and against the Sheriff's protest. . . . [We believe] that this honorable court will not permit your petitioner to be deported hence to Lunenburg county without some valid reason therefor . . ., and in no event while there is the existing danger, if not certainty, that she will be lynched.[103]

The court agreed to consider the petitions immediately. After a short wait, President Keith announced that the original writs would be duly enlarged. The prisoners were to remain in Richmond until the Supreme Court had acted on their appeals.[104]

The Planet exclaimed,

> There were considerations and conditions with which this august tribunal did not deal, until the question was presented to it as it had been shown to the Governor . . . and the Judge of the Circuit [C]ourt of Richmond. When that was done, be it said to the credit of the Supreme Court of Virginia, it acted in the same manner as had the two individuals it had criticized [in the Cardoza opinion], and abundantly justified and supported them in their contention. Had it acted otherwise, the innocent blood of Mary Abernathy and Pokey Barnes would have been upon the hitherto spotless ermine of that tribunal. . . . All honor to our Supreme Court of Appeals.[105]

The paper also praised O'Ferrall and "that grand old jurist,

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[103]Richmond Dispatch, November 23, 1895.

[104]Ibid. Judges Riely and Buchanan dissented.

[105]Richmond Planet, November 30, 1895.

B. R. Wellford."

With the prisoners remaining safely in Richmond,[106] the legal fireworks faded and counsel returned to the normal routine attending a criminal appeal. Attorney General Scott, who thus far had applied all his efforts to keeping the prisoners alive and safe, now switched hats and argued for the commonwealth that they had been fairly tried and that Orgain's sentences should be carried out. The question of amending the trial record continued to be the focus of bitter debate. And from Lunenburg came the surprising news that Orgain had fined Epps $25 for contempt of court. The Richmond officer paid his money and returned home, perhaps more understanding of the prisoners' desire to be rid of Lunenburg justice.[107]

In pressing for new trials defense counsel reiterated the arguments they had used earlier. They tried to turn the absence of trial counsel into an advantage by asserting,

> The necessity for strict compliance with all essential formalities in the procedure should be held . . . more binding [i]n this than in ordinary cases, when it is remembered that the accused was an ignorant and unlettered colored woman, without the aid of counsel, and the Commonwealth was represented by two gentlemen learned in the law. What a farce it would be to say that she, in her helplessness and her ignorance, lost her rights by her failure to object to "unauthorized methods" when on trial?[108]

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[106] In addition to the three in the city jail, Mary Barnes remained in the penitentiary. Lunenburg officials evidently never challenged Scott's opinion that the writ to obtain her custody was imperfect, and let the matter drop.

[107] Richmond Dispatch, November 24, 1895.

[108] Barnes v. Commonwealth, Records and Briefs, LXVIII, O.S., 117. The large collection of petitions, documents, records, and briefs for the cases is at pp. 117-58.

Questioned on oral argument by Judge Riely about the absence of exceptions in the record, Flournoy called it a mockery to require such exceptions when everyone knew that the prisoners had been without counsel. He declared, "There is a constitutional right bought by the blood of our fathers. In the name of justice and humanity, I protest against such a trial as was had in Lunenburg county."[109]

While waiting for the court's decision, defense counsel produced yet another surprise. Mary Barnes petitioned the court to dismiss the writs previously granted in her case, thus dropping her appeal. She explained her request by noting that the sheriff refused to call for a military escort. She continued,

> Under these circumstances your petitioner . . . is firmly convinced that should she be granted a new trial by this Court and be sent back to the County Court of Lunenburg for another trial without the protection of military escort, she will be in great danger of mob violence. She therefore prays that she may be allowed to withdraw her appeal and that same may be dismissed by this Court.[110]

It was a shrewd move. If her conviction were to have been reversed, she would have had to return to Lunenburg and face, in addition to the danger of lynching, the possibility of a

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[109]Richmond Planet, December 7, 1895; Richmond Dispatch, November 27, 28, 1895. Originally the court had intended to hear Marable's case separately, so that only the women's counsel participated in the oral arguments. Justis was to have argued for Marable at a later date. In the interim, however, the court decided that the issues in the various cases were similar and cancelled the second hearing. Richmond Dispatch, December 1, 1895.

[110]Richmond Dispatch, December 6, 1895; Richmond Planet, December 7, 1895.

harsher sentence on retrial. Furthermore, if the other defendants gained new trials and acquittals, she would likely receive a pardon. In any event, the penitentiary was as safe a place for her as any in the state.

On December 12 the court announced its decision, with Judge Buchanan speaking for the four-man majority.[111] Although the court had broken precedent by issuing the writs of error despite a lack of exceptions taken during trial, the judges' sense of innovation left them on specific issues. They rejected the argument, that the record did not show the jurors to have been free from exception, because no objection had been raised at the time. Similarly, lack of mention in the record defeated defense contentions concerning the mode of trial of jointly indicted defendants. Because the record did not quote Orgain's instructions to the jury, the court refused to pass on their accuracy. The judges took a like view on the two issues most observers felt proved the injustice of the trials. Buchanan said that the record contained no evidence showing the need for a change of venue and no motion requesting it. As for lack of counsel at trial, the record did not show that the right had been specifically denied.

As the prosecution had feared, however, the court's desire to go strictly by the record cut both ways. One of the more technical errors claimed by the defense was the failure

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[111] Barnes v. Commonwealth, 92 Va. 794 (1895). Judge Riely dissented.

of the record to show that, at the daily adjournment of the court, the jury had been put in the custody of the sheriff with instructions to that officer to allow no one to speak to them concerning the trial. This was one of the problems that the prosecution had intended to remedy at the never held nunc pro tunc hearing. But the court considered only the record before it, not the prosecution's intentions, and the absence of the required notation justified a new trial. It is ironic that, in a case containing such grave and obvious injustices, the ground for reversal was a relatively minor technicality. Perhaps the court, cognizant of the unjust nature of the convictions but feeling itself restrained by the requirements of the law, was happy to be able to clutch a straw.

Two days after the Supreme Court decision Orgain ordered Cardoza to bring the three prisoners back for retrial.[112] On the eighteenth, before Cardoza had acted, O'Ferrall sent a special message to the General Assembly.[113] In it the governor explained and defended his previous actions in the Lunenburg cases. He then asked for the authority to do more. Without troops the prisoners would again be in danger of lynching, he believed, especially if they were not speedily convicted. The governor continued,

> It is my deliberate opinion . . . that if these prisoners are carried back without military protection, and they have any hope now, they might as well

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[112]Richmond Planet, Jaunary 25, 1896.

[113]Senate, Journal, 1895-1896, pp. 115-21.

> abandon it.
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> In saying this I do not mean to reflect upon the good men of Lunenburg county. . . . But if any insist upon so construing it, let me say that I would be unworthy indeed to hold the high and honorable position to which I have been called, if I stifle my sense of duty to avoid the censure of the thoughtless or save the feelings of a community.[114]

The governor lacked authority to send troops without a formal request by the sheriff. O'Ferrall asked the legislature to amend the law so that the governor could order out the troops at his own discretion. Due to the urgency of the situation, O'Ferrall called for and received immediate action. The legislators refused his request.[115]

Cardoza soon arrived with one deputy and took Marable and Pokey Barnes back to Lunenburg. Mary Abernathy, newly delivered of her baby, stayed another two weeks before making the trip.[116] In the second week of February the three defendants returned to the Lunenburg courthouse, seven months after they had left on the way to the gallows. Counsel for the women asked for a change of venue. Orgain suggested to Marable, again without counsel, that he do the same. The attorneys called local citizens to support their motion. Most testified that many county residents had already made up their minds, but that the defendants could still receive a fair trial. Counsel then tried another approach, one indicated by the commonly held assumption that lynching fervor

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[114] Ibid., pp. 119-20.

[115] Ibid., p. 130. The vote was 22-4.

[116] Richmond Planet, January 25, February 8, 1896.

had died down only because of the belief that the blacks would be reconvicted and hanged. Wise and Flournoy asked what the prisoners' fate would be if they were acquitted. Even Cardoza and his deputy expressed doubts about the prisoners' safety in such a situation.

Orgain jumped at this opportunity to be rid of the troublesome cases and at the same time avoid a situation in which the county and his court would lose face. The judge granted the change of venue, but not because of the local citizens. Orgain assured everyone that "a fair and impartial trial can be had in . . . Lunenburg, and a fair and impartial jury of the citizens of Lunenburg can be impanelled who would try the prisoners fairly and decide the case according to the law and testimony." The problem, continued the judge, was that "the testimony does produce some doubt in the mind of the Court as to what might be the action of some of the people of adjoining counties in case the jury . . . shall render a verdict of acquittal."[117] Cardoza and a possee immediately rushed the prisoners to Farmville. Asked about the reason for the middle-of-the-night trip, the sheriff remained faithful to the charade by explaining that his deputies just happened to have been ready at the time.

Judge Joseph M. Crute of Prince Edward County Court now took control of the cases. The new prosecutor was A. D. Watkins, again joined by Mann and Southall. The prosecution pressed for a February trial for Marable, still without

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[117] Ibid., February 15, 1896.

counsel. When Marable said that he would rather wait for a lawyer, Crute granted the request. In the meantime, rumors of mob violence again filled the air. John Mitchell claimed that one lynching had been aborted only because the mob learned that the Prince Edward blacks were armed and ready to defend the jail. O'Ferrall sent a telegram offering aid, which Crute replied was not necessary.[118]

Marable came to trial on March 17. Fr. Welbers had retained two new attorneys, W. C. Franklin and William Lancaster, and the two did a capable job under the circumstances. Except for the denial by Pollard of some of the facts published by the Times after the first trials, there was little new evidence. Once Crute had ruled that at least one of Marable's several confessions was admissible, the verdict was certain. The all-white jury of Prince Edward farmers found the defendant guilty of murder.[119]

A month later came the trial of Mary Abernathy. Again, the evidence produced no surprises. In contrast to the July trial, though, the defense presented a substantial case. Wise and Flournoy called a number of their own witnesses, in addition to subjecting prosecution witnesses to lengthy and often sharp cross-examination. Marable did not testify. Despite protestations to the contrary, defense counsel did their best to drop hints implying the possible guilt of various other persons. The jury, all-white, returned a verdict of murder

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[118] Ibid., March 7, 1896.

[119] Ibid., March 21, 1896.

in the first degree. Crute denied a motion for a new trial.[120]

Downcast over the Abernathy verdict, the defense began the Pokey Barnes trial. Soon came, however, the last of the many unexpected turns in the Lunenburg cases. After the evidence had been presented, Commonwealth's Attorney Watkins announced to the surprised court that after careful consideration of the evidence he had concluded that the commonwealth's case was insufficient to bring about a conviction. He therefore asked that a nolle prosequi be entered. Mann protested that the evidence was strong enough to warrant conviction. Watkins, however, as commonwealth's attorney, was officially in charge of the prosecution. Crute consented to Watkins' request and suddenly, unexpectedly, Pokey Barnes was free. Eleven members of the all-white jury declared their agreement with the commonwealth's attorney's decision.[121]

The joy in the defense camp was not total. That same day Crute overruled another motion on behalf of Mary Abernathy for a new trial. She was sentenced to hang on July 8, five days after Marable. The latter's request for a new trial had also been denied. On June 24 Judge Coleman, who months before had refused to issue writs of error to the prisoners, granted one to Abernathy. He refused to do so for Marable. Marable appealed once more to the Supreme Court, which this time denied his petition for a writ of error. On

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[120] Ibid., April 25, May 2, 9, 1896.

[121] Ibid., May 9, 16, 1896. The case against Barnes was not exactly the same as that against Abernathy, because the two women had different alibis.

July 3, Marable was executed.[122]

The outlook for Mary Abernathy was much brighter. Not only had Coleman granted the writ of error, thus postponing the hanging indefinitely, but Judge Crute hinted that he also had undergone a change of opinion concerning the case.[123] In early September Coleman set aside the guilty verdict and ordered a new trial. The rest was anticlimax. On September 21, as prearranged, Crute ordered that a nol pros be entered in the case.[124]

Only one act remained. On December 24, O'Ferrall pardoned Mary Barnes. As he explained to the General Assembly,

> It will be seen that two of the women implicated by Marable in his first statement, but whom he declared to be innocent in his subsequent and dying statements, have been acquitted and discharged, yet the third, Mary Barnes, against whom, in my opinion, there was the least evidence--absolutely none except the first statement of Marable--is still suffering the penalty of her conviction.
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> The life or liberty of a citizen, however humble, is too sacred in the eyes of the law or of civilized man to be taken upon the testimony alone of a self-convicted perjurer and murderer. . . . Every mandate of justice and dictate of conscience

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[122] Ibid., May 16, June 27, July 4, 11, 1896. Even in death Marable could find no peace in Virginia. He had requested that his body be sent to his family in North Carolina for burial. Under state law, however, the bodies of executed criminals were given to the state Anatomical Board to be used in the instruction of medical students. A controversy ensued over possession of the remains. The macabre affair included dramatic late night buggy rides through the streets of Richmond, official and unofficial charges of body-snatching by both sides, and attempted mutilation. It culminated in a ghoulish midnight tug over the body in the darkened dissection amphitheater of the Medical College. Mitchell finally gained custody of the remains for the family. Ibid., July 11, August 1, 1896; Richmond Dispatch, July 5, 1896.

[123] Richmond Planet, June 27, 1896.

[124] Ibid., September 5, 12, 26, 1896.

require that the prisoner be restored to her liberty.[125]

The Planet was ecstatic. Throughout the episode Mitchell had been generous in his praise of those who helped the prisoners. The list was substantial: Cunningham and his fellow militiamen, Attorney General Scott, investigator-attorney Justis, Commonwealth's Attorney Watkins, and the many white newspapers that supported the demand for new trials. Five men garnered the most continual and effusive praise: O'Ferrall, Judge Wellford, and defense attorneys Wise, Flournoy and Guigon. And Mitchell realized that the efforts of all would have been in vain had it not been for the decisions of the Supreme Court. "[T]he final release of Pokey Barnes and Mary Abernathy," he wrote, "is a lasting monument to [defense counsel's] skill and ability, and an everlasting tribute to that spirit of justice and fair play which permeated the Supreme Court and was ever present and vigorously manifest in the actions of Governor O'Ferrall and Judge B. R. Wellford of the Circuit Court."[126]

The case of the Lunenburg murderers stands out because so much of the novel legal maneuvering was the result of potential mob violence. From the first request for troops by the Lunenburg authorities, the threat of lynching cast its

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[125]House of Delegates, Journal, 1897-1898, Communication from the Governor . . . Transmitting List of Pardons, H. Doc. 3, pp. 4-5.

[126]Richmond Planet, November 14, 1896.

shadow over every action taken. The lynching atmosphere doubtless caused Orgain's inability to find an attorney willing to represent the defendants, and the lack of counsel in turn doomed the defendants' chances for fair trial. The conscience-striken juror described well the hostility to any suggestion of the defendants' possible innocence. Defense counsel argued passionately and repeatedly of the inherent injustice of any trial held with troops in the courtroom.

Above all, the reaction of the various officials to the possibility of lynching makes the episode instructive. Most acknowledged the threat of mob violence. All denounced it. Even Mann and Southall, although denying the existence of danger to the prisoners in Lunenburg, proclaimed their opposition to lynching itself. Wise and his colleagues again and again argued that the prisoners would not be safe in Lunenburg. And, for the most part, those in authority believed them and acted on their belief.

His firm determination to end lynching in the state was O'Ferrall's reason for acting as he did, and he did not hesitate to justify his course solely on that ground. The legal gloss of the case tends to obscure the substance of O'Ferrall's action, and the abundance of dramatic situations lessens the impact of its significance. But the substance was so remarkable that the significance demands restatement. On the most tenuous legal grounds, the governor ordered the superintendent of the penitentiary and city sergeant of Richmond to defy the duly issued orders of a state judge. He did this,

over heated objection of county authorities, solely to prevent a lynching. And he did it on behalf of four blacks already convicted of the brutal murder of a white woman.

The judicial hero of the affair was Judge Wellford. It was his writ that kept the prisoners in Richmond until the Supreme Court could rule. Editor Mitchell asserted that Wellford knew his order would not stand appellate scrutiny. Certainly the judge's last continuance on behalf of the prisoners had little legal purpose. It did, however, keep the prisoners in Richmond the one extra day that resulted in the enlarged Supreme Court writ.

The Supreme Court's response in the case was less dramatic but no less significant. The decision in Cardoza would have resulted in the prisoners' return to Lunenburg. The next day, however, with no new information, the court enlarged its own writ to keep the prisoners in Richmond. In so doing the court responded to a request for the enlargement based solely on the ground of potential lynching. Both the request and the enlargement were unprecedented in the history of the court. The subject of lynching may not have appeared in the reported opinions of these cases, but the judges certainly recognized and acted upon its presence.

Whether the prisoners would have been lynched in Lunenburg is moot. What is important is that many Virginians believed they would be. The basic response of both private citizens and public officials was to prevent the lynching. The defense attorneys and those officers who supported their cause used every resource and trick of the legal system.

Some were even willing to go a little further than the law supposedly allowed. The affair demonstrated the sense of justice and integrity that such men possessed. It also demonstrated the ability of the judicial system to safeguard the fundamental right to life.

But the vote in the Supreme Court to enlarge the writ was 3-2. The prisoners were supported by the attorney general, the governor, a circuit court judge, and three of the finest lawyers in the state. Yet, if one high court judge had changed his vote, the law would have stood by helplessly while Sheriff Cardoza took four souls to their possible lynching. And what of those prisoners whose predicament did not capture the attention of prominent newspapers, or who fell to the mob before responsible officials could act? The statistics show many, white and especially black, whose luck did not match that of the Lunenburg defendants. The law provided the structure within which officials could act, but it could not force men to act in good conscience. Some, such as Cunningham, Wellford, and O'Ferrall, did so. Too many others did not.

CONCLUSION

Henry W. Flournoy, arguing on behalf of the Lunenburg defendants, stated the problem succinctly:

> We know that there is a growing and perplexing question in this country. It is the Negro question.
>
> One way to settle it, the best and the right way to settle it is for the white people to do justice to them even though the heavens fall. Standing in the temple of justice, I do not fear to say that I am in favor of the same rights and privileges before the law [for the black citizen] as is accorded the white man.[1]

But Flournoy's solution, so simple in theory, was far more troublesome in execution. Equal treatment of the black citizen was contrary to the tradition of southern race relations and to the desires of most contemporary whites. Yet the problem would not disappear, and if the challenge to Virginia society was general, the challenge to the Virginia legal system was specific.

Gunnar Myrdal has noted that white supremacists do not consider all forms of discrimination to be of equal importance. Myrdal proposed a "rank order of discrimination," a listing of the various levels of necessity whites attached to different forms of discrimination. At the top level, where whites wanted the strictest enforcement, was the bar against

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[1]Richmond Planet, September 14, 1895.

intermarriage and sexual intercourse between black men and white women. Next came "behavior in personal relations" (questions of social equality), then segregation of public facilities, and then political disfranchisement. Discrimination in the courts of law was next to last, and lowest on the list was discrimination in economic affairs.[2]

The Virginia Supreme Court's treatment of cases involving blacks during the years 1870-1902 reflects, to a large extent, the pattern of thought represented in Myrdal's ranking. The court was least responsive to demands for black rights in those areas at the top of the list. The judges were adamant about the legal validity and social necessity of antimiscegenation laws. They approved without question publicly mandated distinctions, such as segregation in public schools, and saw nothing unusual in privately imposed discrimination. The court acknowledged that the exclusion of blacks from jury service was illegal, but its rulings in fact allowed and encouraged the practice.

Cases dealing with such matters of public law were relatively rare, however. In the vast majority of cases involving black parties race was not a formal issue. These cases dealt with the private problems or aspirations of the parties,

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[2]Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (2 vols.; New York: Harper & Brothers, Publishers, 1944), I, 60-61, When blacks ranked their concerns about discrimination, their list was the same as that of the whites, but in reverse order. The great changes in race relations in the last quarter century no doubt have caused a realignment in both white and black lists.

matters which ranked relatively low on Myrdal's list of necessary discriminations. Black parties appeared before the court in a wide variety of civil cases involving such matters as contracts, torts, property, and estates. Suits between two black parties presented little problem to the court. The judges treated such cases with no extraneous comments about the race of the litigants. Interracial disputes added an extra element for the consideration of judges and juries, but black parties won their fair share of these cases. In no Supreme Court civil case was the decision against a black party either blatantly unjust or impelled by obvious prejudice.

Even more indicative of the judges' attitude toward black rights was their treatment of criminal cases involving black defendants. Although some innocent defendants, such as Nannie Woods, saw their cases affirmed, the court usually demanded that convictions be supported by both legally sufficient evidence and procedural correctness. Even when all indications pointed to the guilt of an appellant, the court reversed if either the evidentiary or procedural requirement had not been met. This was true even in cases that involved emotionally charged interracial crimes. William Muscoe, the murderer of a white policeman, and Jesse Mitchell, convicted of raping a young white girl, both earned reversal because of procedurally important but highly technical errors.

The court's willingness to approach each case on its merits ran against strong southern beliefs. Whites not only

realized the need to maintain the racial structure of society, they also were certain that blacks were predisposed to criminality. This belief led many whites to accept the concept of indiscriminate racial guilt. Still, the court did not escape totally the atmosphere of a racist society. Its interpretation of provocation in violent interracial encounters sometimes reflected an unspoken, and perhaps subconscious, acknowledgement of the black's inferior social status.

The relatively low importance whites placed on discrimination in the courts was reinforced by other factors in allowing judges to accord blacks substantial justice. Judges dealt with individuals, a situation that acted for the benefit of black parties in two ways. First, as A. E. Keir Nash notes, individuals usually feel prejudice more strongly when engaging in ethnic generalizations than when dealing with specific individuals.[3] In addition to this general response, dealing with individual parties fit into the traditional form of southern paternalism--disdain for the racial mass but generosity toward the familiar individual.

Judges also felt what Nash calls their "peculiar vocational interest . . . in the rule of law."[4] Judges may have held the same racial beliefs as their fellow southerners, but

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[3]A. E. Keir Nash, "A More Equitable Past? Southern State Supreme Courts and the Protection of the Antebellum Negro," North Carolina Law Review, XLVIII (1970), 239. Nash discusses on pp. 236-241 possible reasons for southern judges' having treated blacks fairly during the antebellum period.

[4]Ibid., p. 240.

certainly those others did not feel the pull of the legal imperative so strongly as did the judges. Men who had devoted their lives to the law, and had risen to the top of their profession, could not easily put aside that law. This devotion to the law was not necessarily an active zeal to bring full justice to the black citizen, although some judges may have believed in that ideal. Instead, it was more a simple obedience to the rule of law. If the law decreed that blacks should be accorded certain legal rights, so be it. Even in matters where they accepted obvious racial discrimination--miscegenation, segregation, jury exclusion--judges sought to bolster their rulings by invoking statutory or case authority. The legalistic approach also offered a solution when a case evoked conflicting values in a judge's mind.[5] Thus, black defendants benefited from the often maligned dedication of many courts to adherence to procedure and strict interpretation of statutes.

Race consciousness pervaded Virginia politics, and politics were never far removed from the state courts. The existence of the Readjuster court especially raises the question of the influence of political beliefs on the court's treatment of blacks. Black support played a significant part in Readjuster electoral success, and Readjuster programs usually coincided with black desires. The Readjusters were the

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[5] On the reaction of judges to situations involving conflicting values, see Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975).

more progressive party, and blacks responded favorably to the change in political alignment of the state's judges.

The Readjuster Supreme Court decided the four civil cases during this period in which black parties won important decisions on the basis of justice rather than strong legal position.[6] Judge Fauntleroy, especially, was always willing to interpret a weak legal point for the benefit of what he perceived to be the deserving party. But Judge Lacy, also a Readjuster in good standing, dissented in all four cases. He not only accused his colleagues of ignoring the law, he also consistently questioned the motives and credibility of black parties. While the Readjuster court as a whole may have been slightly more open to arguments of justice by black litigants than were the other two courts, those courts did accord blacks substantial justice in civil suits. There was no discernable difference in the treatment of black criminal defendants among the three courts.

While blacks were assured a fair hearing before the Supreme Court, they could not be so certain of their treatment in the courts below. Trial judges were more subject to social and other extra-legal pressures than were their appellate colleagues. The emotional atmosphere of many trials, especially those involving interracial crimes, was hardly conducive to the quest for justice. Juries were even more

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[6]Davis v. Starnge's Ex'r, 86 Va. 793 (1890); Thomas v. Turner's Adm'r, 87 Va. 1 (1890); Reynolds v. Reynolds' Ex'r, 88 Va. 149 (1891); Thomas' Adm'r v. Lewis, 89 Va. 1 (1892).

liable to bow to extra-legal considerations. Newspaper reports, pardon reports, and comments by contemporary observers all indicate that blacks received substantially less justice in the inferior state courts than they did before the Supreme Court. The high court opinions, which contain many cases where conviction below was based on obviously insufficient evidence, strengthen this impression.

What effect did the Supreme Court's adherence to the rule of law have on the treatment of blacks within the Virginia legal system? The number of cases decided by the court was small compared to the number of blacks who entered the system in need of justice. Lower courts often rejected the spirit of high court decisions, and at times rejected the letter as well. Lee Reynolds, whose conviction was reversed on the ground of obviously insufficient evidence, was convicted again on the same evidence and given an even longer sentence. Daniel Montgomery appealed to the Supreme Court three successive times before local authorities finally understood that they had no case against him.

Was the Supreme Court then an irrelevant institution in the black Virginian's search for justice? Certainly Lee Reynolds and Daniel Montgomery did not think so. Neither did many others for whom the court represented the only chance for a fair hearing. And there were conscientious attorneys and objective judges throughout the legal system who took their direction from the high court. The little faith that blacks had in white law would have disappeared completely had

the most visible symbol of that law been patently unjust. Such a situation would have been a tragedy not only for the blacks, but for the law as well.

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