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WEST VIRGINIA'S RACIAL HERITAGE: NOT ALWAYS FREE*

JUDGE A. LEON HIGGINBOTHAM, JR.**

I. THE RELEVANCE OF HISTORY

It is a high honor to be invited to present the West Virginia University’s Edward G. Donley Memorial Lectures, a series designed to focus on matters “of current interest and development in the law.” While “The Color-Consciousness of the Law,” the subject with which I am most familiar and have selected for this evening, is certainly one of current interest, the issues it involves are firmly interwoven in the texture of our total historical heritage as well. And just as that heritage includes some of the noblest achievements of the human spirit, as manifested by the Declaration of Independence, the valorous devotion to duty of Washington and his men at Valley Forge, the defeat of an oppressive tyrant at Yorktown, and victories over the enemies of freedom in two world wars, we must recognize that it also includes many events and actions spawned in the darker, more ignoble recesses of man’s nature.

Of all the shameful, unprincipled and dishonorable acts of inhumanity the

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human species is capable of committing, perhaps except for genocide, none is more pernicious than the "peculiar institution" of slavery. Under the complete protection of the law, this harsh system of oppression and denigration was imposed, tolerated, sanctioned, encouraged, and profited from, at the expense of an entire race of people singled out on the basis of but one criterion: the color of their skin. As a nation, we must come to grips with the fact that innocent individuals have been mightily wronged, and wronged not only by two and a half centuries of total repression and servitude, but also by the unfair social and legal justice dispensed during the hundred and twenty years following the legal abolishment of slavery. For despite the intent of the Emancipation Proclamation and the guarantees of civil liberties for blacks written into the 13th, 14th and 15th Amendments to the Constitution, the American legal system has often been quite ambivalent about deciding whether blacks are rightful beneficiaries of the American dream.

Americans are still struggling with the issue of race, fulfilling a prophecy made more than seventy years ago by Dr. W. E. Burghardt DuBois, who predicted in his classic book, The Souls of Black Folk, that:

The problem of the 20th century will be the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and islands of the sea.

For many, it is still too painful to acknowledge and accept the indictment of collective guilt and responsibility contained in the 1968 report of the National Commission on Civil Disorders:

What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.

The Commission's statement is a blunt reminder that we cannot act as though the problems of present-day race relations began with a clean slate, or were created in a vacuum and devoid of a past. In this connection, a university has no greater challenge or responsibility than to support its scholars and students in their efforts to review the past with rigor, for only such a study can provide a realistic perspective from which the present can be understood and the future evaluated and molded. Nor is this a new idea: Thomas Jefferson came to the same conclusion some two hundred years ago. Writing in his seminal volume, Notes on the State of Virginia, in regard to "Administration of Justice," he stressed that an educational system which taught and emphasized the lessons of history should be provided. He asserted that:

[History, by apprising [people] of the past, will enable them to judge of the future; it will avail them of the experience of other times and other nations; it will qualify them as judges of the actions and designs of men; it will enable them to know ambition under every disguise it may assume; and knowing it, to
defeat its views. In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover and wickedness insensibly open, cultivate and improve.¹

The occasion of these lectures provides an opportunity for us to examine the values and priorities of men like Thomas Jefferson and his contemporaries and to determine the seriousness of their commitment to equal justice under the law for all Americans. Further, by studying some of the issues and problems, tensions and struggles that have their roots in our historical heritage, we will be better able to recognize injustice, as Jefferson phrased it, "under every disguise it may assume."

II. NOT AS A STRANGER

I speak this evening from a nontraditional perspective, one probably not quite that normally proffered at the West Virginia University. For out of the racial tensions and struggles of the past have evolved distinctly different perspectives from which most black Americans and most white Americans view the nation's early heritage and assess its social progress. Yet, I feel that I do not come here as a stranger. My roots run deep in the soil of Virginia, even as West Virginia itself is a child of that Commonwealth. It was in the rural hamlet of Sandidge, in the County of Amherst, that my mother was born, as well as my grandparents and my great-grandparents. Here they labored, desperately trying to eke out a precarious existence on a remote, almost inaccessible, red dirt farm. It was no doubt to Virginia that my first American ancestors were brought, quite against their will, to aid in the building, survival, and economic prosperity of the colony. Though they were probably among the "First Families of Virginia," those forebears of mine were not aristocratic plantation owners, not signers of the Declaration of Independence, not drafters of the Constitution. Instead, they were among the thousands of nondescript, faceless and almost nameless slaves who labored, sweated and died so that the colony and Commonwealth of Virginia could survive and become the great mother of the new nation's leaders. I am proud of my Virginia heritage, recognizing that in all probability I am a son of the American Revolution, that in my veins flows the blood of persons who lived here at the birth of the Republic and whose labors and sacrifices assisted materially in its creation.

So it is not as an outsider, an alien, but rather as one who shares with you a common heritage rooted in the history of Virginia, that I ask you to set aside for a moment the natural patriotic pride you have in that heritage. Then, instead of through the lens of reverence for the past, I ask you to view early Virginia from my perspective and the perspective of my black predecessors who, because of the American legal process, were systematical-

¹ The quoted passages in this article retain, for the most part, spellings as they appear in the original.
ly exploited, driven, debased and dispossessed. Further, for the purposes of these lectures, I ask you to take it as a given that the exploitation and other evils suffered by blacks were not their rightful and deserved lot due to some inherent racial inferiority, but, instead, that the brutal and unjust system of slavery predicated on the matter of color was instituted primarily for economic reasons, to the end that some individuals, not to mention white society in general, could prosper handsomely.

Obviously, if you start with these assumptions and with this perspective, it is likely that you will have a different image of those “grand old days” of Virginia’s history, days of stately mansions and a civilization based on the aristocracy of wealth, birth, and privilege. Instead of the vision, for example, of a magnificent ballroom filled with high spirited, elegantly dressed people dancing with happy abandon to the music of the waltz, polka or Virginia reel, perhaps you would be more prone to pass over that charming and romantic scene and redirect your thoughts to the slave quarters in the dark shadows out back. You would probably wonder if it was right that the light hearted conviviality in the “big house” had so much of its source in the labors, suffering and despair of the master’s black slaves.

If you were actually the descendant of former slaves, how would you interpret the promises and assertions in the Declaration of Independence, the Constitution, and the other great freedom documents of the time? How would you look at the men who were the Founding Fathers of this country? And specifically, how would you view the Old Dominion—as primarily the mother of presidents and statesmen? Or, would you see Virginia as primarily the mother of slavery? Would you be inclined to admire Virginia for having produced the most elite class of attorneys and legal scholars in the colonies? As a descendant of slaves, would you remember with gratification that many of these distinguished lawyers—men such as Thomas Jefferson and Patrick Henry—spoke out passionately against the evils of slavery? Or would you be inclined rather to wonder how it could be that these same men used their talents, their knowledge and their legal craftsmanship to develop, nurture and codify a body of laws having as a fundamental principle the notion that thousands of blameless individuals could be, and should be, forever kept in a state of hopeless servitude and degradation?

When you begin to look at these matters from my perspective, you will doubtless agree that these contrasts symbolize a dual morality in America, two rules of law: one assuring white justice and another guaranteeing black injustice. It is because of this moral and legal schizophrenia, which has endured almost up to the present day, that it is urgently necessary for the issues of race and the American legal process to be studied, probed, analyzed, and understood. For, as Jefferson warned, it is only by heeding the lessons of the past that we can avoid the same mistakes in the future.
A. Colonial Virginia

The first surviving record of blacks as residents on the North American continent appeared in the notes of John Rolfe, Secretary and Recorder of the Virginia Colony. In an entry written in 1619, he stated: "About the last of August there came to Virginia a Dutch [man-of-war] that sold us twenty Negers." These "Neger" arrivals were in many ways different from most other immigrants to this country. For example, they were unlike the Pilgrims who had landed at Plymouth Rock a year earlier, in that they had not volunteered for the voyage. Instead, they had been brought to America as unwilling captives of a privateer who apparently had seized them from a Spanish ship with the intention of selling them to the labor-short colonists.

Little is known for certain, even after long investigation by historians, about the social, economic and political status of blacks who arrived in America during the period 1619-1660. However, it is agreed that in colonial Virginia, blacks were never legally or socially on a par with whites. The debate has centered around whether blacks from 1619 to 1660 were given any legally recognized privileges and rights similar to those given white indentured servants; or whether they were regarded as mere property and thus nonpersons under the law. In any event, by 1661 the die had been cast: by statute and court decisions it was settled that blacks were not to be treated the same as "Christians," and "Irish and other white servants."

In 1669 the Virginia Legislature, by a statute captioned "An Act About the Casuall Killings of Slaves," removed all doubt on the question; in the eyes of the law and in terms of the law's protection, according to this statute, blacks were not much different than animals or trees or any other material possession of their masters. The very fact that these lawmakers used the word "casuall" in the caption of the statute indicates that there was no duty of care or standard of prudence required to avoid the destruction of the life of a black, even a capricious destruction; for in the words of the statute:

Whereas the only law in force for the punishment of refractory servants resisting their master, mistress or overseer, cannot be inflicted on negroes [because the punishment was extension of time], Nor the obstinacy of many of them by other than violent meanes supprest. Be it enacted and declared by this grand assembly, if any slave resist his master... and by the extremity of
the correction should chance to die, that his death shall not be accompted Felony, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that propensed malice (which alone makes murther Felony) should induce any man to destroy his own estate.

Why could blacks be killed casually without such killings constituting a crime? Because the casual killing of a slave was viewed legally as not much different than the casual act of a farmer plucking an apple from a tree in his orchard. In 1669 and for almost two hundred years thereafter, legislators were under few legal mandates or moral restraints to consider a slave as a human being. Their concern was directed almost exclusively toward protecting and guaranteeing, with the full force of their legislative power, the property rights of the master. The argument they used for adopting this attitude—that "it cannot be presumed that propensed malice should induce any man to destroy his own estate"—was specious in the extreme, for its presumption was too often contrary to fact. "Propensed malice" was not altogether an unknown factor in many killings of slaves. After the passage of this pernicious act in 1669, the suppression of blacks was legitimized with increasing specificity through a series of similar enactments and judicial pronouncements.

In this connection, it is important to bear in mind that the formulation of laws, the handing down of judgments, and all the other affairs of government are not carried out by robots. We know that as the colonists started to challenge their English ruler, King George III, no spokespersons were more bitter in their condemnation of tyranny or more eloquent in their plea for liberty, equality and justice, than the statesmen of Virginia. What is more, they frequently proclaimed their willingness to put their very lives on the line to vindicate these noble principles and to ensure the blessings emanating therefrom for themselves and their posterity. Thus, it is of value to study those same revolutionary leaders of colonial and antebellum Virginia who countenanced and even perpetrated the slave system, in an effort to gauge how strong their convictions were when it came to liberty, equality and justice for blacks. Perhaps the ambiguity and the duality (and even, as some might suggest, the hypocrisy) inherent in the ardent protestations of colonial patriots can be evaluated by looking at a distinguished sample: George Washington, Thomas Jefferson and Patrick Henry—Virginia's premier statesmen and also three of Virginia's largest slaveholders.

B. The Dual Morality of Virginia's Leaders

In common with most of the Revolutionary heroes, Washington, Jefferson and Henry earnestly espoused ideals of liberty and justice for all. The importance of their declarations notwithstanding, there existed a great disparity between the ideals and principles these men professed and the way they applied those ideals and principles to racial issues. In essence, when our leaders
were laying the foundations for a better, more humane nation for themselves, the human rights of blacks were relegated the bottom rung of their hierarchical ladder of values and priorities. This callous attitude on the part of the country's leadership has survived to the present day, manifesting itself in a conflict between national priorities on the one hand and a concern for the human rights of American blacks on the other. The resulting tension has been the nucleus around which race relations in America have become emotionally charged and almost irremediably polarized.

Even so, this lack of solicitude for blacks on the part of our distinguished founders has been masked by historians, who have emphasized particularly our forefathers' qualities of impartiality, reasonableness and statesmanship, while glossing over the fact that these same leaders were personally involved in, and profited from, a system which exploited and denigrated thousands of innocent and helpless victims. Of course we must admit that they were great men; but we must also admit that they had certain moral blind spots when it came to viewing the plight of those who were helplessly ensnared in the bonds of slavery. Ironically, it was not as though there were great intervening distances of land and sea over which they had to strain their mind's eye, as they pleaded for the British to do, to see the denial of "life, liberty and the pursuit of happiness;" America's leaders needed to look no farther than the slave quarters in their own back yards.

The attitude of these first great leaders toward the matter of slavery was of crucial importance to future relations between the races. They were highly respected men with persuasive, charismatic personalities, men who wielded an extraordinary amount of power in the new Republic. Whichever position on slavery they embraced, they doubtless would have been able to formulate public policy in line with it, and to sway public opinion toward its acceptance. But their choice was not to condemn the practice of slavery. Their fortunes were too heavily invested in it, and their way of life too intricately dependent upon it, to press for its abolition. In asking whether there was a valid moral basis for leaving blacks out of the new nation's system of priorities, the answer may depend upon whether one identifies with the economic needs of the slavemaster, or with the human needs of the slave. The lens through which one looks delineates and colors the image.

When Thomas Jefferson declared to the British government in 1776 that "all men are created equal," the system of slavery had been sanctioned, promoted and guaranteed for more than a century, not only by British law, but by the law of the colonies as well. As a slaveholder, Jefferson himself was the beneficiary of many of the statutes dealing with slavery. Further, it is difficult to reconcile his moving lines in the Declaration of Independence about the equality of men with the following notice which he wrote and had published in the *Virginia Gazette*:

Run away from the subscriber in *Albemarle*, a mulatto slave called Sandy,
about 35 years of age, his stature is rather low, inclining to corpulence, and his complexion light; he is a shoemaker by trade, in which he uses his left hand principally, can do coarse carpenters work, and is something of a horse jockey; he is greatly addicted to drink, and when drunk is insolent and disorderly, in his conversation he swears much, and his behaviour is artful and knavish. He took with him a white horse, much scarred with traces, of which it is expected he will endeavour to dispose; he also carried his shoemakers tools, and will probably endeavour to get employment that way. Whoever conveys the said slave to me in Albemarle, shall have 40 [shillings] Reward, if taken up within the county, 4 [pounds] if elsewhere within the Colony, and 10 [pounds] if in any other Colony, from

THOMAS JEFFERSON

By the substance of this announcement, Jefferson seems to repudiate his stated belief in the equality of men. But since he was deeply learned in the principles of natural law and its “self-evident truths,” perhaps Jefferson was all too aware of the great contradiction between his rhetoric and his conduct. This is suggested by the following thoughtful commentary on slavery which he wrote shortly after writing the Declaration of Independence:

[If a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labor for another; in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavors to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him.]

Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever. (emphasis added)

Patrick Henry was another empassioned champion of the rights of men, deploring with all the vigor of an inspired revolutionary the “chains and slavery” imposed upon the colonists by the King of England. On March 23, 1775, standing before the delegates to the Virginia Convention meeting in St. John’s Episcopal Church in Richmond, Henry vehemently exhorted his colleagues to support his resolutions for organizing and arming the Virginia militia. Few patriotic speeches in our history have been so stirring, so well remembered, or so frequently cited:

Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, almighty God. I know not what course others may take, but as for me, give me liberty or give me death! (emphasis added)

Yet Patrick Henry, like Thomas Jefferson and much more so than the malign ed King George III, was himself an imposer of “chains and slavery” upon his fellow men. Whereas Henry had boldly asserted his determination to resist the king to ensure the blessings of liberty for himself and his compatriots by force of arms if necessary, no such drastic measure would have been necessary for him to endow the sixty-seven slaves on his plantation with those same blessings, by releasing them from a more literal bondage. Also
like Thomas Jefferson, he was aware of the self-contradicting distortions in his values and priorities. But he had not the will to apply the idealistic principles so forcefully avowed in his fiery rhetoric to a real condition of "chains and slavery" well within his power to correct. "Would anyone believe," he once ruefully asserted, as though himself surprised at the inconsistency inherent in his position, "that I am master of slaves of my own purchase! I am drawn along by [the] general inconvenience of living without them; I will not, I cannot justify it." It is interesting to note that this confession of Henry's about his weakness toward slavery, unlike his brilliant speech before the Virginia convention, is almost never quoted by reverential historians.

The third of our exemplar patriots is General and later President George Washington, the Father of His Country and owner of hundreds of slaves. Like Thomas Jefferson, his fellow Virginian, patriot and slaveowner, Washington too found it occasionally necessary to resort to advertising for runaway slaves and offering a reward for their return. Referring to his absconding slaves Peres, Jack, Neptune and Cupid (of course, they had no surnames, being slaves) in an advertisement published in the Annapolis (Md.) Gazette, George Washington wrote petulantly: "They went off without the least suspicion, provocation, or difference with any body, or the least angry word or abuse from their overseers." What an extraordinary lack of perception on the part of a man who was to lead men into battle, possibly to their deaths, in order to wrest from a British tyrant the "inalienable" right to their own bodies and to a reasonable share of the fruits of their own labor! As far back as the signing of the Magna Carta in 1215, this concept of personal liberty had been advocated in the common law of England, a body of principles freely drawn upon by the drafters of colonial law as well as the framers of the Federal Constitution. Was not the dispossession of a guiltless person's own body sufficient provocation to make him want to seek freedom? I am sure the barons who confronted King John at Runnymede would think it was. But one wonders what George Washington thought of a black's desire for freedom. Perhaps he expected blacks to be so docile as to tolerate silently, or even enjoy, the permanent degradation of slavery. Does not his advertisement reflect a dual standard of expectation? On the one hand, it was considered to be "natural" and "right" that the colonists should react with hostility and treasonous acts against the head of state to the "provocation" of a political issue like taxation without representation. On the other hand, the incomparably more heinous practice of depriving people of their humanity, not to mention their liberty, was overlooked or simply ignored as a "provocation" by the perplexed Washington as he sought to find a motive behind the apparently capricious action of a slave daring to run away.

In England, the colonists were ridiculed because of their contradictory values. In a response to their familiar protest against the king that taxation without representation was tantamount to "chains and slavery," Dr. Samuel Johnson summarily dismissed the colonists' distorted logic as "too foolish for
buffoonery and too wild for madness,” adding the wry comment: “If slavery be thus fatally contagious, how is it that we hear the loudest yelps for liberty among the drivers of Negroes?”

C. Virginia’s Bill of Rights: Framed with a ‘Cautious Eye’

On June 12, 1776, the Virginia House of Burgesses convening at Williamsburg adopted a Bill of Rights for the colony. Along with the Declaration of Independence, which was drafted shortly afterwards and drew heavily on it, the Virginia Bill of Rights was recognized as one of the key human rights documents of the revolutionary era. Yet, to enslaved blacks, that document, as well as the Declaration of Independence itself, was a meaningless piece of parchment. Abraham Lincoln underscored the irony in these so-called freedom documents when, in 1855, he commented on the deterioration of some of the ideals in the Declaration of Independence:

When we were the political slaves of King George, and wanted to be free, we called the maxim that “all men are created equal” a self-evident truth; but now when we have grown fat, and have lost all dread of being slaves ourselves, we have become so greedy to be masters that we call the same maxim “a self-evident lie.” The Fourth of July has not quite dwindled away; it is still a great day for burning fire-crackers!

But the possibility of this distortion on the matter of equality of man—from a self-evident truth to a self-evident lie—appeared negligible in the case of the Virginia Bill of Rights, thanks to what a later commentator called “a cautious eye” that directed its framing. Straightforward and precise, the statement was couched in language perhaps less rhetorical than that of the Declaration of Independence, but it was also less hypocritical:

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. (emphasis added)

Upon a careful reading, it becomes clear that while Virginia’s Bill of Rights proclaims to the world its belief in the equality of “all men,” the right to “enjoyment of life and liberty,” according to this document, is vested to men only “when they enter into a state of society.”

Thus, those forty-five members of Virginia’s House of Burgesses, meeting in Williamsburg in 1776, took upon themselves to divide all mankind into two distinct legal categories: those who have entered “into a state of society,” and those who have not. The implication in that time and milieu was unmistakable: as is so often the case, the “have nots” were the blacks. The significance of section I of Virginia’s Bill of Rights was construed almost three decades after its adoption by George Wythe, the great Virginia
Chancellor, in the seminal case *Hudgins v. Wright*\(^2\) which is discussed below.

The Virginia Bill of Rights served as an important foundation not only for the Declaration of Independence, but also for the Bill of Rights of the Federal Constitution. For example, the cherished right to religious freedom guaranteed by the First Amendment was outlined in section 16 of the Virginia Bill of Rights:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore *all men* are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other. (emphasis added)

Here, also, the designation *all men* implies the potential for divestiture contained in the significant clause of section 1, that is, only those men who "*have entered into a state of society*" are entitled to the free exercise of religion. In colonial Virginia, a guarantee of religious freedom would never have been construed to mean that *black* men, slave *and* free, denied access to any state of society, had the right to the free exercise of *their* religion. To the contrary, Virginia aggressively determined that all religious gatherings of blacks be monitored by whites, if not indeed conducted by whites. An 1805 statute, for example, gave slaves the right to attend religious worship with the master, provided that the service was "conducted by a white man."

By the extension of its regulatory powers so deeply and vigorously into religious affairs, the legislature of Virginia was skating on very thin ice as far as the constitutional doctrine of separation of church and state was concerned. But we must remember that the United States Constitution, like the Declaration of Independence and the Virginia Bill of Rights, applied only to those who had "entered into a state of society."

Of course, by now it is monotonously redundant to point out that, in the Virginia form of Christian brotherhood, the "*forbearance, love and charity*" of which they spoke in section 16 did not encompass blacks.

**D. George Wythe: An Early Advocate for Racial Justice**

Among Virginia's great leaders of the eighteenth and nineteenth centuries, there were a few who recognized, even as did Jefferson and Henry, the immoral and unjust duality of a legal system which applied its sanctions and extended its protection on a selective basis of race. There were fewer still who, *unlike* Jefferson and Henry, sought actively to eliminate this dual-

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\(^2\) 1 Va. 134 (1 Hen. & M.) (1806).
ity, or at least to narrow the gap between proclaimed ideals and actual practices. Perhaps the most admired of these activists was George Wythe, considered by many historians to be America’s first law professor and also one of America’s greatest jurists and statesmen.

When Virginians claim George Wythe as one of their distinguished sons, they claim a man who was in several key respects as influential in determining the course of American history as those who were perhaps better known. Thomas Jefferson eulogized Wythe, his former teacher and lifelong friend, in these words:

No man ever left behind him a character more venerated than George Wythe. His virtue was of the purest tint; his integrity inflexible, and his justice exact; of warm patriotism, and, devoted as he was to liberty, and the natural and equal rights of man, he might truly be called the Cato of his country, without the avarice of the Roman; for a more disinterested person never lived. . . . Such was George Wythe, the honor of his own, and the model of future times.

Wythe stood tall even in the company of his most distinguished contemporaries, Washington, Jefferson and Patrick Henry, those visionaries who championed by pen and tongue their own particular versions of the American dream. When Jefferson described Wythe as “the model for future times,” he acknowledged that his mentor and fellow signer of the Declaration of Independence was a step ahead of then current ways of thinking and doing.

Like Jefferson and Henry, Wythe recognized the contradiction inherent in a nation which, on one hand, proclaims devotion to the ideals of liberty and the natural and equal rights of man, and on the other hand tolerates the evils of human slavery. Even though Wythe himself was a master of slaves, he eventually freed most, if not all, of his slaves during his lifetime.³ Here again he was significantly different from many other abhorrers of slavery who, after receiving maximum benefits from the system while they were alive, magnanimously provided in their wills for the freedom of their slaves, such freedom conveniently becoming effective at a time when they were obviously beyond the need of slaves. But Wythe believed in confirming in practice his unswerving commitment to the principle that the emancipation of the colonies from their relatively benign political and economic “enslavement” by England carried with it the moral imperative for the emancipation of those individuals the colonists themselves held in bondage.

This was a courageous stand to take, and an unpopular one. As a jurist, Wythe’s decisions from the bench also often went counter to public opinion. But Wythe was noted for his unwavering insistence on doing what was right,

³ There is some debate whether two of Wythe’s slaves were or were not freed. But even if these two were not freed, they were treated with great affection and dignity by Wythe, and one of them, Michael Brown, was bequeathed half of Wythe’s estate.
no matter how inconvenient it was to him personally, or how much criticism
or disapproval he might incur. While he was Chancellor, he valiantly tried to
extend the provisions of Virginia's Bill of Rights to cover all persons, even
slaves. The opportunity to move Virginia's legal code in this direction came
in 1806, when the case of Hudgins v. Wright came before Wythe for adjudica-
tion. In construing the merits of this case, Wythe further illustrated that he
was a step ahead of his fellow jurists when it came to human rights in the
new Republic.

The gist of the landmark case of Hudgins v. Wright involved the petition
of three Indians, who had filed a writ of ne exeat challenging their alleged
owner who was preparing to transport them out of the state for possible sale
as slaves. In preparing his ruling in this case, Chancellor Wythe passed over
the issue of the plaintiffs' race, and cited instead the broad principles of the
1776 Virginia Bill of Rights (later incorporated into the Virginia state con-
stitution). Here, the leading revolutionary statesmen had declared as a first
principle that "all men are by nature equally free," and possess certain "in-
herent rights." By applying the provisions of this historic document to the
case before the court, Wythe ruled that the Virginia Bill of Rights had indeed
established a presumption of freedom at birth for all men, blacks included,
even if that freedom may over time have been abrogated. According to
Wythe's reading of the law, in any dispute arising over the question of
whether a person should be categorized as a free man or as a slave, he must
be presumed free until proven otherwise by any person claiming him to be a
slave. "[F]reedom is the birth-right of every human being," wrote the
Chancellor in his ruling,

which sentiment is strongly inculcated by the first article of our 'political
catechisms,' the bill of rights—they laid it down as a general position, that
whenever one person claims to hold another, in slavery, the onus probandi
[i.e., the burden of proof] lies on the claimant.

On appeal from Wythe's ruling, the Virginia Court of Appeals explored
not only the issue of presumption of freedom, but also the even more funda-
mental issue of whether the Virginia Bill of Rights applied to blacks at all.
Judge St. George Tucker, a former student of Wythe and one of Virginia's
most famous justices, disagreed vigorously with Chancellor Wythe's inter-
pretation. Judge Tucker maintained that the Virginia Bill of Rights had been
framed "with a cautious eye,"

and that it was meant to embrace the case of free citizens, or aliens only; and
not by a side wind to overturn the rights of property, and give freedom to
those very people whom we have been compelled from imperious cir-
cumstances to retain, generally, in the same state of bondage that they were
in at the revolution, in which they had no concern, agency, or interest. (first
emphasis added; second emphasis in the original)

Judge Tucker illustrated his argument in the following graphic terms:
Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper coloured person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a Judge upon a writ of Habeas Corpus, on the ground of false imprisonment and detention in slavery: ... How must a Judge act in such a case? ... He must discharge the white person and the Indian out of custody ... and he must redeliver [into slavery] the black or mulatto person, with the flat nose and woolly hair to the person claiming to hold him or her as a slave, unless the black person or mulatto could ... produce proof of his descent, in the maternal line, from a free female ancestor. (emphases in the original)

According to Tucker's views, not only were all slaves legally excluded from the protection and benefits of the Bill of Rights, but also all blacks must be presumed slave unless they could prove they were free. Thus, Judge Tucker's ruling became a definitive precedent in Virginia law that imposed a unique burden on all black people, and black people alone—that they must prove they were free while whites were presumed to be free. Thus, solely because they had woolier hair, flatter noses, and darker skins, they suffered deprivations that even "aliens" would never have been subjected to, so long as the aliens were white.

While the Virginia Court of Appeals affirmed the ruling of Chancellor Wythe that the Wrights should be free, it rejected the rationale by which he arrived at that decision—that all men were to be presumed free until proven otherwise. Thus it was that St. George Tucker, and not the great law professor and humanitarian, became the author of the definitive ruling regarding presumption of freedom in Virginia. But George Wythe did not live to see the appellate court's repudiation of his ingenious attempt to ameliorate the position of blacks under the law. Before the decision had been handed down, Wythe had died by the hand of a murderer.4

IV. WEST VIRGINIA'S RACIAL LEGACY

Virginia's background of white supremacy and black oppression as reflected in its legal code and in the decisions of most of its jurists, divided the state into two geographically as well as ideologically separate camps—the proslavery plantation owners in the middle and eastern sections, and the antislavery frontiersmen in the mountain areas to the west. The question before the political leaders of the fledgling state of West Virginia was threefold: would they go the way of the majority of Virginians who

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4 Circumstantial evidence indicated that George Wythe died of poison added to his food by his grandnephew, George Sweeney. The poison also killed a free mulatto servant who was coheir of Wythe's estate with the nephew. Because some damaging testimony of Wythe's housekeeper was disallowed at the trial (being a black, she was not permitted to testify against a white), Sweeney was acquitted of the charge.
either advocated slavery as a positive good or simply acquiesced in the system; the way of Jefferson and Henry, who participated in and profited from the institution but openly acknowledged the many evils arising from it; or would they follow the path of George Wythe and actively work for the abolishment of slavery and the harmonious coexistence of the races?

Of the three directions the counties of trans-Allegheny Virginia could have taken on this issue, they ultimately chose a direction similar to that taken by Wythe, but for reasons quite removed from Wythe’s dedication to the principles of human rights, his devotion to the cause of liberty for all men, and his disinterested concern for the plight of the individual slave. To the contrary, the guiding motivation for western Virginia’s desire to abolish slavery within its boundaries had its basis on a more mundane and practical plane—economics. The prevalent attitude, which could best be described as “enlightened self-interest,” was expressed by mountaineer Thomas Marshall in his succinct denunciation of slavery:

> It is ruinous to the whites; it retards improvements, roots out our industrious population, banishes the yeomanry from the country and deprives the spinner, the weaver, the smith, the shoemaker, and the carpenter of employment and support. [Ambler, *West Virginia the Mountain State*, p. 146]

Plantation slavery had developed in Tidewater Virginia, as an integral part of the labor intensive tobacco economy concentrated in that area of the state. To the west, the rough terrain and cooler temperatures of the Appalachian Mountains were not favorable to the raising of tobacco, or any other crop that needed vast acreages of tillable land and a large force of unskilled labor. Indeed, the system of slave labor was not only unneeded in western Virginia, but, as Marshall had perceptively observed, it was actually inimical to the flourishing of its yeoman farming economy, for the system decreased employment opportunities and deflated wages of the free, white working class. It is interesting to note that while the issue of slavery proved to be the root of much of the controversy between eastern and western Virginia, the same incentive motivated both sides: economic advantage for the white man. Very little concern was expressed for the welfare of the central element in this political tug-of-war—the slave himself.

Thus, it was the imbalance of economic prosperity between the eastern and western portions of Virginia that lay at the core of the sectional tensions and eventually led to the division of the state. The frictions were aggravated even more by the fact that the only remedial action available to western Virginians—the ballot—became more and more ineffective, due to the 1776 state constitution’s burdensome property qualifications on the right to vote, and unfavorable legislative apportionment disproportionate to their white population. Both conditions overwhelmingly favored the planter aristocracy of the Tidewater, and rendered the western section politically impotent.

In 1814, in an effort to correct the inequitable election laws, a constitu-
tional reform movement began with the introduction of a bill in the House of Delegates calling for the extension of voting privileges to others besides property holders, and for the reapportionment of representation less discriminatory against the western counties. Although the bill was defeated, three years later, the General Assembly acted on a new petition demanding similar constitutional reforms by reapportioning senatorial districts according to the state's white population figures of the census of 1810.

But this action was accepted by the western Virginians as only a stop-gap compromise, and they continued to agitate for more extensive reforms. As it was Virginia's constitution itself that had brought about the condition of de facto disenfranchisement for these citizens, they realized that, if they were ever to have a determining voice in government, the constitution itself would have to be changed. By 1828, they had persuaded the General Assembly to propose to Virginia's electorate that a Constitutional Convention be called to consider the issues of apportionment and suffrage requirements. The referendum was approved, and in 1829-30, the Convention assembled. Among the delegates were such renowned statesmen as James Monroe, John Marshall, and James Madison. Monroe was elected president of the Convention.

The heated debate over the main item on the agenda, the apportionment of legislative representation among counties, was polarized, not surprisingly, along sectional lines. The delegates from the western frontier called for distribution in proportion to the white population, the so-called "white basis" plan. The counter proposal of the plantation area delegates was that apportionment be based on a composite factor, or "mixed basis," which considered not only the white population, but also property valuations, including slaves. A third proposal was that apportionment be based on the numbers of whites plus three-fifths of the black population; this was the apportionment formula stipulated by the Federal Constitution for purposes of taxation and national elections.

The "white basis" formula proposed by the western delegation was entirely unacceptable to the eastern. If adopted, the plan would result in a shift of the political power base from the slave-owning east to the abolitionist-minded west, and thus would pose a distinct threat to the social and economic structure of the plantation way of life.

In the revised Constitution as it was adopted on January 7, 1830, the western counties gained some ground in that the franchise was extended to include leaseholders and householders. However, their proposal for universal suffrage was defeated; and on the issue of apportionment, the only concession the Convention made to the demands of the western delegates was the enactment of a plan whereby specific numbers of representatives were allotted to each of Virginia's major geographical divisions.

Sectional animosity was renewed and further intensified the following
year, 1831, in the wake of the Nat Turner slave insurrection. The Virginia General Assembly was inundated with petitions demanding some action on "the Negro problem," in light of the slaughter of numerous whites in Southampton County. Proposals ranged from a declaration that the institution of slavery was a positive good, to a call for its immediate abolition as a pernicious evil. Because the delegates from the western, antislavery bloc of counties were becoming quite vociferous in their demands upon the General Assembly, the more powerful proslavery faction imposed a gag rule, which their opponents lacked the votes to rescind, forbidding the discussion of petitions relating to slavery, abolition, or anything else dealing with blacks in Virginia. The antislavery faction countered with a resolution calling for the gradual emancipation of all slaves. The western Virginia contingency supported emancipation but lacked the voting power.

But western Virginians would not be silenced. They persisted in urging the General Assembly to set in motion the convening of a second Constitutional Convention, to debate once again the thorny issue of representation on a white basis. This "Reform Convention" met first in October of 1850 and again in January, 1851. When the eastern proslavery delegates introduced their old arguments to the Convention as to why they could never agree to the "white basis" principle, the western counties threatened to secede from Virginia. Throwing the Convention off balance with this startling and unexpected maneuver, the abolitionist alliance was able to use the threat as leverage to wrest some concessions from the eastern factions who controlled the Convention. The plan of arbitrary allotment of representatives to the various districts, first used in 1830, was revived, and the franchise was extended to all white males over 21. The western delegates, however, were forced in turn to agree to a flat prohibition of legislative emancipation and certain tax advantages respecting slave property. On each slave over twelve years of age, a tax was to be assessed equivalent to that on land valued at $300, whereas slaves under twelve years of age were to be exempt from taxation. While the western farmer was being taxed on the full value of his livestock, regardless of age, the slaveowner paid nothing for slave children and paid on a fixed value below the average market price on slaves of marketable age and quality.⁵

⁵ (22) TAXATION SHALL BE EQUAL and uniform throughout the commonwealth, and all property other than slaves shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law.

(23) Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation; and other taxable property may be exempted from taxation by the vote of a majority of the whole number of members elected to each house of the General Assembly.

(24) A capitation tax, equal to the tax assessed on land of the value of two hundred dollars, shall be levied on every white male inhabitant who has attained the age of twenty-one
In spite of the inequities still existing in the compromise Constitution of 1850, the two contentious factions joined in its ratification.

Throughout the decade of the 1850's, Virginia was kept in a constant state of sectional agitation over the unresolved question of slavery. In the wake of each new crisis, such as the *Dred Scott* decision, the Kansas-Nebraska Act, and John Brown’s raid, the adherents of each side of the controversy used the occasion to propagandize its views and increase the urgency of its demands. The sections of Virginia were much closer to a split in 1850 than generally realized, and Lincoln’s election in 1860 brought the whole matter to a head.

Lincoln was opposed to slavery whatever the form, but for purposes of political expediency, his campaign strategy was to stress his opposition more in terms of the containment of slavery than its abolition. He further emphasized his determination to save the Union—without slavery if possible, with it if necessary. These convictions he reaffirmed in his Inaugural Address in Washington on March 4, 1861. Just six weeks later, on April 15, the Confederate Army attacked Fort Sumter. Lincoln immediately responded by issuing a proclamation calling for troops to coerce the seceding states to return to the Union.

Even though Virginians were not at first favorable to secession, they were so angered by Lincoln's call for troops that, a few days after the proclamation was made, the General Assembly passed an ordinance repealing the state's 1788 ratification of the United States Constitution, after which Virginia placed its military forces at the disposal of the Confederacy. On
April 25, a state convention passed the ordinance of secession, subject to a referendum by the people.

Western Virginians reacted with bitterness and hostility to the secession ordinance. Determined to resist it, they refused to pay state taxes, and mobs threatened to lynch any secessionists in the area. A series of protest conventions were called to condemn it and to urge the citizens to vote against the ordinance. But in this instance as in so many others, they lacked the voting power to overcome the powerful plantation establishment. On May 23, 1861, the secession ordinance was ratified by the referendum, and Virginia's lot was cast with the Confederacy. Six days after the vote on the ordinance, Jefferson Davis was welcomed to the new Confederate capital in Richmond.

The separate history of West Virginia as a state began in June of 1861, when delegates from the twenty-six dissenting western counties met at Wheeling to reorganize the government of Virginia. This Provisional or Reorganized government pledged its support of the Union cause and the laws of the United States, declaring the position that "the citizens of Rebel State Governments are subjects of foreign states at war with the United States. As enemies of the state, they are subject to arrest." A "Declaration of the People of Virginia" was adopted, incorporating the original Virginia Bill of Rights of 1776, and setting forth the principles that:

... The act of the General Assembly, calling the Convention which assembled at Richmond in February last, without the previously expressed consent of such majority, was therefore a usurpation; and the Convention thus called has not only abused the powers nominally entrusted to it, but, with the connivance and active aid of the executive, has usurped and exercised other powers, to the manifest injury of the people, which, if permitted, will inevitably subject them to a military despotism.

The Convention, by its pretended ordinances, has required the people of Virginia to separate from and wage war against the government of the United States, and against citizens of neighboring States, with whom they have heretofore maintained friendly, social and business relations:

state of Virginia and the other states under the constitution aforesaid is hereby dissolved, and that the state of Virginia is in the full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent state.

And they do further declare, that said constitution of the United States of America is no longer binding on any of the citizens of this state.

This ordinance shall take effect and be an act of this day, when ratified by a majority of the votes of the people of this state, cast at a poll to be taken thereon on the fourth Thursday in May next, in pursuance of a schedule hereafter to be enacted.

Done in convention, in the city of Richmond, on the seventeenth day of April in the year of our Lord one thousand eight hundred and sixty-one and in the eighty-fifth year of the commonwealth of Virginia.—Ordinances Adopted by the Convention of Virginia in Secret Session in April and May 1861, Acts of the General Assembly of the State of Virginia, Passed in 1861 (Richmond, 1861), Appendix. (emphasis added)
It has attempted to subvert the Union founded by Washington and his co-patriots, in the purer days of the republic, . . .

It has attempted to transfer the allegiance of the people to an illegal confederacy of rebellious States, and required their submission to its pretended edicts and decrees: . . .

in the name and on the behalf of the good people of Virginia, solemnly declare that the preservation of their dearest rights and liberties and their security in person and property, imperatively demand the reorganization of the government of the Commonwealth, and that all acts of said Convention and Executive, tending to separate this Commonwealth from the United States, or to levy and carry on war against them, are without authority and void; and that the offices of all who adhere to the said Convention and Executive, whether legislative, executive or judicial, are vacated.—Ordinances of The Convention, Assembled at Wheeling, on the 11th of June, 1861, pp. 5-6. (emphasis added)

West Virginia's new constitution, ratified April 3, 1862, provided that representation in the legislature was to be on a white basis; and the right to vote was extended, without property qualifications, to all “white male citizens.” Regarding blacks, the constitution provided that “No slave shall be brought . . . into this State for permanent residence.” However, their hostility was more than merely an antagonism to the importation of slave labor—it also denied “free persons of color” permission to enter West Virginia. Because of this exclusion of free persons of color, the original constitutional proposal was substantively antiblack rather than merely antislavery. However, Congress conditioned West Virginia's admission into the Union upon the deletion of this section and the adoption of an amendment providing for the gradual emancipation of all slaves. Nor would Lincoln issue the proclamation of statehood until the people of West Virginia ratified such an amendment to their proposed constitution. Western Virginia did not react favorably to this demand, but the President was concerned with raising a strong antislavery party which would translate into pro-Union sentiment. When the delegates took this stipulation under consideration, there was some discussion about the propriety of state compensation to slave owners for the loss of their human property, but this proposal was defeated. However, an acceptable emancipation amendment providing for the gradual abolition of slavery was finally adopted on April 16, 1863. The terms of this amendment were:

The children of slaves born within the limits of this state after the fourth day of July, eighteen hundred and sixty-three, shall be free; and all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years; and all slaves over ten and under twenty-one years, shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein. (emphasis added)
“Gradual” was the key design of the Act, if one were asked to describe its effect on the acquisition of freedom by the majority of black people in West Virginia. Most significantly, no slave who was 21 years old as of July 4, 1863 was freed, and those slaves between the ages of 10 and 21 were not immediately freed—but their freedom came most gradually. Thus, if a slave was 10 years old it would be 15 years before he or she became free. Certainly, this abolition process in West Virginia was so gradual that Frederick Douglass' blanket condemnation of slavery would have been equally applicable to West Virginia despite its abolition process. Frederick Douglass had written previously:

... your denunciations of tyrants [are] brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour.

Four days after the gradual emancipation amendment was adopted, Lincoln formally issued a proclamation making West Virginia the thirty-fifth state of the Union. As a new state, West Virginia was a new slave state but one with a constitutional provision calling for the future abolition of slavery. When Lincoln issued the Emancipation Proclamation on September 22, 1862, that historic document did not free all of the slaves. President Lincoln was careful to apply it only to those states “or designated part of a state” where the people “shall then be in rebellion against the U. S.” In this epic-making decree, he deliberately exempted its application to those states not “in rebellion” and specifically excluded the “forty-eight counties designated as West Virginia.” Those exempted areas were to be “left precisely as if this proclamation were not issued.” Thus, the irony of the Emancipation Proclamation, the quintessential document of freedom for most blacks, was that blacks enslaved in rebellious states were freed immediately and blacks in the loyal state of West Virginia remained as slaves—and as a matter of right, could be freed only pursuant to the terms of the gradual emancipation statute.

The new legislature of West Virginia did repeal many of the harsher laws of Virginia pertaining to slaves and free blacks. Virginia’s response to its rapidly increasing black population had been intensification of legal suppression. Unlike Virginia, West Virginia’s black population was small and less in need of extensive control. Like Virginia, however, West Virginia adopted policies of racial control, nonetheless. For example, as in the case of Wythe’s tragic death, blacks in West Virginia were not accepted as competent witnesses in criminal proceedings except against other blacks, but the
criminal code did provide that accused blacks were to be tried like white men.7

An analysis of West Virginia's slave code reveals that West Virginia was continuously trying to stride the most divisive issues of slavery, and to ultimately balance the human rights of blacks against the masters' potential economic loss. West Virginia tried to appease its own small slave-holding class in many ways, while issuing general proclamations favorable to some slaves. As an example, section 1 of the December 9, 1863 statute provides:

No person held to service or labor as a slave under the laws of any other state, territory or country, or who has been sent or taken out of this state with the consent of the owner, and was out of the state on the twentieth of June, eighteen hundred and sixty-three, shall be permitted to come or be brought into this state for permanent residence. Any such person or slave coming or brought into this state by or with the consent of his master or owner, or of any person legally representing or acting for or on behalf of such master, owner or person for six months, shall be thereafter free.

Though slaves illegally brought into the state became free within six months, that provision was similar to a Virginia statute in the early 1800's. Many Southern states towards the middle of the 19th century provided that the slave who had entered illegally could be sold, while West Virginia freed them. Yet even when considered in the light most favorable to West Virginia, their statute was applicable basically to non-resident slaves and non-resident slave holders. Thus, this was as much a provision against non-residents as it was favorable to freeing slaves. As to their own citizens, they carefully declared:

Nothing in this section shall be construed to prevent loyal citizens from bringing into the state their slaves who may have fled from service, or who may have been removed by their owners to other loyal states holding slaves.

Similarly, they protected the right of all masters from any state to recover runaway slaves.

However, there were some dramatic differences in the slave codes of Virginia and West Virginia. First and foremost, West Virginia eliminated the many impediments on emancipation which Virginia and most Southern states generally imposed upon individual slave holders. There were no requirements that the owners post a bond or get legislative approval, nor were there

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7 CHAP. 10.—An ACT to regulate Criminal Proceedings against Negroes. Passed July 15, 1863.

Be it enacted by the Legislature of West Virginia:

1. A negro charged with any offense shall be prosecuted and tried in the same manner, and, if convicted, be subject to the same punishment as a white person; but a negro shall be a competent witness for or against a negro in any criminal proceeding.
any prohibitions against emancipation. The statute was brief and comprehensive in eliminating restraints on masters freeing their slaves. It provided simply that:

Any person may emancipate his slaves by deed or will. Slaves so emancipated shall not be liable, in any way, for any claim or taxes, whether contracted or due before or after the passage of this act, saving only for such actual liens as exist at the time of the passage of this act.

The West Virginia Legislature finally brought their state up to the moral standards of Lincoln’s Emancipation Proclamation when, more than two years later, the legislative enactment of February 15, 1865, freed all the slaves and outlawed both slavery and involuntary servitude.

In studying West Virginia’s racial history of more than a century ago, it is impossible to classify West Virginia as either a pure abolitionist state or a traditional slave state. Perhaps more for pragmatic reasons than any others, West Virginia wavered in the middle of the spectrum, and was probably somewhat of an enigma to both the slavery and the abolitionist camps. But whatever reasons historians assign for West Virginia’s differences, the truth of the matter is that the West Virginia legal system, though less oppressive than some other states, nevertheless denied, bluntly and unequivocally, to blacks the quality of justice whites demanded for themselves.

V. CONCLUSION

For almost fifty turbulent years before the Civil War, the issues of slavery, economic rivalry, and deep-seated political animosity in Virginia precipitated damaging sectional conflicts which ultimately led to the secession of the northwestern portion of the state. Formally given the name of West Virginia, this area became the thirty-fifth state in the Union on June 20, 1863. On its first seal, the new state proudly declared: “Montani Semper Liberi—West Virginians (‘Mountaineers’) Are Always Free.” Yet for more than 200 years prior to statehood, West Virginia shared the racial history of Virginia, and during those years, a great portion of the black “montani” living in that state were not at all free. West Virginia had inherited a harsh legacy from its mother state of Virginia, a legacy which had steadfastly repudiated the sharing with blacks those coveted “unalienable rights” of freedom, equality and fundamental justice.

Yet in a race relations context, West Virginia was somewhat unique. Though racist, on a relative scale, it was not as racist as its parent Virginia and the magnitude of its racial oppression was less. Blacks were still not free from the standpoint of equality with whites before the law, but West Virginia narrowed the gap somewhat between the egalitarian principles of freedom and the racist practices which thwart the attainment of that goal. Although not “always free,” as West Virginia’s motto proudly, if a little inaccurately,
boasts, perhaps the state can rightfully take pride in the more pervasive freedom under the law now generally accorded to all its inhabitants.

**EPILOGUE**

I look upon my research on the slavery period not as an end but as a beginning, in efforts to understand the different developments, pace and quality of justice between two adjacent states which shared a common parenthood, originally as a colony and for an additional 84 years as a part of the Old Dominion. It is my hope that my research on West Virginia, which still continues, can be a base for others in exploring the uniqueness of West Virginia as to its evolution of law on the issue of race during the Reconstruction period and the 20th century. There is much evidence to suggest that during the 100 years after the birth of West Virginia that West Virginia was somewhat less harsh on blacks, or to state it more positively, that West Virginia was more committed to assuring equal rights to blacks, than was Virginia.

According to one historian:

Even after the final break with the parent state, West Virginia retained many marks of the Virginia heritage—subtle ones of accents, cuisine, and social attitudes, along with stronger ones of family connections and common political experience.

For this reason, it is difficult to understand the mentality of whites in West Virginia with regard to race relations, more so than in other Southern states. On the one hand, West Virginia retained many of the racist attitudes which had fostered Virginia's dual morality. On the other hand, the magnitude of the racism was less as indicated by several of the laws discussed above. These differences create the West Virginia race relations enigma, which makes it so difficult to categorize the state. Some commentators have suggested that there was substantial benevolence in West Virginia's treatment of blacks. See generally the excellent dissertation of Professor John Sheeler, *The Negro in West Virginia Before 1900* (1954). Yet there is a danger in overstating the “liberality” of West Virginia. Many blacks, uncertain of their futures and the commitment of whites to equal treatment under the law, left the new state. By 1870, West Virginia's already small black population had declined dramatically.

Perhaps on some issues West Virginia may have been worse than Virginia. As an example, in Virginia there was no statute in the 1870's which prohibited blacks from serving on a jury—nevertheless, by practice in some counties blacks never served. West Virginia did not leave the issue open; their statute specifically limited jury participation to “white male persons” who were at least 21 years old. See *Virginia v. Rives*, 100 U.S. 313 (1879); and *Strouder v. West Virginia*, 100 U.S. 303 (1879).
Yet, as one looks at the evolution of education for blacks in West Virginia, there is some evidence which suggests that West Virginia may have been more supportive of public education for blacks. Unlike some public schools in New Orleans, West Virginia's public schools were apparently never integrated in the 1870's. See John W. Blassingame, Black New Orleans 1860-1880 pp. 105-21; and C. Vann Woodward, The Strange Career of Jim Crow p. 24 (3d rev. ed.).

Soon after its founding in 1863, West Virginia statutorily provided for the establishment of separate schools for "free colored children," the beginning of the State's long history of what one scholar has called "benevolent segregation."8 But many whites objected even to these schools, fearing that they would be an incentive for nonresident free blacks to migrate into the State and increase the small black population.

Despite the school law and the availability of public funds, public education for blacks developed quite slowly. An act of 1866 authorized education for "colored children," but the geographically dispersed black population and community hostility impeded development. The State did attempt to alleviate the effects of population distribution. An 1867 provision allowed districts to consolidate to form a school if each individually did not have enough black students in the proper age categories to have its own school. Legislation in 1881 and again in 1899 reduced the number of students required to form a school. Moreover, in response to an 1868 suit filed by blacks against the Harper's Ferry township to recover wrongfully withheld funds, it was stipulated that any local school board which failed to provide blacks with their portion of school funds could be compelled by mandamus to do so.

Although segregated schools had not been an explicit feature of the 1863 State Constitution of West Virginia, custom and school legislation had brought about the same effect. However, in 1872, West Virginia's segregationist policies became part of the Constitution itself, by a provision which prohibited the education of white and black children together. This provision inaugurated in West Virginia the infamous "separate but equal" system of

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8 (17) The township boards of education in their respective townships shall be, and they are hereby authorized and required to establish within their respective jurisdictions, one or more separate schools for free colored children, when the whole number by enumeration exceeds thirty, so as to afford them as far as practicable, under all the circumstances, the advantages and privileges of a free school education; and all such schools so established shall be under the management and control of the board of education; but in case the average attendance of free colored children shall be less than fifteen for any one month, it shall be the duty of said board or other school officers to discontinue said school or schools for any period not exceeding six months at any one time, and if the number of free colored children shall be less than fifteen in attendance, or not exceeding thirty by enumeration, the directors shall reserve the money raised on the number of free colored children, and the money so reserved shall be appropriated for the education of such colored children in such a way as the township board shall think best.
education which had been sanctioned in Massachusetts before the Civil War.\(^9\) It was not until after the United States Supreme Court decision of 1954 in *Brown v. Board of Education*,\(^{10}\) which brought an end to state imposed segregated schools, that West Virginia dismantled its system of separate public education.

But to its credit, West Virginia had not nearly the amount of hostility toward the Supreme Court decision as that manifested by its mother state, Virginia. To illustrate the magnitude of Virginia's resistance to desegregation, in 1963 (nine years after the *Brown* decision), only 24 of Virginia's 120 school districts were integrated, and these districts were heavily concentrated in the cities such as Richmond and Roanoke. Moreover, in Virginia, the school district of Prince Edward County, rather than comply with court-ordered desegregation, completely abolished its public school system in 1960.

By way of contrast, in 1963 all the school districts in West Virginia had some integration. Even West Virginia State College, once predominantly black, had a majority of white students. According to a 1963 report by the United States Commission on Civil Rights, "West Virginia ... no longer fits the southern school mold."

Although it took Virginia and some other states even longer, it was not until the 1960s that West Virginia broke away from the system of dual morality inherited from Virginia and accepted the ruling of George Wythe that freedom was the birthright of every human being. To those of us familiar with West Virginia's racial legacy from Virginia and stormy acquisition of statehood, it is not surprising that the counties comprising West Virginia did not fit perfectly into the "southern mold."

\(^{10}\) 347 U.S. 483 (1954).