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ORIGINAL ARTICLE

Free Black Witnesses in the Antebellum Upper South

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Abstract

While every slave state except Louisiana limited free Black testimony in cases involving whites, and most barred it completely, several jurisdictions with slavery, including three in the Upper South—Delaware, Maryland, and D.C.—allowed at least some free Black testimony in cases involving whites at least some of the time. Historians and legal scholars have largely overlooked the phenomenon of free Black testimony in the South, outside of Louisiana. In this article, I argue that courts in the Upper South allowed some free Black testimony in cases involving whites in part because allowing (limited) Black testimony enabled courts to access the truth (slightly) more freely, thereby increasing the law's legitimacy. The exceptions to the general bar against Black testimony in cases involving whites also demonstrate the diversity of legal trends in the antebellum Upper South. In Maryland, the space for free Black testimony shrank. In D.C. and Delaware, it grew. But Southerners long contested the relationship between race and law. Competing pressures to administer a well-functioning legal system and to maintain racial hierarchy exerted force on the white elite. Southern elites, even before the great convulsion of the Civil War, sometimes divided on how best to administer a white supremacist legal regime.

Slavery permeated Southern life and law, as racial hierarchies pervasively shaped society. Southern judges and legislators crafted numerous doctrines to maintain slavery. Enslaved people were legally property. As a general rule, they could not sue and be sued, they could not contract, and they could not testify against whites in court. In this context, it would be natural to assume that free Black Southerners would likewise be categorically barred from providing testimony in cases involving whites—and several historians have assumed so.[1]

[1] Kimberly M. Welch, *Black Litigants in the Antebellum American South* (Chapel Hill: University of North Carolina Press, 2018), 18; Judith Kelleher Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1994), 144; Paul Finkelman, "Rehearsal for Reconstruction: Antebellum Origins of the Fourteenth Amendment," in *The Facts*

While every slave state except Louisiana limited free Black testimony in cases involving white litigants, and most barred it completely, several jurisdictions where slavery was legal, including three in the Upper South—Delaware, Maryland, and D.C.—allowed at least some free Black testimony in cases involving whites at least some of the time. Why would a slave state ever allow a free Black witness to testify in a case involving whites?

The competing forces at play in deciding whether to admit free Black witness testimony in cases involving white litigants reflect disagreement among the white elites. Creating pressure to include free Black testimony was the centuries-long doctrinal shift that George Fisher has called the rise of the jury as lie-detector.[2] English common law evidentiary rules in the mid-sixteenth century were highly restrictive, but increasing faith in the powers of lawyer-conducted cross examination and the jury's ability to assess credibility led to the gradual decline of restrictions on who could testify over the following centuries.[3] In states with large free Black populations, their blanket exclusion from cases with white litigants limited the relevant evidence that juries could hear, impeding the truth-seeking function of trials. Working against these pressures—successfully in most slave states before the Civil War—was the white elite's desire to maintain the racial hierarchy. Excluding free Black witnesses from testifying was a potent tool of white supremacy.

One cause of the gradual loosening of witness competency rules from seventeenth-century England to the Reconstruction South is the discrepancy between public knowledge (what people in the community know) and legal verdicts (what the court decides) that excluding testimony could produce.[4] Truth-seeking human institutions, like the jury, are not the only source of legitimacy for a trial verdict. Trial by ordeal, trial by combat, and oaths called upon divine authority.[5] But courts have usually made some appeal to the rational effort to uncover truth, and it does not take any sophisticated theory to think that refusing to hear witnesses who saw the crime might obstruct the effort to get to the bottom of what really happened. Noting that the English common law once prevented the defense from presenting sworn witnesses at all, Fisher remarks, "[L]ong before Bentham and long before the Enlightenment or the Scientific Revolution, ordinary people must have shaken their heads in wonderment at a system designed to find truth that permitted only one party to the cause to present any sworn evidence at all."[6]

Similarly, it was incongruous when white community members knew that disinterested third parties had witnessed a crime, but their testimony could not be admitted in court because of their race. Often, this exclusion benefitted

of Reconstruction: Essays in Honor of John Hope Franklin, eds. Eric Anderson and Alfred A. Moss, Jr. (Baton Rouge: Louisiana State University Press, 1991), 1, 14.

[2] George Fisher, "The Jury's Rise as Lie Detector," *Yale Law Journal* 107, no. 3 (1997): 577–85.

[3] Fisher, "The Jury's Rise as Lie Detector," 579–80.

[4] Fisher, "The Jury's Rise as Lie Detector," 584–85, 704–5.

[5] John H. Langbein, Renée Lettow Lerner and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Aspen Publishers, 2009), 29–53.

[6] Fisher, "The Jury's Rise as Lie Detector," 704–5.

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whites. Other times, it did not. In states with large Black populations, the restrictions on Black witnesses prevented a considerable amount of testimony from being admitted in court. Restrictions on Black testimony may have reinforced a white supremacist system that white Southerners wanted to protect, but these restrictions on Black testimony could also inconvenience the slaveowner. For example, when enslaved people gambled with poor whites, the state often struggled to convict the white gamblers for lack of competent witnesses. Some slave states even relaxed prohibitions of enslaved testimony against whites in cases where white defendants were accused of committing interracial crimes.[7] The same forces that propelled the centuries-long decline of witness competency rules—the increasing confidence in the jury's ability to determine credibility and the decreasing willingness to tolerate the delegitimizing effect of keeping credible testimony out of the courtroom—also illuminate the considerably more marginal phenomenon of free Black witnesses in the slave South. Barring a witness from testifying could produce glaring conflicts with a trial's ostensible purpose of determining the truth.

Previous scholarship on Black testimony in the South has mostly focused on the relatively swift end of race-based witness competency rules in the wake of the Civil War.[8] After the Civil War, as the federal government forced Southern states to allow Black testimony, white supremacists acted quickly to avoid the unpalatable circumstance of Black witnesses testifying as white parties in interest listened in silence.[9] Southern states soon changed their witness competency rules—though they took longer than the North to allow criminal defendants to testify.[10] Cases in Delaware, Maryland, and D.C., however, demonstrate that the tensions created by the exclusion of free Black testimony long preceded the Civil War.

Historical investigations of the relationship between slavery, Black communities, and the law have examined how slavery and the presence of enslaved and free Black populations shaped Southern law.[11] Historians have also uncovered the claims making of Black communities. Enslaved people made claims to property ownership and developed complex informal economies in the absence of any formal legal recognition of their right to do so.[12] Free Black communities also made creative use of the law to assert their rights and citizenship.[13] Black litigants brought suits in Southern courts to protect their property

[7] Robert M. Jarvis, "Slave Gambling in the Antebellum South," *Florida A&M University Law Review* 13, no. 2 (2018): 167, 178; *Berry v. State*, 10 Ga. 511, 520 (1851).

[8] See Alfred Avins, "The Right to Be a Witness and the Fourteenth Amendment," *Missouri Law Review* 31, no. 4 (1966): 471; Fisher, "The Jury's Rise as Lie Detector," 575, 658–97.

[9] Fisher, "The Jury's Rise as Lie Detector," 674.

[10] Fisher, "The Jury's Rise as Lie Detector," 667–71.

[11] See Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996); Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1974), 25–49.

[12] See Dylan C. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth Century South* (Chapel Hill: University of North Carolina Press, 2003).

[13] See Martha Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge: Cambridge University Press, 2018).

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rights, sometimes winning cases against white defendants.[14] In freedom suits, enslaved people often relied on white witnesses, but some states allowed enslaved people to sign their "X" on an affidavit.[15] Southern juries often decided questions of racial identity, incorporating complex local judgments about race.[16] As Ariela Gross cautions, "[L]aw as it is actually experienced is created by a variety of lawmakers: not only by judges and legislators, but by the litigants, witnesses, and jurors in the courtroom."[17]

While information supplied by Black witnesses surely made its way into Southern courts through both informal and formal means even in the absence of a Black witness in the witness stand, the evidence that follows centers on the formal admission of free Black witnesses in court, reflecting doctrinal developments rather than practical concessions or workarounds. The official acceptance of Black testimony in cases involving white litigants demonstrates that the consideration of free Black testimony in the South did not arise only out of ad hoc attempts to resolve particular problems; rather, certain white elites in the Upper South believed that free Black witnesses, in at least some cases involving whites, should have the right to testify.

Given the pervasive nature of racial hierarchy in Southern society, these judges and lawmakers either must have thought that this limited acceptance of free Black testimony would further, rather than subvert, the racial order, or, if they saw a potential threat to white supremacy in admitting free Black testimony, they must have valued some other principle highly enough to accept this tension. Kimberly Welch argues that free Blacks were sometimes able to bring—and win—court cases in the South because the slave-owning elite valued the rights of property more than the privileges of whiteness, and when the two values came into conflict—when, for example, a free Black creditor sued a white borrower to recover a debt—Southern courts chose to uphold property and the rights of the creditor over the status privilege of the white Southerner.[18] In most cases, property worked hand in glove with racial hierarchy to maintain slavery and protect the rights of the slaveholding class, so the slave-owning elite was willing to make the occasional concession to the Black litigant to maintain the conceptual coherence of the legal system.[19] This hypothesis, however well it explains the phenomenon of Black litigants in the slave South, cannot explain the full extent of the much more

[14] Welch, *Black Litigants*, 121, 135.

[15] Loren Schweninger, *Appealing for Liberty: Freedom Suits in the South* (Oxford: Oxford University Press, 2018), 61.

[16] See Ariela J. Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108, no. 1 (1998): 109–88.

[17] Gross, "Litigating Whiteness," 181.

[18] Welch, *Black Litigants*, 121, 135.

[19] Welch, *Black Litigants*, 135. Welch writes, "In this world of white freedom and black slavery, race and property went hand-in-glove; but there were moments when the actions of black litigants forced some white southerners to choose between the two pillars of their society. Time and again, the protection of property rights (rights that unavoidably extended to free people of color) proved more important than denying African Americans' claims solely on the basis of racial status." Welch, *Black Litigants*, 135.

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marginal circumstance of the free Black witness. Allowing free Black witnesses to testify against white defendants in criminal cases bears no obvious connection to the rights of property. The puzzle remains: why did a line of cases in the Upper South allow free Black testimony in cases involving whites while the bulk of the South did not embrace this expansion of witness eligibility until Reconstruction?

Historians and legal scholars have not attempted to explain why free Black witnesses testified in cases involving white litigants in the antebellum Upper South in large part, perhaps, because the existence of free Black testimony in the slave South outside of Louisiana has mostly been overlooked. Welch characteristically writes, "Every southern state except Louisiana denied free blacks the ability to testify in court in cases involving whites."[20] Louisiana, indeed, was the only place in the South that categorically allowed free Black witnesses to testify in cases involving whites, but Louisiana is better seen as the far end of a spectrum than as a lone outlier.

Some historians, in an echo of the Tanenbaum thesis,[21] explain the difference between Louisiana and the other slave states as a result of Louisiana's inheritance of Roman law.[22] According to the original Tanenbaum thesis, Iberian America (and to a lesser extent, French America) had laws that—in contrast to English and Dutch America—treated enslaved people as people.[23] Defenders of Louisiana exceptionalism, in a similar vein, argue that "free colored people in antebellum Louisiana" possessed "uncommon legal rights and privileges," including, "perhaps most important, [to] sue and testify in court against whites."[24] Critics of Louisiana exceptionalism, however, point out that facts on the ground differed less than laws on the statute books, and "despite Louisiana's unusual Roman law heritage and its Civil Code, its cases exhibit struggles over the character of slaves and masters remarkably similar to those in common law states."[25]

The admission of free Black testimony in Delaware, and to a lesser extent, Maryland and D.C., suggests that the presence of a large free Black population was more decisive than whether the legal system derived from civil or common law. In 1820, 14% of the Black population in Louisiana was free compared to 74% in Delaware, 27% in Maryland, and 38% in D.C. In 1860, the figures were

[20] Welch, *Black Litigants*, 18. See also Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 144; Finkelman, "Rehearsal for Reconstruction," 14.

[21] See Frank Tannenbaum, *Slave and Citizen: The Negro in the Americas* (New York: Vintage Books, 1947). For recent qualified defense of the Tannenbaum thesis, see Alejandro de la Fuente, "Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited," *Law & History Review* 22, no. 2 (2004): 339–69.

[22] Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 5–6; Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York: The New Press, 1974), 108–14.

[23] Tannenbaum, *Slave and Citizen*, 65.

[24] Kenneth R. Aslakson, *Making Race in the Courtroom: The Legal Construction of Three Races in Early New Orleans* (New York: New York University, 2014), 5.

[25] Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Athens: University of Georgia Press, 2006), 6–7.

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5% for Louisiana, 92% for Delaware, 49% for Maryland, and 78% for D.C.[26] Iberian law—in its self-presentation—contained a default presumption that the law should favor freedom over slavery.[27] But, as antebellum Delaware courts demonstrate, the English common law tradition sometimes made similar claims about itself.[28] That the law should favor slavery over freedom for those of African descent was an innovation made in America, not in England, and each American state that adopted such a presumption did so in slightly different ways. Just as historians have noted that in practice, Louisiana could look a lot like common law slave states, doctrine in the Upper South could sometimes resemble Louisiana more than the Deep South.[29]

I consider cases in Delaware, Maryland, and D.C. These jurisdictions comprise some of the most important exceptions to the general rule against free Black testimony in cases involving whites in the slave South. The most significant omissions are Louisiana and South Carolina. Free Black witness testimony was admissible by statute in Louisiana, and this fact has already been well noticed by historians, so there is no need to retread earlier accounts.[30] South Carolina only allowed some free Black witnesses in cases involving whites for a relatively short period in the early national period.[31] My examination of Delaware and Maryland concentrates on state court decisions, although I also consider federal cases when applicable.[32] My analysis of D.C., which did not possess non-federal courts, relies on federal cases interpreting local law. I do not consider federal cases applying federal law even when they occurred in the South, because these cases reflect federal, rather than Southern, law.[33] The South's general antipathy to free Black testimony is unsurprising and well-documented; it is countervailing examples when antebellum Southern jurisdictions accepted free Black testimony that requires explanation.

The story of free Black witnesses was different in every jurisdiction. In Delaware, the legislature passed a series of statutes in the late eighteenth

[26] Campbell Gibson and Kay Jung, "Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States," *U.S. Census Bureau*, 2002, https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf.

[27] Tannenbaum, *Slave and Citizen*, 106.

[28] *State v. Dillahunt*, 3 Harrington 551, 551 (Del. 1840).

[29] Thomas N. Ingersoll, "Slave Codes and Judicial Practice in New Orleans, 1718–1807," *Law & History Review* 13, no. 1 (1995): 23, 62; Thomas N. Ingersoll, *Mammon and Manon in Early New Orleans: The First Slave Society in the Deep South, 1718–1819* (Knoxville: The University of Tennessee Press, 1999), 61 n. 123; Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 6.

[30] See La. Civil Code of 1825, art. 2261; Berlin, *Slaves Without Masters*, 108–32; Ingersoll, *Mammon and Manon in Early New Orleans*.

[31] See *State v. M'Dowell*, 2 Brev. 145 (S.C. 1807); *State v. Hayes*, 1 Bailey 275, 276 (S.C. 1829); Avins, "The Right to Be a Witness," 475. For other minor instances of free Black witnesses in the antebellum South, see Avins, "The Right to Be a Witness," 477.

[32] Federal courts followed the rules of evidence of the state in which they resided in the antebellum period. Avins, "The Right to Be a Witness," 484.

[33] For an account of Hooe affair, see Richard Williams Smith, "The Career of Martin Van Buren in Connection with the Slavery Controversy Through the Election of 1840" (PhD diss., The Ohio State University, 1959), 339–61.

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century and the court, especially in the 1840s, adopted expansive readings of these laws to create a narrow but important exception to the exclusion of free Black testimony, allowing Black victims to testify against whites when there were no competent white witnesses.[34] This provision did not end all the injustices created by barring free Black witnesses from testifying, but it did resolve the most outrageous case of the lone white criminal who could maim, kidnap, or kill Black Delawareans with legal impunity so long as there were no white people in sight. In Maryland, the admission of free Black testimony was derived from an ambiguous colonial statute, and the courts, in keeping with a broad decline in the rights of free Black Marylanders in the early national period, interpreted it out of existence in the early nineteenth century.[35] D.C., the larger part of which inherited Maryland law, however, interpreted Maryland statutory law in the opposite direction, expanding it almost into a complete end to any bar on free Black testimony in the early nineteenth century.[36] D.C. judges were not unanimous in this project, however, and some cases cut the other way until Congress finally resolved the ambiguity and ended the bar on free Black testimony completely during the Civil War.[37]

Delaware

Delaware provides one of the most significant examples of free Black testimony in the antebellum South. The reason for Delaware's unusual approach to free Black testimony was rooted in the state's singular experience with slavery and emancipation. The state maintained slavery even as the economic importance of enslaved labor fell and the size of the free Black population rose. In 1790, less than one-third of the nearly 13,000 Black Delawareans were free.[38] A steady stream of manumissions resulted in almost 92% of a little more than 21,000 Black Delawareans being free in 1860.[39] When James Madison divided the country into north and south in 1787, he counted Delaware among the eight northern states.[40] Many observers expected Delaware, which had fewer enslaved inhabitants than New York,[41] to follow its northern neighbors in gradual emancipation.[42] Delaware did not. The first state in the Union proved the second-to-last to ratify the Thirteenth Amendment, finally doing so in 1901.[43] At the same time, Delaware did not restrict manumission,

[34] See 1787 Del. Laws ch. 108; 1799 Del. Laws ch. 39; *State v. Whitaker* 3 Harr. 549, 549 (Del. 1840); *State v. Cooper*, 3 Harr. 571, 573 (Del. 1842); *State v. Cooper*, 3 Harr. 571 (Del. 1842).

[35] See 1717 Md. Laws ch. 13; *Rusk v. Sowerwine*, 3 H. and J. 97, 99 (Md. 1810).

[36] See Act of February 27, 1801, ch. 15, §1, 2 Stat. 103, 103–05; *United States v. Fisher*, 25 F. Cas. 1086 (C.C.D.C. 1805); *United States v. Mullany*, 27 F. Cas. 20 (C.C.D.C. 1808).

[37] See *O'Neale v. Willis*, 18 F. Cas. 698, 698 (C.C.D.C. 1809); Act of July 12, 1862, §5, 12 Stat. 539.

[38] Gibson and Jung, "Historical Census Statistics," table 22.

[39] Gibson and Jung, "Historical Census Statistics," table 22.

[40] Patience Essah, *A House Divided: Slavery and Emancipation in Delaware, 1638–1865* (Charlottesville: University Press of Virginia, 1996), 5.

[41] Gibson and Jung, "Historical Census Statistics," tables 22 and 47.

[42] Essah, *A House Divided*, 5.

[43] Essah, *A House Divided*, 2.

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rendering the institution of slavery increasingly moribund, even as the legislature refused to make Delaware a free state.[44] This strange path led one historian to dub Delaware "the great paradox,"[45] and it provides the context for Delaware's unique approach to free Black testimony.

The decades after the Revolution in Delaware, although failing to bring abolition, brought a rise in manumissions in Delaware, with economic, political, and religious causes. As the importance of wheat grew, and the cultivation of tobacco declined, slavery became economically marginal in Delaware.[46] The 1776 Delaware Bill of Rights promised equal rights to "all persons professing the Christian religion," and many white Delawareans thought that slavery was inconsistent with the political ideals of the new republic. Methodists and Quakers also marshaled religious arguments against slavery in Delaware in the late eighteenth century.[47] In the late eighteenth century, consistent with the mood against slavery, the General Assembly banned the exportation of enslaved people out of the state and made freedom contracts binding and enforceable.[48]

A nineteenth-century reaction brought a series of laws limiting free Black rights. In 1832, after Nat Turner's rebellion, Delaware prohibited free Black residents from owning guns. In 1849, Delaware passed a law allowing justices of the peace to order any "free negro or mulatto" who was without "the necessary means of support and [not possessing] good and industrious habits" to be hired out "to serve in the capacity of a servant until the first day of January next following." By 1863, the General Assembly declared that "no free negro or free mulatto" would be entitled to "any rights of a free man other than to hold property or to obtain redress in law or equity for any injury to his person or property."[49]

Two statutes provided the basis for free Black testimony in Delaware. The first, passed in 1787, provided scant textual support for free Black Delawareans to give evidence against whites. The statute listed the legal disabilities and rights possessed by free Black Delawareans: they could not vote. They could not hold office. The law did not allow them to "give evidence against any white person, or to enjoy any other rights of a freeman, other than hold property, and to obtain redress in law and equity for any injury to his or her person."[50] According to an 1842 Delaware court, this law "recognized in the negro race the right to hold property, and to obtain redress in law or equity for any injury to his or her person or property. Under this act it is said to have been held that a black man was a competent witness against a

[44] Essah, *A House Divided*, 3–4.

[45] Armstead L. Robinson, *Foreword* to Essah, *A House Divided*, xi, xii.

[46] Essah, *A House Divided*, 69–72, 83; William H. Williams, *Slavery and Freedom in Delaware, 1639–1865* (Wilmington: Rowman & Littlefield, 1996), 45–46.

[47] Del. Decl. of Rights of 1776 §3; John Andrew Munroe, *History of Delaware* (Newark: University of Delaware Press, 2006), 96–98; Essah, *A House Divided*, 42–52.

[48] 1787 Del. Laws ch. 145; 1789 Del. Laws ch. 194; 1797 Del. Laws ch. 6; Williams, *Slavery and Freedom in Delaware*, 88; Essah, *A House Divided*, 41.

[49] 1832 Del. Laws ch. 176; 1849 Del. Laws ch. 392; 1863 Del. Laws ch. 305; Williams, *Slavery and Freedom in Delaware*, 193–98; Munroe, *History of Delaware*, 98. [fix]

[50] 1787 Del. Laws ch. 108.

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white man, to prove an offence against his own person."[51] The court opinion did not cite any sources for this claim. As historians have shown, it was perfectly possible for a Southern state to allow free Black residents to own property and sue, while not allowing them to testify against whites.[52] The 1787 statute appears relatively unambiguous in its wording—free Black witnesses cannot "give evidence against any white person"—but clear statutory language is no impediment to a sufficiently motivated court.

The second statute, passed in 1799, provided stronger support for free Black testimony. Titled "An Act to allow free black persons and free mulattoes in certain cases to give testimony in Courts of Justice," the law acknowledged that "great injustice and many inconveniences have heretofore arisen from free black persons and free mulattoes not being allowed to give testimony in Courts of Justice" and provided the terms in which free Black Delawareans could testify against whites.[53] The statute encompassed "all criminal prosecutions" in which "no white person or persons competent to give testimony, was or were present at the time when the fact charged is alledged to have been committed, or where such white persons who were present have since died, or are absent from the State and cannot be produced as witnesses … ."[54] The law also clarified that free Black testimony would never be allowed against a white man "to charge such white man with being the father or reputed father of any bastard child," apparently an especially sensitive case for the Delaware legislature.[55] The key ambiguity in the law was the meaning of "white person or persons competent to give testimony," and the Delaware courts would spend the ensuing decades expanding free Black testimony by more narrowly defining white witness competency in the context of the statute.

The context for several important Delaware cases interpreting the 1799 law was the persistent problem of kidnapping. Kidnappers illegally spirited free Black Delawareans south and sold them into slavery. Even as the political mood in Delaware was often antagonistic to free Black rights in the nineteenth century, legislators and judges acted to protect Black Delawareans from kidnapping, and allowing free Black witnesses to testify against white kidnappers was vital to prosecute kidnappers. The most sensational kidnapping ring was the "gang of cutthroats and robbers" led by "the notorious Patty Cannon,"[56] which has passed into local legend.[57] In 1822, Joseph Johnson, Cannon's son-in-law, known as far away as London for his role "in the abominable traffic of kidnapping negroes, and conveying them out of State," surrendered to

[51] *State v. Cooper*, 3 Harr. 571, 573 (Del. 1842).
[52] See Welch, *Black Litigants*.
[53] 1799 Del. Laws ch. 39.
[54] 1799 Del. Laws ch. 39.
[55] 1799 Del. Laws ch. 39.
[56] "Death of a Prominent Citizen," *The Sun* (Baltimore), December 26, 1882.
[57] See "Death of a Prominent Citizen," *The Sun* (Baltimore), December 26, 1882; "Will Remodel Famous Patty Cannon House," *Evening Journal & Every Evening* (Wilmington), May 12, 1934, at 3; Theresa Humphrey, "Notorious Patty Cannon Still Haunts Her Home," *Daily Times* (Salisbury, MD), September 27, 1980, at 3.

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authorities.[58] The authorities found thirteen captives, five enslaved people, one as young as four, and eight free people, on as young as ten, three kidnapped from Baltimore and five kidnapped from Wilmington. Johnson was "sentenced to receive thirty-nine lashes on the bare back at the public whipping-post, to stand at the pillory for an hour, to have his ears nailed thereto, and the soft part cut off."[59] At his trial in the Court of Common Pleas for the County of Sussex, according to an 1840 Delaware court, "the person kidnapped was [admitted as] a competent witness ... ."[60]

Kidnapping also provided the background for an 1840 case, *State v. Whitaker*. Three white men stood accused of kidnapping William Clarkson, a free Black boy. The defense tried to prevent Clarkson from testifying, contending "that the case of this negro witness does not come within the terms of the act, inasmuch as David Walton, a white man, and an accomplice in the alledged offence, who is now in court, is competent to give testimony." The judge rejected the defense's cramped interpretation of the 1799 law, arguing that the restriction on Black testimony as a deviation from common law justified by the needs of slavery, and therefore less applicable to mostly free Delaware; that as a rule of statutory interpretation, the judge believed that courts should defer to the wisdom of the legislature; and that the defense's reading of the law would create perverse incentives, encouraging "an association in guilt; a multiplication of offenders; with a view to the exclusion of the testimony of free negroes and mulattoes."[61]

As the opinion in *Whitaker* suggests, Delaware courts claimed that the common law favored freedom. Delaware departed from other slave states—including Maryland[62]—in holding that a presumption of freedom existed absent proof of slavery.[63] In *State v. Dillahunt*, the court held that a Black woman, who "was not proved to be a free woman, though it was proved that she acted as such," was a competent witness.[64] The court claimed that "[a]t the common law there was always a strong presumption in favor of freedom" but that "[i]n the first settlement of this country, the fact of the existence of the negro race in a state of bondage to the whites, and a large majority of that color being slaves, was considered sufficiently strong to outweigh the common law presumption, and to introduce a legal presumption that a colored person is prima facie a slave." The court noted that conditions in Delaware had markedly changed, "and cessante causa, cessat et ipsa lex" (when the reason for a law ceases, the law itself ceases). By 1840, there were "about 20,000 persons of color

[58] "Kidnapping Negroes," *Morning Post* (London), July 5, 1822.

[59] "Kidnapping Negroes," *Morning Post* (London), July 5, 1822; "Wilmington, May 17," *Republican Compiler* (Gettysburg), May 29, 1822.

[60] *State v. Whitaker* 3 Harr. 549, 549 (Del. 1840).

[61] *State v. Whitaker* 3 Harr. 549, 549–51 (Del. 1840).

[62] See *Burke v. Joe*, 6 G. & J. 136 (Md. 1834); *Anderson v. Garrett*, 9 Gill 120, 135 (Md. 1850); *Hughes v. Jackson*, 12 Md. 450 (1858).

[63] *State v. Dillahunt*, 3 Harr. 551, 551 (Del. 1840).

[64] *State v. Dillahunt*, 3 Harr. 551, 551 (Del. 1840).

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[in Delaware]; of whom 17,000 [were] free, and 3,000 slaves."[65] Demographic facts therefore caused Delaware to return to the old common law.

The courts interpreted the 1799 statute broadly, but not so broadly as to eliminate the general bar against free Black witnesses testifying against whites. *State v. Cooper*, an 1842 assault case that slightly expanded the scope of free Black testimony, illustrates the limits of the Delaware judiciary's flexibility. The attorney-general expressed his understanding that courts had decided to allow Black victims to testify in all cases.[66] The court corrected the attorney-general, clarifying that *Whitaker* had allowed Black victims to testify because the only available white witness was an unindicted accomplice.[67] Initially, "[t]hey ruled out the evidence of the negro; but, it afterwards appearing that though there were two white persons present, one of them was drunk, and the other did not see the whole of the fight, though they both knew that a blow was struck; the court now admitted the testimony of the negro."[68] According to *Cooper*, it was necessary for a white witness to have been sober and to have seen the entirety of the altercation to count as a competent witness under the statute.[69] Ruling out whites who were impaired, party to the crime, or not witness to the entirety of the events at issue as incompetent, the allowance for free Black witnesses to testify against white defendants in criminal trials was fairly expansive. As defendants could not testify under oath themselves anywhere in the United States in the 1840s, Delaware allowed Black witnesses to testify against white defendants who could not provide contrary sworn testimony, a state of affairs that, according to Fisher, would prove so offensive in much of the South as to motivate states to change their laws to allow criminal defendants to testify under oath.[70]

The courts continued to interpret the 1799 statute even more broadly in the 1850s. In an 1858 murder trial, a Black witness claimed to have heard the white defendant confess to the crime.[71] The defendant argued that since the witness had not seen the crime itself, the 1799 statute did not apply.[72] Indeed, a textualist reading of the 1799 law would appear to support the defense's argument, as the statute states that Black witness may only testify when no competent white person or persons "was or were present at the time when the fact charged is alledged to have been committed … ."[73] The attorney-general advocated ignoring the plain meaning of the law, because the act was "an enabling statute in brief, but very broad and general terms, and a free and voluntary confession of the crime made to such a person would come within the spirit and policy, if not the letter of it, as much so undoubtedly, as if he had been

[65] *State v. Dillahunt*, 3 Harr. 551, 551 (Del. 1840). The court's estimates are consistent with the 1840 census. Gibson and Jung, "Historical Census Statistics," table 22.
[66] *State v. Cooper*, 3 Harr. 571, 571 (Del. 1842).
[67] *State v. Cooper*, 3 Harr. 571, 571 (Del. 1842).
[68] *State v. Cooper*, 3 Harr. 571, 571 (Del. 1842).
[69] *State v. Cooper*, 3 Harr. 571, 575–76 (Del. 1842).
[70] See Fisher, "The Jury's Rise as Lie Detector," 704–5.
[71] *State v. Downham*, 1 Houston 45, 46–49 (1858).
[72] *State v. Downham*, 1 Houston 45, 49 (1858).
[73] 1799 Del. Laws ch. 39.

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the only person present at the commission of it."[74] The judge agreed. "The practice had long been settled to admit such testimony," he claimed. In any case, "if no white person was present when the homicide was committed, we consider the words of the statute broad enough without any forced construction in view of the object of it, to admit the testimony under the terms of it."[75] The 1799 was the statutory justification for free Black testimony, but by 1858, the law provided loose guidelines rather than strict limits, as the courts recognized the practical benefits of admitting free Black testimony.

The career of free Black testimony in Delaware, in a strange way, mirrored the state's uncommon approach to slavery. Even as slavery grew increasingly marginal in Delaware, under the force of both economic and moral pressures, the state refused to follow the North in embracing abolition. At the same time, the state refused to follow the South in restricting manumissions. Similarly, the scope of free Black testimony appears to have grown in antebellum Delaware. Several Northern states either long allowed free Black testimony against whites, like Pennsylvania, or ended their prohibitions on free Black testimony during the antebellum period, like Ohio.[76] Maryland, which had once allowed some free Black testimony in cases involving whites, reversed course in the early national period. Delaware did neither. Delaware courts chose to allow free Black testimony in more cases—and attorneys-general argued for even more expansive readings of the 1799 law—but the state refused to allow free Black testimony in all cases.

Maryland

In Maryland, an early willingness to admit free Black testimony matched an early acceptance of free Black rights. As free Black rights diminished in early national Maryland, the admission of free Black testimony similarly declined. Maryland, like Delaware, was a slave state with a large free Black population, and Maryland, like other slave states, restricted Black testimony, but the relationship between race and law in Maryland was significantly different than it was in the Deep South. Throughout the antebellum period, the legal status of free Black residents worsened throughout the South. Considerable diversity, however, existed among the Southern states. For example, while Virginia made the franchise an exclusively white male right in 1723, Maryland did not follow suit until 1802, and North Carolina allowed free Black male voting until 1835.[77] Maryland had a large free Black community, and the legal status of the state's free Black minority long remained contested.

[74] *State v. Downham*, 1 Houston 45, 49 (1858).

[75] *State v. Downham*, 1 Houston 45, 49–50 (1858).

[76] Paul Finkelman, "The Historical Context of the Fourteenth Amendment," *Temple Political & Civil Rights Law Review* 13, no. 2 (2004): 395, 398.

[77] A. Leon Higginbotham, Jr. and Greer Bosworth, "'Rather than the Free': Free Blacks in Colonial and Antebellum Virginia," *Harvard Civil Rights-Civil Liberties Law Review* 26, no. 1 (1991): 25–27; 1801 Md. Laws ch. 109; *Proceedings and Debates of the Convention of North Carolina: Called to Amend the Constitution of the State, Which Assembled at Raleigh, June 4, 1835* (Raleigh: Joseph Gales and Son, 1836), 80–81.

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Historians have explored several aspects of the legal history of the Maryland free Black community. David Skillen Bogen has chronicled the decline of free Black rights in Maryland from 1776 through 1810, when, Bogen claims, Maryland effectively ended any legal distinctions among free Black residents, creating a two-caste racial society.[78] Martha Jones has demonstrated that free Black Marylanders constructed their own legal world, claiming their birthright as citizens even in the face of white hostility and government resistance.[79] Adam Malka has traced the history of policing in Baltimore, focusing on the law as enforced on the street, rather than as it appears in the text of statutes and judicial decisions.[80]

These historians have all effectively provided productive angles to view the relationship between the Maryland free Black community and the law. A survey of the restriction on Black testimony in Maryland from its birth in 1717 to the Civil War, however, demonstrates the continued disagreement over free Black legal status long after Bogen ends his study, in 1810. White elites in Maryland were themselves conflicted about the legal status of free Black residents, and their official pronouncements of the law provide a revealing window into the legal world the white legislators and judges saw themselves as making—and their continued conflict over the place free Black Marylanders had in that vision. Even after Maryland legislators and judges had largely turned against free Black rights, the question of the admissibility of free Black testimony in cases involving whites continued to arise, reflecting the practical difficulties of excluding relevant testimony and perhaps the lingering influence of an earlier, marginally more equal era.

The story of Black testimony in Maryland begins in 1717, with the passage of a law racializing the right to testify. In eighteenth-century Maryland, enslaved labor was becoming increasingly important. In 1707, the 4,657 enslaved Marylanders barely outnumbered the state's 3,003 white servants, but the number of and economic importance of the enslaved population was growing, and the indentured servants represented an increasingly smaller share of bound labor in Maryland. Racial control was becoming more important.[81] The Maryland legislature, explaining the need to limit non-white testimony, explained that "it may be of very dangerous Consequence to admit and allow as Evidences in Law … any Negro, or Mulatto Slave, or Free Negro, or Mulatto born of a White Woman, during their Servitude appointed by Law, or any Indian Slave, or Free Indian Natives … ."[82] The 1717 statute provided that "no Negro, or Mulatto Slave, Free Negro, or Mulatto born of a white Woman, during his Time of Servitude by Law … be admitted and received as good and valid Evidence in Law … wherein any Christian white Person is

[78] David Skillen Bogen, "The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776–1810," *American Journal of Legal History* 34, no. 4 (1990): 381–411.

[79] Jones, *Birthright Citizens*.

[80] Adam Malka, *Men of Mobtown: Policing Baltimore in the Age of Slavery and Emancipation* (Chapel Hill: The University of North Carolina Press, 2018).

[81] Margaret M.R. Kellow, "Indentured Servitude in Eighteenth-Century Maryland," *Social History* 17, no. 34 (1983): 230–33.

[82] 1717 Md. Laws ch. 13.

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concerned … .”[83] The wording of several key parts of this statute is difficult to parse, and different courts came to contradictory interpretations.

The statute possessed both textual and interpretive ambiguities, both noted in later court opinions.[84] Both the phrasing and the purpose of the 1717 statute provoked disagreement. The phrasing of the statute was particularly unclear. Did the “his” in “during his Time of Servitude by Law” refer to the directly preceding subject (“Mulatto born of a white Woman”) or to the entire preceding list (“Negro, or Mulatto Slave, Free Negro, or Mulatto born of a white Woman”)?[85] The difference between the two interpretations is substantial. If the former, then the only free Black Marylanders who could testify would be the children of white mothers. If the latter, then all free Black Marylanders could testify. Courts also disagreed about the purpose of the statute. Was the intention to protect free citizens from enslaved testimony, as one court argued, or was it to protect white Christians from Black testimony, as another court claimed?[86]

In early national Maryland, the 1717 statute was anomalous. In 1776, formal legal rights for free Marylanders largely did not depend on race.[87] In 1810, the Maryland Court of Appeals remembered that Benjamin Banneker, the famous Black mathematician and scientist, exercised “in his life the rights of a free man in holding real property, in voting at elections, and being allowed and permitted to give evidence in courts of justice in cases in which free white citizens were concerned.”[88] It did not take very long after independence, however, before Maryland acted to curb free Black rights. In 1783, the legislature created a new category, between slave and white citizen, which Bogen terms “Newly Free Blacks,” a group which possessed fewer rights than “Historically Free Blacks.”[89] Any Black person freed after 1783, or any descendent of such a person, had the right to freedom, property, and redress in court, but he or she was not entitled to vote, run for office, or provide evidence against whites.[90]

The Maryland legislature amended the 1717 law at several points in the ensuing century and a half to restrict Black testimony against whites and to allow Black testimony against Black defendants. In 1783, fearful of the growing free Black population, but initially hesitant to destroy the vested rights of the Historically Free Blacks,[91] the legislature passed a law that provided that “no slave manumitted agreeable to the laws of this state, or made free in consequence of this act, or the issue of any such slave, shall be entitled to … give evidence against any white person.”[92] Seemingly, then, descendants of free Black residents manumitted before 1783 could bring evidence against white Jews and descendants of free Black residents manumitted after 1783 could not. In 1808,

[83] 1717 Md. Laws ch. 13.
[84] See *United States v. Mullany*, 27 F. Cas. 20 (C.C.D.C. 1808); *Rusk v. Sowerwine*, 3 H. & J. 97 (Md. 1810).
[85] 1717 Md. Laws ch. 13.
[86] See *United States v. Mullany*, 27 F. Cas. 20 (C.C.D.C. 1808); *Rusk v. Sowerwine*, 3 H. & J. 97 (Md. 1810).
[87] Bogen, “The Maryland Context of Dred Scott,” 383–84.
[88] *Rusk v. Sowerwine*, 3 H. & J. 97, 99 (Md. 1810).
[89] Bogen, “The Maryland Context of Dred Scott,” 391–403.
[90] 1783 Md. Laws ch. 23.
[91] Bogen, “The Maryland Context of Dred Scott,” 388–91.
[92] 1783 Md. Laws ch. 23.

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to aid in the conviction of Black criminal defendants, the Maryland legislature passed a law to allow Black Marylanders, free or enslaved, to testify in court against Black defendants, free or enslaved, in criminal proceedings.[93] In 1847, at the urging of the Baltimore Jewish community, which resented the privilege granted to white Christians by the 1717 law, the Maryland legislature passed a law so that "the distinction made by the second section of the act passed in the year seventeen hundred and seventeen, chapter thirteen, between persons professing the Christian religion and those not professing the same, be hereby removed, and that no negro or mulatto slave, free negro or mulatto ... be admitted and received as good and valid evidence in law in any matter ... wherein any white person is concerned."[94] Thereafter, no Black Marylander, free or enslaved, could testify in any case involving a white Marylander, Jewish or Christian.

The question of free Black testimony divided judicial opinion in Maryland. In 1805, the Maryland Court of Appeals proved unable to come to an interpretation of the 1717 law. A trial court had allowed a free Black woman, born to a free Black mother, to testify against a white Christian man, because "a contrariety of opinion had taken place upon the subject" of the admissibility of free Black testimony, and so the judge decided to admit the testimony but suspend final judgment until a higher authority could resolve the issue.[95] The question came before the Court of Appeals in 1805, but the judges "could not agree in opinion upon the question" and left the issue unresolved.[96]

The question of how to interpret the 1717 came to the Maryland Court of Appeals again, in 1810, in *Rusk v. Sowerwine*. The Maryland court appears to have read the "his" in "his Time of Servitude by Law" to apply to "Mulatto born of a white Woman" but not to "Free Negro." The court noted that Banneker had been allowed to testify in cases involving white citizens.[97] Banneker's father was an enslaved Black man who had purchased his freedom and his mother was the daughter of an enslaved Black man and a white woman.[98] That Banneker had been allowed to testify in cases involving white citizens could have been because courts had interpreted "Mulatto born of a white Woman" to include the grandson of a white woman. The court in *Rusk*, however, noted that no one had ever raised the 1717 law to challenge Banneker's testimony, so this claim is conjectural.[99] The *Rusk* court, unlike the *Mullany* court, did not advance any argument for its ruling; it merely confirmed the trial court's exclusion of the testimony of Banneker's sister, Minta Black, on the grounds that "the plaintiff and defendant [were] free white christian persons."[100] This decision clearly interpreted the 1717 statute to exclude

[93] 1808 Md. Laws ch. 81.

[94] 1846 Md. Laws ch. 27; Benjamin H. Hartogensis, "Unequal Religious Rights in Maryland Since 1776," *Publications of the American Jewish Historical Society* 60, no. 25 (1917): 101.

[95] *State v. Fisher*, 1 H. & J. 750, 750 (Md. 1805).

[96] *State v. Fisher*, 1 H. & J. 750, 750 (Md. 1805).

[97] *Rusk v. Sowerwine*, 3 H. & J. 97, 99 (Md. 1810).

[98] Ron Eglash, *The African Heritage of Benjamin Banneker, Social Studies of Science* 27, no. 2 (1997): 308–10.

[99] *Rusk v. Sowerwine*, 3 H. & J. 97, 99 (Md. 1810).

[100] *Rusk v. Sowerwine*, 3 H. & J. 97, 99 (Md. 1810).

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the testimony of free Black persons not born to a white woman. There is no indication how the *Rusk* court would have treated a free Black witness born to a white woman, but there is no evidence that any Maryland court allowed a free Black witness born to a white woman to testify against a white citizen after *Rusk*. Bogen, therefore, concludes that Maryland courts had ceased to give some free Black residents more rights than others by 1810.[101]

Interpretation of the 1717 law continued well into the nineteenth century. In 1840, Supreme Court Justice Roger Taney, riding circuit in Maryland, ruled that Maryland law meant that "negroes and mulattoes, free or slave, are not competent witnesses, in any case wherein a Christian white person is concerned; but they are competent witnesses against all other persons."[102] Taney decided that Black testimony was admissible in *United States v. Dow* because the defendant was "Malay," having been born to two Christian "native[s] of the town of Manilla, in one of the Philippine Islands," and "Malays are not white men."[103] In 1857, in *State v. Negro Presbury*, a Maryland trial court, consistent with the law, allowed Black testimony in a criminal case against a Black man.[104] *Dow* and *Presbury* show the logic of the laws on Black testimony and the Maryland courts' interpretation of them. When Black testimony did not harm white interests, the courts allowed it.[105]

Marylanders recognized that Black testimony often shed light on the truth, and restrictions on it impeded courts' abilities to reach accurate rulings. Newspapers sometimes admitted free Black testimony into the court of public opinion. In 1857, a Baltimore newspaper noted that "Negro testimony, although not admissable in a court, confirmed" the accuracy of a recent trial verdict.[106] In 1837, in a Baltimore trial, a lawyer argued "that although he was aware that by express statute of the State of Maryland, no negro, mulatto, or Indian slave, could be a witness in any case where the interests of a white citizen was involved, he hoped that a liberal construction would be put on that statute, and that it would not be construed by its letter."[107] The lawyer made an interpretivist argument reminiscent of *Mullany*. "The statute," the lawyer claimed, "was evidently intended to protect the white against the machinations and depravity of the slave population; and it was not the design of its framers, that it should be so construed so as to cut off the benefits that might be derived from it by the whites."[108] If the court interpreted the statute to allow Black testimony in this instance, the lawyer continued, "as humanity would assuredly dictate, he was prepared and ready to show by the evidence of certain blacks and mulattoes" that one white man was guilty of murdering

[101] Bogen, "The Maryland Context of Dred Scott," 410.
[102] *United States v. Dow*, 25 F. Cas. 901, 902 (C.C.D. Md. 1840).
[103] *United States v. Dow*, 25 F. Cas. 901, 902–3 (C.C.D. Md. 1840).
[104] "Court—A Baltimorean Acquitted—Decision of Judge Price in Regard to Negro Testimony," *The Sun* (Baltimore), May 25, 1857.
[105] Md. Const. art. III, sec. 53.
[106] "Murder Case Dismissed," *The Sun* (Baltimore), September 23, 1857.
[107] "City Court, July 7, 1837," *The Sun* (Baltimore), July 10, 1837.
[108] "City Court, July 7, 1837," *The Sun* (Baltimore), July 10, 1837.

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another white man.[109] The judge denied the lawyer's request, replying that "the construction of the statute had long been settled by all the courts of the state."[110] The impulse among white Marylanders to, when convenient, informally credit the words of free Black witnesses—and to attempt to formally introduce them into evidence—survived judicial disapproval.

As the Civil War approached, Black testimony became a minor political issue in Maryland, but sufficient will did not exist among white Marylanders to overturn the 1717 law. In 1856, legislators presented dueling petitions "to admit negro testimony in certain cases" and "against admitting negro testimony against whites."[111] Edward Wilkins, a State Senator from Kent County, identified in his obituary as a member of "the old whig party" and "a moderate Union man" during the Civil War but elected in 1856 as a member of the Know Nothing Party, presented the petition in favor of free Black testimony.[112] William Griffith and Emory Sudler, Delegates from Kent County, also elected on the Know Nothing Ticket, presented petitions opposing free Black testimony against white persons.[113] In 1860, a Maryland legislator "offered a resolution of inquiry, into the expediency of allowing negro testimony against white men in certain cases," but the legislature never acted on it.[114] These conflicts, which failed to spark significant interest in the newspapers, are consonant with contemporaneous advocacy in other states to allow free Black testimony, both from Northern supporters of Black rights, who opposed the proscription on Black testimony against whites because of racism, and from Southern slaveholders, who despite supporting the racial hierarchy, supported "the general admission of negro testimony, on the ground that the general tendency and reformatory progress of our laws were to admit all testimony, leaving the question of credibility entirely to the jury."[115] Only the Civil War and Reconstruction would settle the questions of Black testimony and citizenship in Maryland.

D.C.

Although D.C. inherited Maryland and Virginia law, federally appointed judges in Maryland interpreted the statutory text much more flexibly. An analysis of D.C. court decisions usefully demonstrates the interpretive room judges had to interpret the Maryland law. D.C. always had a sizable Black population, mostly

[109] "City Court, July 7, 1837," *The Sun* (Baltimore), July 10, 1837.

[110] "City Court, July 7, 1837," *The Sun* (Baltimore), July 10, 1837.

[111] "Maryland Legislature," *The Sun* (Baltimore), February 14, 1856.

[112] "Colonel Edward Wilkins," *The Sun* (Baltimore), December 30, 1878; "List of Members of the Maryland Legislature," *The Sun* (Baltimore), November 19, 1855; "Maryland Legislature," *The Sun* (Baltimore), February 14, 1856.

[113] "List of Members of the Maryland Legislature," *The Sun* (Baltimore), November 19, 1855; *Journal of the Proceedings of the House of Delegates of the State of Maryland, January Session, Eighteen Hundred and Fifty-Six* (Annapolis: Requa & Wilson, 1856), 283, 429.

[114] "The Legislature," *Civilian & Telegraph* (Cumberland, Md.), January 12, 1860.

[115] See, e.g., "The Ohio Election," *Richmond Daily Whig*, October 23, 1846; L. Diane Barnes, "'Only a Moral Power': African Americans, Reformers, and the Repeal of Ohio's Black Laws," *Ohio History* 124, no. 1 (2017): 19–21; "Home Reforms," *New Orleans Daily Delta*, November 19, 1856.

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enslaved at first, and later, mostly free. D.C. had slavery (until 1862) and the slave trade (until 1850), points of increasing sectional contention in the antebellum period.[116] A little under one-third of Washingtonians were Black in 1800, the proportion rose to just over a third in 1810, and then the share gradually declined to just under a fifth by 1860.[117] The fraction of D.C.'s Black population that was free grew from about one-fifth in 1800 to more than four-fifths in 1860.[118] Congress did not legislate on the rules D.C. courts should follow for witness competency until 1862,[119] so the larger part of D.C., which inherited Maryland law, was governed by the 1717 Maryland statute.[120] The judges of the Circuit Court of the District of Columbia, however, were appointed by the President and confirmed by the Senate, so judicial decisions need not have reflected local opinion—even of the local white elite.[121]

D.C. courts were significantly more open to free Black testimony than Maryland courts. By act of Congress in 1801, the land Maryland ceded to the District of Columbia inherited the laws of Maryland and the land Virginia ceded inherited the laws of Virginia.[122] Consequently, the Circuit Court for D.C. interpreted the 1717 Maryland statute to determine the admissibility of free Black testimony. In 1803, in *United States v. Barton*, the court allowed two free Black witnesses to testify against a free Black defendant.[123] The same year, in *United States v. Swann*, the court barred an enslaved person from testifying on behalf of a free Black defendant.[124] In 1805, in *United States v. Fisher*, the court allowed a free Black woman to testify against a white man indicted for beating his wife.[125] In 1808, in *United States v. Hill*, "having more fully considered" the 1717 law, the court decided that an enslaved person could not testify against a free Black. The 1717 law, the court admitted, did not say this exactly, but "the principles of the civil law, and of the laws of every country where slavery is tolerated, exclude [the enslaved] as witnesses against a free person."[126]

The Circuit Court for the District of Columbia reached its most extended interpretation of the 1717 law in 1808 in *United States v. Mullany*, providing a textualist argument for an expansive reading. The *Mullany* opinion was written by William

[116] Tamika Y. Nunley, *At the Threshold of Liberty: Women, Slavery, and Shifting Identities in Washington, D.C.* (Chapel Hill: The University of North Carolina, 2021), 5–6.

[117] Gibson and Jung, "Historical Census Statistics."

[118] Gibson and Jung, "Historical Census Statistics," table 23.

[119] Act of July 12, 1862, §5, 12 Stat. 539; Avins, "The Right to Be a Witness," 483–84.

[120] Act of February 27, 1801, ch. 15, §1, 2 Stat. 103, 103–5.

[121] Act of February 27, 1801, ch. 15, §3, 2 Stat. 103, 105–6. Despite its name, the court heard both trial and appellate cases. Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia* (Durham: Carolina Academic Press, 2001), 6, 37.

[122] Act of February 27, 1801, ch. 15, §1, 2 Stat. 103, 103–5.

[123] *United States v. Barton*, 24 F. Cas. 1024 (C.C.D.C. 1803); *United States v. Mullany*, 27 F. Cas. 20, 22 (C.C.D.C. 1808). The opinions in *Barton*, *Swann*, and *Fisher* are very brief, so I have also used the descriptions of these cases in *Mullany* to fill in details.

[124] *United States v. Swann*, 27 F. Cas. 1379 (C.C.D.C. 1803); *United States v. Mullany*, 27 F. Cas. 20, 22 (C.C.D.C. 1808).

[125] *United States v. Fisher*, 25 F. Cas. 1086 (C.C.D.C. 1805); *United States v. Mullany*, 27 F. Cas. 20, 22 (C.C.D.C. 1808).

[126] *United States v. Hill*, 26 F. Cas. 318, 318 (C.C.D.C. 1808).

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Cranch, the Massachusetts-born nephew of John Adams. Cranch was a staunch Federalist, and Adams appointed him to the United States Circuit Court for the District of Columbia on February 28, 1801, with the Senate confirming him on March 3, Adams's last day in office. Thomas Jefferson, however, appointed Cranch Chief Judge of the same court despite their difference in party in 1806. By the time Cranch died in 1855, he was the only Federalist to still hold federal office.[127] In *Mullany*, Cranch interpreted the "his" in "his Time of Servitude by Law" to refer to "Free Negro" as well as "Mulatto born of a white Woman" and not only the latter, "because the words 'free negro' and 'mulatto,' are joined by the conjunction disjunctive 'or'; and in such case the idiom of the English language admits the use of the singular pronoun as applicable to each member of the sentence so joined."[128] *Mullany* was not an anomaly. In 1813, "Nancy Butler, a freeborn mulatto, was permitted to testify for the United States [against Ruth Butler, a white woman], upon the authority of U.S. v. Mullany."[129]

In addition to this textualist rationale, Cranch provided an interpretivist argument, looking to the intent of the Maryland legislature. "The evil that the legislature wanted to remedy," Cranch argued, "is not the admission of free negroes and mulattoes as witnesses generally, and in all circumstances, but only 'during their servitude, appointed by law.'"[130] "[W]hy permit a free-born mulatto to be a witness, and reject the free-born negro?" Cranch asked. "We can see no reason for such a whimsical distinction, and the legislature cannot be presumed to have had an intention to make it, unless such intention be very clearly expressed."[131] Cranch therefore reached the conclusion "that free-born negroes, not in a state of servitude by law, are competent witnesses in all cases, or rather that color alone does not disqualify a witness in any case."[132] In D.C. law, then, it was free or slave status, not race, which determined the right to be a witness. D.C. interpreted the 1717 law to allow free Black witnesses to testify in all cases in *Mullany* and, in *Hill*, it extended the group against whom the enslaved could not testify from white Christians to all free people.

Some D.C. court cases from the same time appear not to follow *Mullany*. In an 1809 case, *O'Neale v. Willis*, Cranch was in favor of admitting a witness under the authority of *Mullany*, but a divided court declined to admit him.[133] The laconic decision does not give any further details about the case, so the text is less revealing than the author. Buckner Thruston wrote the opinion. Thruston, a Virginia-born slaveowner and political moderate, was a Madison appointee, and, in the words of one historian, "fiercely anti-black."[134]

[127] Theodore Voorhees, "The District of Columbia Courts: A Judicial Anomaly," *Catholic University Law Review* 29, no. 4 (1980): 920; Paul Finkelman, *Millard Fillmore* (New York: Times Books, 2011), 72; William Cranch, Seventh Census of the United States, 1850, Ward 5, Washington, District of Columbia.

[128] *United States v. Mullany*, 27 F. Cas. 20, 21 (C.C.D.C. 1808).

[129] *United States v. Douglass*, 25 F. Cas. 896, 896 (C.C.D.C. 1813).

[130] *United States v. Mullany*, 27 F. Cas. 20, 21 (C.C.D.C. 1808).

[131] *United States v. Mullany*, 27 F. Cas. 20, 21 (C.C.D.C. 1808).

[132] *United States v. Mullany*, 27 F. Cas. 20, 22 (C.C.D.C. 1808).

[133] *O'Neale v. Willis*, 18 F. Cas. 698, 698 (C.C.D.C. 1809).

[134] "Buckner Thruston," Federal Judicial Center, https://www.fjc.gov/node/1390931; Buckner Thruston, Fifth Census of the United States, 1830, Tenley, Washington, District of Columbia;

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The public in Washington was often hostile to the city's free Black community, sometimes violently so. In 1835, federal soldiers had to guard the city jail to prevent a lynch mob from murdering a white botanist, accused of circulating abolitionist pamphlets. Frustrated, the mob vandalized Black churches and terrorized the city's Black neighborhoods throughout the week.[135] But the people of D.C. had no say in who their judges would be, and so jurisprudence in D.C. had more connection to national politics—the President who appointed the judges and the Senators who confirmed them—than local public sentiment. Cranch, who wrote a decision holding that "free coloured persons" have "the same civil rights" as free white persons, "except so far as they are abridged by the general law of the land," was supportive of free Black civil rights. It is not altogether surprising that Thruston, a Virginia-born slaveowner appointed by Madison, interpreted the law to limit free Black rights, and Cranch, a Massachusetts-born Federalist who began his judicial career as one of Adams's midnight judges, interpreted the same statute to reach a result much more favorable to free Black rights.[136] While Cranch's views may have been unpopular among D.C.'s voting public, he had life tenure, making him free to interpret the law as comported with his sense of justice.

Because *Mullany* rested on interpretation of Maryland law, it did not apply to those parts of D.C. governed by Virginia law. Virginia clearly disallowed free Black testimony in cases where white people were a party, so there could be no free Black witnesses against white defendants south of the Potomac. In *United States v. Birch*, an Alexandria case, the partially Black son of a white woman could not testify, as one of the two jointly charged defendants was white, and "it was a joint indictment, and the defendants had pleaded jointly; and [so] the testimony, if given against one, would operate against all."[137]

Mullany emphasized the importance of the legal distinction between free and slave, but some other D.C. cases placed greater weight on descent from a white woman. In *United States v. Beddo*, an 1835 case applying the Maryland statute, the court ruled "that free negroes and mulattoes, not born of white women, were not competent witnesses against free negroes and mulattoes not in a state of servitude by law."[138] Avins interprets this case to hold that "that free Negroes and mulattoes born of a colored mother could not testify against free mulattoes born of a white mother."[139] The case does not say this directly, but it appears a necessary construction, or else *Beddo* would mean that free Black descendants of Black mothers could not testify against Black descendants of Black mothers, which is to say they could never testify. The 1717 Maryland statute did not completely disallow free Black testimony; the law only defines *whom* they cannot testify against, and so such a reading

Kathryn Turner, "The Midnight Judges," *University of Pennsylvania Law Review* 109, no. 4 (1961): 516; Neil S. Kramer, "The Trial of Reuben Crandall," *Records of the Columbia Historical Society, Washington, D.C.* 50 (1980): 137.

[135] Kramer, "The Trial of Reuben Crandall," 123–25.

[136] *Carey v. Washington*, 5 F. Cas. 62, 66 (C.C.D.C. 1836).

[137] *United States v. Birch*, 24 F. Cas. 1148, 1148 (C.C.D.C. 1827).

[138] *United States v. Beddo*, 24 F. Cas. 1061, 1061 (C.C.D.C. 1835).

[139] Avins, "The Right to Be a Witness," 475.

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(that free Black witnesses could never testify) would be strained. The *Beddo* decision does not provide an explanation for its holding or acknowledge its apparent departure from *Mullany*. In 1842, the D.C. courts allowed a "free colored witness" to testify, noting that while his father was Black, his mother was white.[140] The court did not specify whether this fact was legally determinative, but its inclusion in the brief opinion is suggestive.

Free Black testimony in D.C. remained uncertain until Congress intervened in 1862 to end any racial element to the rules of witness competency.[141] The variety of D.C. decisions, and their variance from the Maryland courts, demonstrates the importance of judicial interpretation, and the broad range of racial restrictions on witness competency that appeared plausible to contemporary legal actors. Free status, descent from a white woman, and race all competed as grounds for witness competency, with no clear champion crowding out the competition.

Conclusion

The law has often proved a tool of dispossession, and in the antebellum South, it was frequently a tool of white supremacy. But refusing to admit Black testimony created the same problems that other witness competency restrictions created: publicly known eye-witness accounts could not be admitted as sworn testimony. It was harder for courts to arrive at the truth, or, perhaps more importantly, it was harder for courts to convincingly present themselves to the public as arriving at the truth. The admission of free Black witnesses into court sometimes served the immediate interests of the white elite and sometimes it did not, but it always alleviated the friction created by having two public narratives, one widely known in the community but legally inadmissible, and another, narrower narrative, presentable at court. The legitimacy of the law, partly resting on its self-presentation as truth-seeking, benefitted from the minimization of this tension.

The exceptions to the general bar against Black testimony in cases involving whites demonstrate the diversity of legal trends in the antebellum South. Competing pressures to administer a well-functioning legal system and to maintain racial hierarchy exerted force on the white elite. Southern elites, even before the great convulsion of the Civil War, sometimes divided on how best to administer a white supremacist legal regime.

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[140] *Beckley v. United States*, 1 Hay. & Haz. 88, 89 (1842).
[141] Act of July 12, 1862, §5, 12 Stat. 539.

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