Between "Race" and "Nation": Indian/Black Identity in the Southern Courtroom, 1780-1840

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Between "Race" and "Nation": Indian/Black Identity in the Southern Courtroom, 1780-1840

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I. Introduction: "Race" and "Nation"

In 1888, Nathan McMillan of Robeson County, North Carolina sued the School Committee of the "Croatan Indian" public school district for his children's admission. McMillan claimed that "all children not white" in the district were entitled to the benefits of the Croatan school, and moreover, that his wife and the mother of his children was the sister of Preston Locklear, a member of the defendant School Committee, proving that his children were as Croatan as anyone else, and should be allowed to go to school. Preston Locklear, Hector Locklear, and William Sanderson, who constituted the School Committee, did not think so, and wrote to Nathan McMillan that they would not allow his children in school "until the law compels us to do so." McMillan did not claim to be a Croatan; he had been a slave, and his master, a white man, was his father. However, he did not think Croatan identity was such a clear-cut affair: as one defense witness admitted on cross-examination, "The people now designated as croatans were called mulattoes up to the passage of the Croatan Act, but were always a separate race to themselves."[1]

The people known in the late nineteenth century as Croatans, and today as Lumbee Indians, have a tangled history of self-identification and government classification. They have been variously designated free people of color, mulattoes, Croatan Indians, Cherokee of North Carolina, Cheraw Indians of the Lumbee River, Siouian, Lumbee, and Tuscarora. In Robeson

[1] Testimony of J.C.M. Eachin, Transcript of Trial, McMillan v. School Committee, No. 16,384, pp. 26-27, N.C. Dept. of Archives & History, Raleigh, N.C., Supreme Court Records. Appeal reported in 12 S.E. 330 (N.C. 1890). The N.C. Supreme Court affirmed the jury verdict that McMillan's children were "negro" and not "Croatan"; at best, according to the judge's instructions, they were "half-bloods," but they had not proven that they had no "negro blood" to the "fourth degree," or in four generations.

County lore, "Croatan" was shortened to "Cro" and became identified with "Jim Crow" as a shorthand for people with African ancestry. Even today, their identity is highly contested, as they fight for federal recognition as a tribe. There is complete disagreement among scholars about the Lumbees' historical origins.[2] One theory is that they are descendants of the "lost colony" at Roanoke, Virginia, who left no trace but the word "CROATOAN" written on a cave wall. According to this theory, these Europeans went to live with the Croatan Indians and intermarried with them. Other scholars contend that the Lumbee are most likely descendants of Hatteras, Saponi, and Choctaw; still others argue that they are Siouian. The Lumbee have had great difficulty achieving Federal recognition, partly because they have not had a continuous "tribal" identity, and partly because of the idea of "mixed" blood – Lumbees could not truly be Indians if they had mixed with "negros." It is precisely that tangled history in whose web Nathan McMillan's children were caught in 1888, and it is that history which forms the background for the litigation I will discuss in this essay.

Lawsuits like McMillan's, in which a person's racial identity was the central legal question, were argued in Southern courtrooms long before 1888, long before there were public schools segregated by race. Before the Civil War, trials involving questions of racial determination arose when slaves sued for freedom claiming to be white, when claimants in an inheritance dispute suggested that someone could not devise or inherit property because of "colored" blood, or in

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[2] See, e.g., Gerald Sider, Lumbee Indian Histories: Race, Ethnicity, and Indian Identity in the Southern United States (1993); Karen I. Blu, The Lumbee Problem: The Making of An American Indian People (1980); Anne M. McCulloch & David E. Wilkins, "'Constructing' Nations Within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes," 19 Am. Ind. Q. (Summer 1995) 361-388; Cindy D. Padget, "The Lost Indians of the Lost Colony: A Critical Legal Study of The Lumbee Indians of North Carolina, 21 Am. Ind. L. Rev. 391 (1996); Adolph L. Dial, The Lumbee (1993).

criminal cases, where statutes referred specifically to "negros" or "persons of color." My earlier article, entitled "Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South," based on the manuscript trial records of cases like these from across the South, primarily focused on the years 1845-61. During that period, I argued, there were two trends in the determination of racial identity at trial. One of those, the rise of race as science, is a familiar story to students of the history of race. Beginning in the 1840s, medical experts testified at trial about the shape of people's feet, the cuticles of their fingernails, and other signs of "blood." But I argued that another way of talking about race became equally important during this period: whiteness as a performance of the social behaviors and civic virtues associated with white people.

I am currently in the process of expanding that article into a book. As I research this subject further, and examine more closely the early years 1780-1840, I have become more interested in the intersections and contrasts between Indian and black identity, and in particular, the way witnesses and litigants at trial conceived of the intersection of racial identity and national or tribal citizenship as they explained why they considered certain people to be black, Indian or white. I will discuss these cases in the context of evolving white-black-Indian relations in the early nineteenth century, and changing attitudes towards intermarriage among whites, blacks, and Native Americans.[3]

Racial formation and the development of racial ideology in the American South have been the subject of an enormous historical, legal and sociological literature. Historians of the antebellum South, in particular, have painted a picture of a culture increasingly obsessed with the line between black and white, especially after the 1830s. Yet Native Americans have to some extent been "missing persons" in antebellum Southern history. The undeniable and tragic fact of Indian Removal in the

[3] In this essay, I use the terms "Indian" and "Native American" interchangeably; although scholars have favored the term "Native American" in recent years, many tribal people, particularly in the West, continue to refer to themselves as "Indian."

1830s has blinded us to the importance of the Indians who remained behind – not only those who *identified* as Indian, such as the eastern band of Cherokee, but those who remained "mixed" with other groups so that their identity was more ambiguous. Finally, we should remember that the Cherokee "trail of tears" did not happen until 1839; Indians retained a strong presence in the South until well into the nineteenth century.

Shifting the focus to Native Americans brings a new perspective to those trying to understand racial meanings in the South. First, it puts a spotlight on groups often overlooked in Southern history, although frequently the subject of anthropologists' interest: sometimes called "tri-racial isolates," groups like the Lumbee, Melungeons, Brass Ankles, and so on, demonstrate the complex social history of the *intersections* of black and Indian identity.

But even more important, paying attention to the *contrast* between conceptions of black and Indian identity lays bare the political nature of racial definition, as we see courts choosing between identity as race and as national citizenship. Exploring the contrast between the litigation of black and Indian identity highlights what is distinctive about "race." As Etienne Balibar has noted, "[t]he discourses of 'race' and 'nation' are never far apart." Yet, in their origins, the two are distinct: "the first stage towards this modern combination was the gradual separation of 'race' and 'nation' during the Enlightenment."[4] At precisely the time when white Southerners were trying to

[4] Nicholas Hudson, "From 'Nation' to 'Race': The Origin of Racial Classification in Eighteenth-Century Thought," Eighteenth-Century Studies, 29:3 (1996): 247-264, 248. See also Immanuel Wallerstein, "The Construction of Peoplehood: Racism, Nationalism, Ethnicity," in Race, Nation Class: Ambiguous Identities (Etienne Balibar & Immanuel Wallerstein, eds., 1991), p. 82 ("If we then ask what is served by having two categories – races and nations – instead of one, we see that while racial categorization arose primarily as a mode of expressing and sustaining the core-periphery antinomy, national categorization arose originally as a mode of expressing the competition between states in the slow but regular permutation of the hierarchical order and therefore of the detailed degree of advantage in the system as opposed to the cruder racial classification.")

establish the equation of freedom with whiteness and slavery with blackness, and drawing distinctions between the savagery of Indians and of Africans, anthropologists and others on both sides of the Atlantic were developing their ideas about what "race" meant. The racialization of Native Americans in Anglo-American thought was an important step in the general development of racial ideology. At the beginning of the period I am examining, Native Americans were seen by most white observers as a conglomeration of tribes of primitive people shaped by their environment, at a different stage of civilization from Europeans, but of the same white race. By contrast, American thinkers like Thomas Jefferson and Benjamin Franklin saw blacks as immutably inferior because of their racial identity.[5] "Thomas Jefferson and Benjamin Franklin generalized broadly about the character of the 'Negro race,' yet seemed more conscious of linguistic and cultural diversity among 'Indian nations.'"[6] Nicholas Hudson concludes that "[t]he emergent concept of the 'nation' as a linguistic and cultural community was of considerable importance to the concurrent rise of a racial worldview."[7]

II. Intersections of Indian and Black Identity

[5] During the eighteenth century, "Native Americans were less often described as a single 'race,' for there was no agreement that these peoples formed a single stock." Hudson, "From 'Nation' to 'Race,'" p. 249.

[6] Ibid., p. 251.

[7] Ibid., p. 256.

The fact that all people of color were not "negro" made it especially difficult to determine one individual's racial identity in court, for there were three "races" rather than two in the antebellum South. The presence of Indians in the early antebellum South made it impossible to simply equate dark skin with unfreedom. "red" complexion, unlike "negro" appearance, gave rise to a presumption of freedom.[8] Yet the status of Native Americans was determined in different ways from the status of people of African descent. "Indian" identity depended on matrilineal descent, that is, Indian ancestry in the maternal line; for blacks, rules developed about fractions of "blood." Furthermore, Indian identity was conceptualized not simply in terms of "race" but in terms of "nationhood." Indian-ness was an explicitly *political* identity, a question of national or tribal citizenship. Thus, there were numerous ways someone could end up on the cusp between "Indian" and "negro": having an Indian mother but some African ancestry; belonging to an Indian tribe but having some African ancestry; and so on.

What made these cases doubly challenging was that the three racial categories whites so dearly hoped would remain distinct, in fact overlapped. Intermingling took place on both a societal and an individual level. On a societal level, despite the fact that large numbers of Native Americans lived in separate national territories, they came into contact with African Americans as the slaves, or runaway slaves, of neighboring whites, and when the Indian nations themselves adopted black slavery. The "Five Civilized Tribes" of the Southeast – the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles – who lived in substantial areas of the Carolinas, Georgia, Florida, and Tennessee, all developed black slavery during the early nineteenth century. While in 1809, only 583

[8] Hudgins, 11 Va. (1 Hen. & M.), at 134.

black slaves resided in the Cherokee Nation, this number had nearly tripled by the time of Indian "Removal" to Oklahoma.[9]

White Southerners had a strong interest in keeping blacks and Indians apart. Particularly in regions with a "black majority," like South Carolina in the colonial period, whites recognized the danger of black-Indian alliances. Because slaves who ran away often headed to Indian territory, and some set up "maroon" communities within Indian national boundaries, slaveholding whites directed some of their efforts to enlisting Indians as allies in catching runaway slaves, or at least preventing Indians from aiding runaways. Historians have chronicled a variety of "divide and rule" tactics used by whites to foster anti-Indian feelings among blacks, and anti-black feelings among Indians.[10] James Merrell, for example, has suggested that the Catawba Indians of North Carolina underwent a "racial education" from European Americans, who taught them to think in terms of a color hierarchy, with Africans on the bottom.[11] William McLoughlin portrays the status of black slaves among the Cherokees as declining steadily over the course of the early nineteenth century.[12]

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[9] William G. McLoughlin, *Red Indians, Black Slavery, and White Racism: America's Slaveholding Indians*, 26 Am. Q. 367 (Oct. 1974), at 380.

[10] *See* William S. Willis, *Divide and Rule: Red, White, and Black in the Southeast*, 48 J. Negro Hist. 157 (July 1963).

[11] James H. Merrell, *The Racial Education of the Catawba Indians*, 50 J. So. Hist. (Aug. 1984): 363-384.

[12] McLoughlin, Red Indians, Black Slavery, and White Racism, at 381; *see also* Theda Purdue, Slavery and the Evolution of the Cherokee Society (1979), at 40-49 (chronicling efforts of whites to create antagonism between blacks and Cherokees and gradual acceptance by Cherokees of European model of race); R. Halliburton, Red Over Black: Black Slavery Among Cherokee Indians (1977); Rennard Strickland, Fire and The Spirits: Cherokee Law from Clan to Court (1975). For a similar story regarding the Creek Indians, see Kathryn E. H. Braund, *The Creek Indians, Blacks and Slavery*, 57 J. So. Hist. 603 (Nov. 1991).

Of course, in an increasingly racialized society, Native Americans themselves had a strong interest in not being considered "colored."[13] To the extent that the line between white and non-white was being more and more clearly marked, Indians wanted to make sure that they were on the white side of the line. They had some resources to take advantage of, among them the Jeffersonian resurgence of interest in Indian-white marriage and the romantic myth of "Pocahontas."[14] Some Native American tribes, including the Pamunkey of Virginia, tried explicitly to exploit the more favorable racial views held by some whites towards Indians and white-Indian intermixture in order to distance themselves from the taint of "colored" blood. In Virginia, for example, because "Virginians were quick to suspect a 'blackening' of Indian blood," Pamunkey Indians in the early nineteenth century obtained "certificates of Indian descent" from local authorities, and wore their hair long despite adopting other aspects of European clothing, in order to demonstrate that they were racially distinct from African Americans, having straight hair.[15] In 1824, the Cherokee Nation adopted the first law against intermarriage between "negros" and either Cherokees or whites residing in the Cherokee Nation. The Cherokees, while giving white spouses citizenship in the Nation, denied citizenship to children of Cherokee men and black women, and created a form of second-class citizenship, without voting rights, for children of Cherokee women and black men.[16] The Creeks

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[13] *See* Karen M. Woods, *A "Wicked and Mischievous Connection": The Origins of Indian-White Miscegenation Law*, 23 Legal Studies Forum 37, at 67.

[14] Woods, *Indian-White Miscegenation Law*, at 54-55; Christian F. Feest, *Pride and Prejudice: The Pocahontas Myth and the Pamunkey*, in The Invented Indian: Cultural Fictions and Government Policies, James Clifton, ed. (1990).

[15] Feest, *Pride and Prejudice*, at 53-54.

[16] "Resolved . . . That intermarriages between negro slaves and indians, or whites, shall not be lawful, and any person or persons, permitting and approbating his, her or their negro slaves, to intermarry with Indians or whites, he she or they, so offending, shall pay a fine of fifty dollars . . . That any male Indian or white man marrying a negro woman slave, he or they shall be punished with fifty-nine stripes on the bare back, and any Indian or white woman, marrying a

adopted a law making it impossible for children of Creeks and "Negroes" to inherit property from their Creek parents, declaring that "the property shall be taken from them and divide among the rest of the children as it is a disgrace to our people [crossed out] Nation for our people to marry a Negro."[17]

Despite the efforts of whites to divide Indians and blacks, and the similarities between Cherokee slavery and plantation slavery in white areas, there were regions where African Americans and Native Americans enjoyed friendlier relations, and where slavery never took on the repressive cast of plantation slavery under white masters. For example, in Seminole territory, blacks had a far greater degree of freedom than under other slavery systems, and there were whole communities of maroons who lived separately from Indians, within the territory, paying a modest amount in return for protection from slave catchers.[18] Even among the Creeks, who had adopted similar laws to the Cherokees regarding intermarriage, white missionaries reported a lack of enforcement of the regulations. And ex-slaves of Creeks in interviews often commented on their "leniency" as masters: "I was eating out of the same pot with the Indians . . . while [black slaves owned by whites] were still licking their masters' boots in Texas."[19]

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negro man slave, shall be punished with twenty-five stripes on her or their bare back. Laws of the Cherokee Nation, Nov. 11, 1824. *See* Woods, *Indian-White Miscegenation Law*, at 65-66. Little has been written on tribal law in the nineteenth century and earlier; see John Phillip Reid, A Law of Blood: The Primitive Law of the Cherokee Nation (1970).

[17] Law 20th, Laws of the Creek Nation.

[18] Kenneth W. Porter, The Black Seminoles: History of A Freedom-Seeking People (1996), at 5. *See also* Daniel F. Littlefield, Africans and Seminoles (1977); Thomas A. Britten, A Brief History of The Seminole-Negro Indian Scout (1999).

[19] Creek freedman quoted in Katja May, African-Americans and Native Americans in the Creek and Cherokee Nations, 1830s to 1920s: Collision and Collusion (1996), 41-45 (quotation on 41).

Furthermore, by the late eighteenth century, there were a significant number of people, slave and free, who traced their roots to both Indian and African foremothers and fathers. In Virginia, for example, late eighteenth-century newspapers were filled with runaway advertisements for people alleged to be slaves who based their claims to freedom on Indian ancestry. For example, Paul Michaux advertised in October 1772 for "a Mulatto Man named Jim, who is a Slave, but pretends to have a Right to his Freedom." Jim was the son of an Indian man and had "long black hair resembling an Indian's"; Michaux suspected that "he was gone to the General Court to seek his freedom"; likewise, William Cuszens complained that his "Mulatto Slave" David, who "sa[id] he [wa]s of the Indian breed" had gone "down to the General Court, as I imagined, to sue for his freedom . . ."[20]

Many ex-slaves interviewed by the Works Progress Administration in the 1930s talked about their Indian parents or grandparents.[21] They described very different ways in which they came by their mixed ancestry. Some were born of Indian slaveholding fathers and enslaved African American mothers. Milton Starr, for example, told interviewers that his mother was "a slave girl picked up by the Starrs when they left [Arkansas] with the rest of the Cherokee Indians." Sarah Wilson called herself "a Cherokee slave . . . and besides that I am a quarter Cherokee my own self," to indicate that she was both owned by Cherokee masters and had

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[20] Quoted in Peter Wallerstein, "Indian Foremothers: Race, Sex, Slavery, and Freedom in Early Virginia," Sex, Love, and Race: Crossing Boundaries in North American History, Martha Hodes, ed. (1999).

[21] Mentions of Indian blood, physical description - The American Slave, Supp., Series 1; Vol. 10 - Arkansas - pp. 33, 35; p. 103; p. 123; pp. 187-88, 195; 318; Vol. 9 - 105, 287, 295; Vol. 6 Part 1, p. 92, p. 559; Vol. 7, p. 54; pp. 344-45, 347, 350; Vol. 9??, pp. 12-13; Vol. 8, pp. 137, 139; 326; Part 2, 95, 147, 169.

Cherokee ancestry. Sarah's father was her master's son, Ned Johnson; she did not find this out until her mistress died, and "Grandmammy told me why old Mistress picked on me so. She told me about being half Mister Ned's blood. Then I knowed why Mister Ned would say, 'Let her alone, she got big big blood in her,' and laugh."[22] Others claimed that their mothers were full-blooded Indians, although enslaved. James Fisher, who was enslaved in Tennessee, explained that his mother, "[t]hough an unmixed Cherokee Indian, . . . was kept in slavery all her life. . . . She was one of a company of twelve Indian children taken prisoners in the time of the last war, and sold into slavery; a *practice not uncommon among those who deal with the Indians* [emphasis in original]." Although his mother consulted a lawyer about proving her children free, he told her "it would cost more money to carry on the suit, than it would to buy the whole of them. This discouraged her, and she gave it up."[23]

R.C. Smith told a more unusual tale: "My father," he said, "was half Cherokee Indian. His father was bought by an Indian woman and she took him for her husband."[24]

A number of ex-slaves remembered Indian Removal in the South, in which some people of Indian "blood" were forced to leave, but others with Indian "blood" had to remain behind; because of their "negro blood," they could be enslaved and were not considered to be Indian by white people. "Uncle Abe" watched soldiers in Alabama round up Indians and march them to Oklahoma on "Trail of Tears"; he himself was part Indian.[25] Susan, a "full-blooded Creek Indian" who

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[22] American Slave, Vol. 7, pp. 344-45, 347, 350.

[23]Blassingame, *Slave Testimony*, p. 231.

[24] Supp. Series 1, Vol. 12, Oklahoma, p. 281.

[25] Jack D. Forbes, Africans and Native Americans: The Language of Race and the Evolution of Red-Black Peoples (1993), 249 n. 3.

belonged to Judge Lane in Nashville, Tennessee, although he had warned his wife before buying her that "if a suit at law should ever be brought, she would be set free." As Susan watched the Creeks pass by her house on the "Trail of Tears," they recognized her as a member of their tribe. "They stopped, and gathered round her, and made signs for her to go with them. . . . Susan would have gone with her tribe, but Judge Lane . . . pleaded hard with her not to go. He told her the Indians ate raw meat, and were often nearly starved, and many other frightful stories: until she gave up to stay." By staying, Susan remained a "negro" rather than an Indian.

While some people with mixed "negro" and Indian "blood" were enslaved because they were considered "negro," or simply because they could be, there also developed communities of free people of color who were considered to be mixed-race. These communities, known to anthropologists as "marginal Indians" or "tri-racial isolates," were in the early nineteenth century simply known as "mulattos." They include people known as Croatans, Red Bones, Red Legs, Buckheads, Goins, Turks, and Brass Ankles in South Carolina; as Houma Indians in Louisiana; as Melungeons in Tennessee and Virginia; as Ramps, Melungeons, Issues, Cubans, and Brown People in Virginia.[26]

III. Contrasting Ideas about Indian, Black, and "Mixed-race" Identity

Legal determinations of racial identities intersected in complicated ways with cultural beliefs about racial difference and racial mixture. Not only did white Southerners betray a great deal of ambivalence about whether Indians were indeed a distinct race, and if so, whether they

[26] Brewton Berry, Almost White (London: Collier Books, 1963), p. 15.

were an inferior race, but Indians and people of mixed Indian and African ancestry -- people of color, as they were known at the time -- had their own views about racial identity. Although litigation in state courts tended to reflect white understandings of racial difference, the self-image of "people of color" becomes important to the cases they initiated, as well as to understanding the social historical background of the litigation.

White Southerners in the late eighteenth and early nineteenth centuries viewed Indians quite differently from the way they saw blacks. Revolutionaries like Benjamin Franklin and Thomas Jefferson had Romantic ideas about the Indians' character and culture. Franklin, writing in 1753, disparaged "attempt[s] to civilize our American Indians," arguing that their "present way of living" was more natural to all humans:

> almost all their Wants are supplied by the spontaneous Productions of Nature, with the addition of very little labour . . . they are not deficient in natural understanding and yet they have never shewn any Inclination to change their manner of life for ours, or to learn any of our Arts; When an Indian Child has been brought up among us, taught our language and habituated to our Customs, yet if he goes to see his relations and make one Indian Ramble with them, there is no perswading him ever to return, and that this is not natural to them merely as Indians, but as men, is plain from this, that when white persons of either sex have been taken prisoners young by the Indians, and lived a while among them, tho' ransomed by their Friends, and treated with all imaginable tenderness to prevail with them to stay among the English, yet in a short time they / become disgusted with our manner of life . . ."[27]

Thirty years later, Franklin penned an early example of cultural relativism: "Savages we call them, because their manners differ from ours, which we think the Perfection of Civility; they think the

[27]Benjamin Franklin, Writings (Library of America, 1987) Letter to Peter Collinson, Phila. May 9, 1753, pp. 470-71.

same of theirs."[28] Jefferson compared Indians favorably to blacks in his *Notes On The State of Virginia,* claiming that Indians with no education "astonish you with strokes of the most sublime oratory; such as prove their reason and sentiment strong, their imagination glowing and elevated. But never yet could I find that a black had uttered a thought above the level of plain narration . . . Among the blacks is misery enough, God knows, but no poetry."[29] Elsewhere he wrote that "the Indian [is] in body and mind equal to the white man."[30] Jefferson not only considered differences between Native Americans and Europeans products of the American environment, but argued against the alternative environmentalist view put forward by Comte Buffon that the New World environment was deficient and would lead to the degeneration of European peoples to the state of Native Americans.

Historians disagree about the timing of the "racialization" of Native Americans. Robert Bieder and Robert F. Berkhofer, Jr. put forward the traditional view that environmentalist views of Indians as essentially whites who appeared red and uncivilized because of their environment gave way to more biological views in the mid-nineteenth century with the advent of scientific racism.[31] Alden Vaughan, on the other hand, places the transformation earlier, in the late eighteenth century, claiming that by the time of the Revolution, whites already saw Indians as

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[28] Remarks Concerning the Savages of North-America, 1783.

[29] Thomas Jefferson, Notes on The State of Virginia (William Peden, ed. 1982), 140.

[30] Quoted in Robert F. Berkhofer, Jr., The White Man's Indian: Images of the American Indian from Columbus to the Present (1978), 42.

[31] Robert E. Bieder, "The Representations of Indian Bodies in Nineteenth-Century American Anthropology," American Indian Quarterly 20 (2) (Spring 1996): 165-179; Berkhofer, The White Man's Indian. See also Michael Paul Rogin, Fathers and Children: Andrew Jackson and the Subjugation of the American Indian (1991), 125 and passim, for a psychohistorical approach to whites' views of Indians and Blacks.

"inherently dark, incurably savage, and intrinsically non-American."[32] Karen Ordahl Kupperman argues that during the colonial period, racialism already played a part in English of Indians as a way of understanding whites' "own experiences in America, especially the treachery they perceived in Indians' unwillingness to assimilate to their construction of the normal."[33] From this perspective, we can see that there is a fair amount of continuity between eighteenth- and nineteenth-century views; nineteenth-century anthropologists like Buffon combined environmentalism and racialism in their view of Indians as "incapable of mastering their environment."[34]

Of course, it is far harder to determine the racial views of people of color themselves. Yet ex-slave interviews contain numerous references to mixed blood and its meaning in life and character. Former slaves who spoke about their own Indian identity or "blood" often ascribed particular character traits of their parents or grandparents to their "Indian-ness." The most common trait ex-slaves associated with Indians was a fierce temper, which often led them to acts of resistance to slavery. For example, James Fisher claimed that the Indian woman Susan's seller

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[32]Alden T. Vaughan, "|From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian," Am. |Hist. |Rev. 87(Oct. 1982): 917-53, 953.

[33] Karen Ordahl Kupperman, "Presentment of Civility: English Reading of American Self-Presentation in the Early Years of Colonization," Wm. & Mary Q. 54 (Jan. 1997): 193-228, 228. See also Daniel K. Richter, "'Believing that many of the Red People Suffer Much for the Want of Food': Hunting, Agriculture, and a Quaker Construction of Indianness in the Early Republic," J. Early Republic 19 (Winter 1999): 601-28.

[34] Bieder, "Indian Bodies, p. 166. See also William G. McLoughlin & Walter H. Conser, Jr., "'The First Man Was Red'– Cherokee Responses to the Debate over Indian Origins, 1760-1860," American Quarterly.

warned her buyer "never to strike her, for she had a real Indian temper, and wouldn't bear it."[35] Mary Allen Darrow remembered that her Indian grandmother was "mean . . . She'd cut a cat's head off fer no cause er tall."[36] Cora Gillam's ancestors were "peaceable Indians, until you got them mad," and then they were "the fiercest fighters . . ."[37] Nancy Williams' father was "a mean man, big strong half Injun, couldn' never git long. Pappy had plenty temper," and so he never let his master or overseer whip him.[38] Another trait was stoicism and silence: Sophie Bell remembered that her Mother knew many secrets about her masters but she did not tell because "Indians don't tell."[39]

The metaphor of "blood" was very strong in slave culture. Jim Henry, a South Carolina ex-slave, noted that he had "three bloods in my veins, white folks, Indian folks, and Negro folks," and that was why "us been thrifty like de white man, crafty like de Indians, and hard workin' like de Negroes."[40] Yet, at the same time, some ex-slaves demonstrated a nuanced perception of what we today would call "the social construction of race": Uncle Moble Hopson explained to his interviewer that his mother was an Indian and his father was a white man or "least-ways he warn't no slave even effen he was sort of dark-skinned." And although Uncle Moble himself had "white skin," after the War, "dey say dat all whut ain't white is black. An den dey tell Injuns yuh kain't

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[35] Blassingame, Slave Testimony, p. 230.

[36] American Slave, Supp. Series 1, Vol. 8, 30796.

[37] Vol. 9, p. 28.

[38] Weevils in the Wheat, p. 315.

[39] Vol. 8, p. 326.

[40] American Slave, Supp. Series 1, Vol. 2, S.C. Narratives Parts 1 and 2, p. 266.

marry no more de whites. . . .So perty soon et come time tuh marry, an' dey ain't no white woman fo' me tuh marry so ah marries uh black woman. An' dat make me black, ah 'spose 'cause ah ben livin' black ev'y sence."[41] What made Uncle Moble "black," according to this story, was not his physical appearance, but his way of life, into which he was forced by legal regulation of intermarriage.

Despite the generally positive views of "Indian" blood held by people of mixed African-Indian ancestry who remained in African American communities, even those Indians who married Blacks betrayed more ambivalence about "mixing." The Cherokee chief Chulio, for example (also known as Shoe Boot), had three successive wives, one Cherokee, one white, one a Black slave. After his white wife abandoned him to return to her relatives in Kentucky in 1804, Chulio married his slave. He wrote: "Being in possession of some Black people and being cross in my affections, I debased myself and took one of my Black Women by the name of Daull [as my wife.] By her I have had three Children."[42]

IV. Legal Constructions of Indian Identity

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[41] Weevils in the Wheat: Interviews with Virginia Ex-Slaves, ed. Charles L. Perdue, Jr. (Charlottesville: UVA Press, 1976), pp. 143-44.

[42] Quoted in William McLoughlin, Cherokee Renascence in the New Republic (1986), 344. By 1824, when the restrictive intermarriage laws were being passed, Chulio worried about his children's citizenship rights, and petitioned the Cherokee National Council to have his children be "free Sitizens of this Nation." This petition was granted, provided "Shoe Boots cease begetting any more children by this said slave woman." However, after Chulio's death, several of the children were re-enslaved by a white man from outside the Nation who claimed deed to them, and there is no evidence that they were ever recovered. Ibid., p. 345.

A. Statutory law

I want to turn briefly to survey the statutory law governing the status of racially ambiguous people, before looking at the litigation they brought in court. During the colonial era, Indian identity was not clearly defined in Southern law or culture – Indians were often lumped together with blacks as "people of color" or even "mulattoes," both in daily conversation and in legal statutes. The first law to define "mulatto" was a1705 Virginia statute that deemed a mulatto, "the child of an Indian" as well as "the child, grandchild, or great grandchild of a negro ."[43] This statute was not modified until 1785 when a "colored person" was defined as all persons with "one-fourth or more Negro blood"; whereas those who had "one-fourth or more Indian blood" and no "Negro blood" were Indians. In the tax rolls of Charles City County, Va., for example, Indians underwent a variety of classifications. From 1783 to the early 1800s, no race was marked for free persons, all were classifed as "white-tithable"; from 1809 to 1812, "free negro" was placed after some names, but Indians and people of mixed blood were apparently treated as white; in 1813, the term "mulatto" appeared, and Chickahominy Indians were classified as mulattoes. In other Virginia counties, relatives of reservation Indians who had taxable property were classified as "mulatto" or "free colored," and sometimes even "free negro."[44] As late as 1818, "mulatto" was applied to white-Indian mixed-blood by Virginia jurists in *Mercer v. Commonwealth*, where the judge noted that "the free man sold, was not proved to be either a negro or mulatto, but by one witness, who said he had heard that he was the offspring of a white

[43] Jack D. Forbes, Africans and Native Americans: The Language of Race and the Evolution of Red-Black Peoples (Univ. of Illinois Press, 1993 2nd ed.), p. 195.

[44] Ibid., p. 199.

woman by an Indian."[45] In South Carolina, early eighteenth-century legislation distinguished between "negroes, Indians, mulattoes & mestizoes" who were slaves and "free Indians in amity with this government, and negroes, mulattoes, or mestizoes who are now free."[46]

Indians remaining in the South in the nineteenth century had an "anomalous legal status."[47] The "Eastern band" of Cherokees who remained in North Carolina, for example, did not vote or "attempt to exercise some of the other rights usually accompanying citizenship, like serving in the militia or sitting on juries in cases involving whites." Apparently they sought a "'half-way house' . . . between the status of white citizens and free blacks, from whom they dissociated themselves (at least on the public level)."[48]

Thus, the statutory and customary regime governing the racial identity of people on the cusp of "Indian" and "negro" contained a great deal of ambiguity. In particular, the category of "mulatto" seemed to encompass, at different times, people with "negro"/white, "Indian"/white, and "negro"/ "Indian" ancestry. Indians, especially those groups believed to have mixed with people of African ancestry, appeared to have been classified on both sides of the black/white line when efforts were made to draw that line.

B. Litigation

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[45] Ibid., p. 200.

[46] Ibid., p. 252.

[47] John R. Finger, The Eastern Band of Cherokees, 1819-1900 (Knoxville, Tenn.: Univ. of Tennessee Press, 1984), p. 49.

[48] Ibid., p. 50.

In court, Indian identity was decided by ancestry and, even more important, status. Ancestry rules differed markedly from those used to determine "negro" identity, because the focus was on matrilineal descent.[49] In this respect, Indian identity and slave status mirrored one another. To prove freedom as an Indian, one had to prove a free Indian female ancestor in the maternal line. Thus early nineteenth-century suits for freedom brought by enslaved people claiming Indian ancestry often turned on the legality of Indian slavery during the colonial period. A series of late eighteenth and early nineteenth century Virginia cases held that descendants of Indians enslaved between 1682 and 1705, but not later than 1705, were lawfully slaves. It was not enough to show that one was "Indian" or the descendant of Indians in the maternal line to prove one's freedom, one had to pinpoint the moment of enslavement as well.[50]

Yet other cases made it clear that the term "Indian" itself was a status designation. In 1817, the South Carolina Supreme Court decided a case involving East Indians who claimed exemption from the poll tax of the City of Charleston, levied against "free people of color."[51] The Charleston ordinance applied to "each and every other free male negro, or free person of color, whether a descendant of an Indian or otherwise." The court, in finding for the plaintiffs, decreed that only Indians who were once enslaved could be considered "free people of color," defining

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[49] See, e.g., United States v. Sanders, 27 F. Cas. 950, 950-51 (C.C.D. Ark. 1847) ("[T]he child of a white woman by an Indian father, would . . . be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins, determining the condition of the offspring.")

[50] See, e.g, Jenkins v. Tom, 1 Wash. 123 (Va. 1792); Butt v. Rachel, 4 Munford 209 (Va. 1814); Coleman v. Dick & Pat , 1 Wash. 233 (Va. 1793), Robin v. Hardaway, (get cite); Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134 (1806); Davis v. Wood, 14 U.S. (1 Wheat.) 6 (1816); Gregory v. Baugh, 25 Va. (4 Rand.) 611 (1827), 2 Leigh 665 (Va. 1831); Pegram v. Isbell, 11 Va. (1 Hen. & M.) 387 (1807), 12 Va. (2 Hen. & M.) 193 (1808).

[51] Ex Parte Ferdinand Ferrett, 1 Mill. Const. 194, Charleston, May 1817, J. Colcock.

"Indian" more as a status than as a racial identity: the terms "Indian" and "free person of color," according to the court, "are not a mere description of persons, but have an evident relation to the *condition in society* . . . The word Indian means unquestionably slave Indians, for it is a fact . . . well known that the Indians of the country were formerly made slaves; it cannot then be extended to the descendants of an East Indian and a white man, nor indeed to the descendants of any other free Indian not impregnated with the blood of the negro."

In the first decades of the nineteenth century, Indian identity was conceived in terms of membership in an Indian nation. In Tuten's Lessee v. Martin, Wyly Tuten was found to be "the head of an Indian family" for purposes of land ownership because he had married a Cherokee woman, Rachel Coody, lived within Cherokee territory, "followed their practices and habits," and had been a full participating member of the Cherokee Nation, which gave full citizenship rights to white spouses. Thus, Tuten's national identity was determined by the court according to his self-identification and the determination of the Indian nation, although he did not appear to have lost his racial identity as "white."[52] Later in the antebellum period, after Indian "removal," Indian identity came to be more often defined in terms of "blood"; for example, in 1852, the North Carolina Supreme Court held that "Indian" racial identity, for the purposes of a statute prohibiting intermarriage, meant one-eighth Indian ancestry, or Indian "blood . . . to the third degree," very similar to definitions of "negro," which in a plurality of states at this time used a "one-eighth blood" rule.[53]

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[52] Transcript of Trial, Tuten's Lessee v. Martin (collection of Tenn. State Archives, Nashville, Tenn., Supreme Court Records), *rev'd*, 11 Tenn. (3 Yer.) 452 (1832).

[53] Transcript of Trial, State v. Melton, No. 6431 (N.C. Stanley County Super. Ct. Dec. 1852) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *aff'd*, 44 N.C.

A Virginia case suggests the legal ramifications of a distinction between “race” and “nation.” In 1827, James Baugh sued Thomas Gregory for his freedom in Chesterfield County, Virginia, claiming that his mother’s mother, Sibyl was an Indian woman entitled to her freedom, although apparently enslaved.[54] Witnesses testified about Sibyl’s appearance, which was that of an Indian, "except that she was too dark to be of the whole blood"; the fact that she was called Indian Sibyl; and that in her lifetime, she was reputed to be entitled to her freedom.[55] Gregory claimed that Baugh needed to affirmatively prove that Sibyl’s *mother* was Indian rather than black; whereas, the trial judge instructed the jury that "it was a question to be decided on probabilities and circumstances; among which, it was lawful for the jury to consider facts connected with the history of the country." One of these facts was that "it was much more common for female Indians to be captured and domesticated among us, than males . . . at that time," presumably the mid- to late- eighteenth century, when Sibyl was married.[56] The Virginia Supreme Court overturned the jury verdict in favor of freedom, finding fault with these instructions; after a second trial, another jury gave the same verdict, and the Supreme Court again struck it down.[57] Upon the second trial, Baugh submitted the deposition of an eighty-three year old witness who testified about the Indian-ness of Indian Sibyl’s mother, but was unable to

(Busb.) 49 (1852).

[54] Gregory v. Baugh, 4 Rand. 611 (Va. 1827).

[55] *Id.* at 612-14.

[56] *Id.* at 614.

[57] Gregory v. Baugh, 2 Leigh 665 (Va. 1831).

exclude the possibility that Sibyl's mother had been enslaved during the brief period in the late seventeenth century when it was legal to enslave Indians in Virginia.[58]

More decisively, the majority of the Court considered hearsay testimony about Sibyl's or her mother's tribal status inadmissible. This was in striking contrast, as the dissent pointed out, to the general rule about the admissibility of reputation evidence regarding "pedigree," another term for *racial* status or ancestry. In trials of racial identity, courts routinely allowed every kind of hearsay or reputation evidence, no matter how remote, to be heard by the jury on the grounds that it was often the only way to know someone's race. Indeed, that was a frequent argument in these cases: Given the difficulty of attaining racial knowledge in the face of racial intermixture, the only solution was to allow the jury to hear and see every kind of evidence in order to determine a person's identity. Yet the majority in *Gregory v. Baugh* sharply distinguished "the country, nation or tribe, of the claimant's ancestor" from her "pedigree."[59] This distinction between Indian status as membership in a nation or tribe, and "negro" status as "pedigree" meant not only a different formula for determining one's identity, but also a different method of fact-finding. Presumably, if Baugh's witness had given similarly vague hearsay evidence regarding Indian Sibyl's black father, it would have been admissible. "Race" was a matter for community consensus, a matter of reputation – Indian status, however, membership in the tribe, was a question which required other forms of proof. Although the dissent pointed out that

[58] *Id.* at 667-670.

[59] *Id.* at 669.

documentary proof would not be forthcoming in this case, that few Indians could provide such written documentation, the majority was unmoved.[60]

In an 1848 case, Amelia Marchant, a free woman of color, claimed that she should be allowed to testify in court as the prosecutrix in an indictment of a white man for assault and battery. Witnesses on her behalf testified that her family had "always passed as persons of free Indian descent, not liable to the capitation tax."[61] Witnesses on the other side claimed that her father "was considered a colored person" and that he "associated with colored persons"; the City Marshal testified that he "did not report Amelia Marchant for capitation tax, because she lived on the Neck," not because she was Indian. The trial judge charged the jury "that there were but two classes of free inhabitants of this State . . . white citizens and free persons of color; and that there was no intermediate or third class, denominated free Indians, or persons of Indian descent, possessed of civil privileges . . . but that the exception in the Acts of Assembly in relation to free persons of color, of "Indians in amity with this government," is confined to Indians belonging to tribes, who possess an acknowledged national existence, and are in amity with this State, and who may be transiently within our jursidiction. . . . whose blood is not mixed with that of the african or negro race . . ." The high court's opinion made an extensive comparison of Indian and black slavery, and of the Indian and "negro" races, and concluded by drawing a sharp distinction between the two. Judge Richardson claimed that Indian slavery was "temporary" and that Indians "never made valuable slaves, but withered away in a state so alien to the red man's nature."[62] By

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[60] *Id.* at 687-91.

[61] State v. Belmont, 4 Strobhart 445, 445 (S.C. 1848).

[62] Ibid., p. 451.

contrast, “the negro race thrive in health, multiply greatly, become civilized and religious, feel no degradation, and are happy, when in subjection to the white race.”[63] Therefore, Richardson decreed that the legal presumption was that all free Indians were “of the class of ‘Indians in amity,’” even if they did not live within a tribe with separate national existence.[64] He ended by declaring in fully racialized terms that “the Red race” does not “come[] within the curse of Noah upon Ham and his offspring” and that his decision “spares the race of Shem.”[65] Thus, by 1840, Indians had come to be seen as racially distinct, yet at the same time, they were treated legally in terms of their national class – a people in amity with the government – in stark contrast to “negros.”

In some racial determination trials, white witnesses demonstrated the lesser stigma they attached to the Indian race by discussing an individual interchangeably as "Indian" and "white," in contrast to "colored" and "black" or "negro." In Boullemet v. Philips, French witnesses who had come to Louisiana from Santo Domingo as well as those from New Orleans testified both that M. Boullemet’s mother was Indian and that she was white. Jean Fauchet testified on direct examination that the Boullemets "were considered as a respectable family, they were considered as white." On cross examination, he explained that he had heard that Mr. Boullemet’s mother "was a descendant of an Indian race . . . that [her] mother . . . was of a dark colour like the Indians (elle etait burne comme les Indiens). He says that he knew many white persons who had the same complexion and who had no African or Indian blood in their veins." Suzanne

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[63] Ibid., pp. 451-52.

[64] Ibid., p. 449.

[65] Ibid., pp. 452-53.

Mouchon testified that "Mrs. Boullemet [was] always considered as a white person . . . she appeared to be of an Indian race she was of a dark white color (Blanche Brune)." Characterizing her as Indian, or having Indian blood, did not prevent them from also seeing her as white. Mrs. Lavigne even noted, in one breath, that "Mr Boullemets wife she was considered as white she was an Indian she did not look like a negro or white person - she visited nobody but was always hunting in the woods." Of course, in Mrs. Lavigne's story, Mrs. Boullemet may have been considered *as* white, but still not have *been* white.[66]

The lawsuit arose when a Mr. Murphy refused to serve in the Louisiana militia with Stephen Boullemet "saying he was a colored man," and Boullemet's friends traced the rumor to Alexander Philips. Witnesses for Stephen Boullemet insisted that he had lived his life as a white man, accepted into white society, and that his mother was reputed to be, if not white, then Indian, but certainly not "colored." Francis Oboyd testified that Boullemet was "received in good circles of society ─ He was received as a white man." William Emerson testified that Boullemet was "always considered a white boy at school . . . was a kind of favorite at school." Thomas Spear testified that Boullemet's children played with his children, although he had heard the rumor that Boullemet's mother was a colored woman. Several witnesses from Santo Domingo confirmed that the Boullemets had been a respectable white family on that island, and that "if a white person was to unite to a coloured man he was immediately considered as degraded." (Jean Chaillot) The Santo Domingo witnesses testified that Boullemet's mother had

[66] Boullemet v. Phillips, Docket #4219, June 1837, New Orleans, LSCR-SCA-UNO, appeal reported in 2 Rob. 365 (La. 1842).

professed to be "a descendant of an Indian race."[67] Mrs. Lavigne had seen Boullemet's father, on the other hand, "at Lafayette Balls and at Mr Mackay's balls . . . Mr Boullemet visited Mrs Brennan, Mrs Benvist, Mr Baptiste, Mrs Legalle, Mrs Chapion, Mrs Mouchon . . ."By contrast, witnesses for the defendant described Boullemet's mother as the mulatto housekeeper of his father, the "menagere" who kept his grog shop. M. Vaudry, for example, explained on cross-examination that while Boullemet's father was indeed "a very respectable man," his mother "never associated with white ladies . . . he always took her for a coloured woman." One, from San Domingo, claimed that "the mother of the woman who calls herself Mrs Boullemet she had no more the appearance of an Indian than witness himself has that of a broom stick (l'air d'un Indian comme mien d'un manisse a balet)." Furthermore, "her complexion was more that of a grenadier than that of a woman . . . the children might have been considered as interesting children but not as white children." The defendant's Santo Domingo witnesses emphasized that they had never known of Indians in the West Indies, that Mrs. Boullemet, who was called Fillette, was known "as coloured," although several did not known whether she was "descended from an Indian or negro race." As Thomas Bausy said, "the fact is he never gave it a thought." M. Barnett testified that many boarders left Boullemet's father's boarding house when he married Fillette. Several defense witnesses tried to explain the racial practices of Santo Domingo in the years leading up to the slave revolt, in which mulattoes were accepted on an equal footing in certain realms — in the military and in public office, but not in private white society and certainly not in marriage. Boullemet called several rebuttal witnesses to deny that

[67] Boullemet v. Phillips, Docket #4219,Testimony of Jean Fauchet, Jean Chaillot, Mrs. Louis Engelhim, Mrs. Widow Jean Mouchon.

Fillette and his mother were the same person. The housekeeper, whom they claimed was known as Mrs. Julie, was about forty when Mrs. Boullemet arrived at the age of eighteen.[68]

By 1840, when the major Indian tribes had left the Southeast, Indian "blood" figured in litigation only in terms of figuring an individual's racial identity as black or white. "Indian" became integrated as either another form of "white" blood, or another kind of "color," but it did not retain its distinct sense as a national citizenship once the Indian nations had been removed. So, for example, in *Bryan v. Walton*, a case I have discussed at length elsewhere, the racial identity of a father and son, James and Joseph Nunez, was discussed at length in three successive trials in Georgia in the 1850s and 1860s,[69] with complete disagreement among the witnesses about whether their dark color came from Indian or Portuguese "blood." ("Portuguese" was very likely a euphemism for "Jewish.") One witness, for example, reported that Jim Nunez "was always treated and regarded in the neighborhood as not a negro, or having any negro blood in his veins,

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[68] The jury gave a verdict for Stephen Boullemet, showing that they believed he was a white person. The trial judge indicated that he disagreed with their reading of the facts of the case, but felt that he could not disturb the verdict; the Louisiana Supreme Court, however, finding the verdict "contrary to the evidence," overturned it and remanded the case for a new trial. Boullemet v. Phillips, 2 Rob. 365 (La. 1842).

Similarly, in Cauchoix v. Dupuy, Docket #2519, New Orleans, LSCR-SCA-UNO, appeal reported in 3 La. 206 (1831), the plaintiff sued for slander because his impending marriage had been scuttled by the rumor that his aunt was a woman of color in New York. Witnesses on both sides reported that they had known M. Cauchoix and his family in Havana, and had known his aunt, Madame Allien in New York, with completely conflicting views of their racial status. Some witnesses said that they had never even heard it rumored in Havana that the Cauchoix had colored blood; others claimed to have known them as colored people. Similarly, one witness said that Madame Allien "was invited by a great many ladies of the City of New York," and another that "there was current report there in Circulation that [Madame Allien] was a colored woman."

[69] Seaborn C. Bryan v. Hughes Walton, Case #A-1154, Box 17, Ga. Supreme Court Case Files, Georgia Dept. of Archives & History [GSCCF-GDAH]; Seaborn C. Bryan v. Hughes Watson [sic], Case #A-1836, Box 21, GSCCF-GDAH; Case $A-3737, Box 46, GSCCF-GDAH; appeals reported in 14 Ga. 185 (1853); 20 Ga. 480 (1856); 33 Ga. Suppl. 11 (1864). *See generally* HODES, WHITE WOMEN, BLACK MEN, *supra note* 44 at 98-108.

but as *a respectable Indian and white blooded man.*"[70] [emphasis added] Other witnesses described him as looking Indian or Spanish, without noting any distinction between the two, and at the same time, concluded that he was a "gentleman and a free citizen," a "white man."[71]

V. Conclusion: "*As tribes and nations the Indians must perish and live only as men!*"

Trials of racial determination in the early nineteenth century revolved around questions of both black and Indian ancestry and identity. Because Indian identity was inherited from one's mother and did not depend on a fraction of "blood," cases involving claims of Indian-ness focused less on discerning "blood" through either spurious medical science or the evidence of performance than did cases involving only black vs. white. Instead, these cases revolved around questions of status and citizenship in Indian nations, using a different mode of fact-finding.

For Native Americans, the conflation of "race" and "nation" offered some hope of avoiding being lumped together with African Americans as "people of color." In some cases, Indian tribal status allowed some measure of self-determination and escape from the legacy of slavery. Yet the greatest danger faced by Southeastern Indians in the 1830s was removal to "Indian Territory." In the removal controversy, whites persistently saw Indian nationhood as the greatest threat to their continued survival. Only individuals who accepted "civilization" and broke away from their nations were to be allowed to survive in the South – and even in Oklahoma, after

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[70] 20 Ga.480,492 (1856).

[71] Stephen Newman, Mary Harrel at 2nd trial, William C. Bates, Matthew Alexander at third.

removal, pressure to abandon national status was strong. As one missionary in Oklahoma exclaimed in 1846, "*As tribes and nations the Indians must perish and live only as men!*"[72]

Identification as members of nations – "domestic dependent nations," in Chief Justice Marshall's fateful words – held dangers that persist to this day.[73] After 1830, escalating limitations on the rights of free blacks meant that U.S. citizenship was increasingly defined in racial terms, rather than in terms of status. For Indians, definition as separate nations meant the possibility of denying Indians U.S. citizenship rights. Forcible removal of Indians from their lands allowed white Southerners to draw the line between free and unfree more and more clearly as a line between white and black.

In the twentieth century, people like the Lumbees and others who consider themselves to be Indians but have been considered by Southern whites to be "mulatto" have sought federal recognition as "Indian." Their claims, like the land claims of Northeastern tribes such as the Mashpee, have suffered because they have been able to demonstrate neither racial purity nor continuous tribal identity. "Race" and "nation" have thus been a double-edged sword for these groups. The conceptions of identity at play in contemporary cases are not unlike those at work in the nineteenth century cases, except that the comparisons to "the negro race" are no longer made explicit. Yet, today, as affirmative action programs are being rolled back under the Supreme Court's recent decision in *Adarand*, Indians retain a protected legal status only by emphasizing

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[72] Quoted in Berkhofer, The White Man's Indian, p. 151.

[73] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). For a discussion of these cases in the context of Indian sovereignty, see Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (1994), 25-43 and passim.

that theirs is a political designation, a nationality, rather than a racial identity – thereby leaving all Indians not in federally recognized tribes in the same position as African Americans.[74]

[74] See Stuart Minor Benjamin, "Equal Protection and the Special Relationship: The Case of Native Hawaiians," 106 *Yale L.J.* 537 (1996).

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