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When Blood Won't Tell: An Intra-Categorical Intersectional Framework for Understanding the Construction of Race

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When Blood Won't Tell: An Intra-Categorical Intersectional Framework for Understanding the Construction of Race

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by

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ABSTRACT OF THE THESIS

When Blood Won't Tell: An Intra-Categorical Intersectional Framework for Understanding the Construction of Race

By

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Master of Arts in Afro-American Studies

University of California, Los Angeles, 2012

Professor Brenda Stevenson, Chair

This thesis employs the theory of intersectionality to broaden our understanding of the social construction of race. To do so, the thesis explicates a 1806 Virginia Supreme Court decision, Hudgins v. Wright, to illustrate how race is intersectionally constituted. I employ the term "intra-categorical intersectionality" to describe this dynamic. By intra-categorical intersectionality I mean to the process by which a number of factors intersect to construct race. First, the thesis discusses both Crenshaw's 1989 article on the theory of intersectionality, and Ian F. Haney Lopez's 1994 article on the Social Construction of Race in its Theoretical Framework section. The thesis then provides some background on Virginia during the early eighteenth and nineteenth century as a predicate to explicating Hudgins v Wrights to reveal how the court's opinion reflects an intra-categorical intersectional approach. In the context of doing so, the thesis demonstrates

how skin-color, hair texture, performance, family lineage, white witnesses testimony, reputation, judges' personal views on slavery, and gender intersect to determine race.

The thesis of Asmara Carbado is approved.

Cheryl Harris

Scot Brown

Brenda Stevenson, Committee Chair

University of California, Los Angeles

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TABLE OF CONTENTS

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TABLE OF CONTENTS

WHEN BLOOD WON'T TELL:
An Intra-categorical Intersectional Framework for Understanding the Construction of Race

By Asmara Carbado

INTRODUCTION

In 1806 a slave woman named Jackey Wright presented herself to Virginia's Supreme Court. She argued on behalf of herself and her three children[1] for the status of "free persons" on the basis of race. The court describes "the youngest of the appellees" being "perfectly white."[2] The question, however, was not whether this woman and her children had a freedom claim on the basis of whiteness. Rather, the question was whether they had a right to freedom on the basis of Native Indian identity. Jackey Wright argued not only that they were Native Indians; they also argued that this racial classification entitled them to freedom. For the most part, Virginia courts determined a litigant's race on the basis of the racial identity of the litigant's mother. According to Virginia Law, "those who had 'one-fourth or more Indian blood' and no 'negro blood' were Indians."[3] In addition, a 1662 Virginia Statute declared that the social status of a child is determined by the status of the mother.[4] The plaintiff claimed that they were descendants of Butterwood Nan, an "old Indian."[5] However, the racial status of Butterwood Nan was in dispute because she lacked of documentary proof. Holder Hudgins, who owned the plaintiff's as slaves, argued that Butterwood Nan was a descendant of an Indian man and black slave woman. Without ancestral documentation, the court could not employ Virginia's bloodline method. Instead, the court had to articulate a set of racial criteria to determine the racial identity of Jackey and her children.

What criteria did the court employ to determine whether Jackey and her children were Native Indian and free or enslaved? How could Native Indians qualify for the status of freeperson during a time of slavery and racial subordination? This thesis draws on the theory of intersectionality to answer these questions. By using an intersectional framework, this thesis expands our understanding of intersectionality in two ways. First, this thesis employs intersectionality to analyze slavery, focusing specifically on the 1806 Virginia Supreme Court Case, *Hudgins v Wright.*[6] Second, in the context of examining the case, this thesis employs intersectionality not to explore how, for example, race and sex intersect to shape the lives of females or male slaves. Instead, this work employs the theory to explore how race itself is intersectionally constituted. In other words, the thesis argues that multiple factors—ancestry, phenotype, skin-color, hair texture, and performance, among others— intersect to produce race. Although scholars have discussed the various factors that courts consider when determining race, they fail to investigate the manner in which these factors operate. This thesis focuses on this complexity. In making these two interventions this work broadens the understanding of intersectionality, antebellum Virginia, and the construction of race.

The remainder of the thesis is organized as follows. Part Two provides the theoretical framework. Here, the thesis discusses both Crenshaw's article on intersectionality[7] and Ian F. Haney Lopez's 1994 article, which is one of the earliest articulations in law of the idea that race is a social construction.[8] A description of both of these theoretical frameworks is necessary to appreciate this intersectional intervention.

Part Three provides the background on Virginia during the early eighteenth and nineteenth century in order to give historical context to both the case and the intersectional claims herein. More particularly, this section discusses state and federal laws on trade and slavery, and race relations within Virginia.[9] Moreover, with respect to race relations, Part Three

examines the dynamics between Native Indian identity and early white/black binaries. As, this thesis explains more fully later, explicating the relationship between Indian identity and the white/black binary highlights how race is constructed to produce privileges and disadvantages. Part III also includes examples of cases decided both before and after *Hudgins* that highlight this dynamic with respect to Native Indian identity.

Part Four explicates *Hudgins v Wright* to provide a clear textual reading of the opinion. In describing this case, this thesis illustrates precisely how the court's opinion reflects an intra-categorical intersectional approach. This illustration will focus on three components of the case: 1) the Trade Laws of Virginia, 2) the racial criteria the court employs to racially determine the women, and 3) the court's final decision regarding the women's race and their legal status.

Part Five employs intra-categorical intersectionality to analyze the manner in which race is socially constructed in *Hudgins*. This part demonstrates that skin-color, hair texture, performance, white witnesses testimony, reputation, immediate family lineage, judges' personal views on slavery, and gender all intersect in intricate and at times hierarchical ways to determine race.

THEORETICAL FRAMEWORK

In 1989, legal scholar Kimberlé Crenshaw coined the term intersectionality in her groundbreaking work, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics."[10] Crenshaw coined the term intersectionality to demonstrate the extent to which black women's experiences are marginalized in law, anti-racist politics, and feminist theory. Crenshaw attributed this to societies collective failure to grapple with intersectionality—namely, the way in which identities intersect to shape one's vulnerability to discrimination. To explain intersectionality, Crenshaw compared different categorizations of discrimination (racism, sexism, classism etc) to roads, each of which is constructed by a distinct form of discrimination. However, these roads overlap at different points creating complex intersections (racism and sexism, sexism and classism, etc).[11] Each of these intersections creates different discriminatory experiences than the initial roads upon which they are made. For example, an employer might discriminate against an employee for being both a female and a person of African ancestry. However, this form of discrimination would not necessarily affect an African American male or a white female. In this instance, the African American male and the white female are the initial roads that intersect to produce a new form of discrimination—discrimination against African American females.[12] Crenshaw argued that until society incorporates intersectionality into its legal discourse, political practices, and academic theorizing, Black women would not be adequately protected from discrimination.

Subsequent to Crenshaw's article, scholars have engaged "intersectionality" in a number of ways, both affirming[13] and critiquing[14] its validity. In their affirmation, scholars have employed intersectionality to focus on women of color more generally[15] and to discuss more than two social categories.[16] Further, scholars have theorized how to methodologically approach

intersectionality.[17] This thesis continues this intellectual effort to broaden the terms upon which scholars conceptualize intersectionality.

Most of the scholars who employ intersectionality—indeed all of the scholars referenced thus far—do so in an inter-categorical way. That is, they focus on the intersection *between* different identity categories, such as the way in which one's vulnerability to discrimination is a product of one's intersectional identity as black, female, and poor. For example, when considering *Hudgins*, scholars discuss the way in which race and gender intersect to produce privilege and subordination. In Antebellum Virginia, race was determined through the maternal line. *Hudgins* illuminates the way in which gender (being female) and race (being Native Indian) determines legal status (being free). As Peter Wallenstein puts it, Jackey Wright "demonstrated the enormous power that race and sex, in various combinations, could have in shaping people lives, in determining whether, when, and under what conditions they might live in freedom."[18] Such work has been, and continues to be, extremely useful in understanding identity, privilege, and subordination. This thesis expands this literature by examining how race is itself intersectionally constituted, referring to this conceptualization of intersectionality as intra-categorical intersectionality.

The dominant way to explain the social construction of race is to describe it "as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics."[19] This is the way Ian F. Haney Lopez describes the social construction of race in his pioneering piece, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice."[20] From this perspective, society constructs race in contradictory ways by giving social meaning to phenotype and personal characteristics. Moreover, according to this perspective, this process creates and maintains the existing racial hierarchies.

Lopez sets forth a four-step process to explain how society constructs race.

> First, humans rather than abstract social forces produce races. Second, as human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations. Third, the meaning-systems surrounding race change quickly rather than slowly. Finally, races are constructed relationally, against one another, rather than in isolation.[21]

This framework helps individuals understand that race is not biologically determined but produced through a variety of processes.

Scholars have built on this framework in three ways: (1) by discussing how the legal doctrine and statutes construct race,[22] (2) by investigating how society and courts re-enforce race and racism,[23] and (3), by focusing on how race shapes society.[24] *Hudgins* can be employed to illustrate each of these dynamics.

Consider first the law's role in constructing race. Virginia established that "those who had 'one-fourth or more Indian blood' and no 'negro blood' were Indians."[25] The blood quantum for being Native Indian differed from the blood quantum for being black. Acting in 1785, Virginia defined "colored person" as having "one-fourth or more negro blood."[26] In addition, a 1662 Virginia Statute declared that the social status of a child is determined by the status of the mother.[27] While the quantum of blood in the maternal line was unclear in *Hudgins*, the courts nevertheless attempted to determine the race of Butterwood Nan so that they could employ the 1662 Virginia Statute to determine the status of Jackey and her children. In sum, *Hudgins* demonstrates how the law both reflects and solidifies prejudice, "making law a prime instrument in the construction and reinforcement of racial subordination."[28]

However, as Ian F. Haney Lopez argued, "race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics."[29] In effect, Lopez is suggesting that different

characteristics intersect to produce race. But because he does not employ the language of intersectionality, Lopez does not interrogate the nature of these intersections.

Lopez is not alone in this critique. Other scholars have yet to focus on intersectional construction of race. For example, Deborah Rosen, states that race "clearly meant more than just color and physical characteristics"— it also included cultural factors.[30] Ariela Gross expounds upon the way in which cultural factors play a role in determining race when she discusses the role of performance. She lists the different ways that ones demeanor, language, clothing, religion, and cultural traditions indicate race.[31] Angela Onwuachi-Willig also touches on the multiple dimensions of determining race. From her perspective, *Hudgins* exposed the complexities of racial determinations: "*Hudgins* demonstrates all too well, [how] race is defined not by biology, but by proxies, both physical and social—performance and authenticity."[32]

However, all of these scholars fail to examine precisely how the foregoing factors intersect. Are certain factors given more weight? Are there discrepancies in terms of which factors courts consider? Without an intra-categorical intersectional framework for understanding the construction of race, all of these questions are left unanswered or answered simplistically. For example, in his discussion of *Hudgins*, Lopez contends that the court ultimately determined race through their analysis of the defendants' hair.[33] While hair was indeed a characteristic the court considered, it was by no means the only factor the court took into consideration.

By understanding the construction of race in intersectional terms, this thesis highlights the complex of social factors that converged to legally produce race. In the context of doing so, this thesis contends that in determining race, early Virginian judges drew upon a number of factors: ancestry, phenotype, hair texture, skin color, performance, reputation, gender, and the judges' personal perspectives on slavery. In this way, early Virginian courts did not solely rely on existing laws that determined race through bloodline. Rather, when blood won't tell race,

courts relied on the foregoing factors, reflecting what I call an intra-categorical intersectional framework. Before explaining the framework, the next section provides the legal and historical backdrop against which *Hudgins* was litigated. This background information explains why the plaintiffs in *Hudgins* based their freedom claims on Indigenous, not white, identity.

CASE BACKGROUND: INDIAN IDENTITY IN COLONIAL VIRGINIA

[34]

When English settlers first arrived in Virginia in 1607, they encountered several indigenous populations. They included: the Powhatans along the Tidewater section; the Monacans, along the James River; the Manahoacs, near the Rappahnnock waters; and the Nottoway and the Meherrian tribes, south of the James River.[35] More generally, early Virginian's categorized the Indigenous population in three groups. The first are "foreign Indians with whom negotiations were carried on as 'independent political communities.'"[36] The purpose of Virginia granting political sovereignty for these Native Indian tribes was to maintain peace in the aftermath of two Indian wars.[37] In 1786, the Ordinance for the Regulation of Indian Affairs details this purpose. It reads, "[T]he safety and tranquility of the frontiers of the United States, do in some measure, depend on the maintaining of a good correspondence between their citizens and the several nations of Indians in Amity with them."[38] This Ordinance drew boundaries to delineate Indian sovereign land and Virginian land.[39]

The second group of Native Indians was "tributary tribes who acknowledged themselves to be English subjects."[40] Virginians treated these Native Indians as citizens and bound them to Virginia law. The final group of Native Indians was "individual Indians either imported into the

colony as servants and slaves, or individuals living as freemen in the colony without tribal ties."[41] Laws allowing Indian slavery were written between 1670 and 1691. They are as follows:

In 1670 Virginia enacted the statute, "an act concerning who shall be slaves."[42] There are two bases for servitude under this statute. First, Native Indians who are not Christians can be enslaved for life if they arrived into Virginia from overseas. Second, Native Indians brought into Virginia via land can be enslaved for a term of years. This statute was repealed in 1682 with "An act to repeal a former law, making Indians and others free."[43] The 1682 statute tightened the law, making an Native Indian who arrives in Virginia—whether by sea or by land—subject to enslavement for life.

1691 marked another change in Virginia law concerning slavery. This time the Virginia legislature restricted the terms upon which Indians could be enslaved. It did so to facilitate trade between Native Peoples and whites.[44] The Trade Act of 1691, entitled, "An act for a free trade with Indians," permitted all Native Indians to participate in free trade. The statute reads,

> All former clauses of former acts of Assembly, limiting, restraining, and prohibiting trade with Indians be, and stand hereby repealed, and they are hereby repealed; and that from henceforth there shall be free and open trade for all persons, at all times, and at all places, with all Indians whatsoever.[45]

This limitation of Indian slavery was pragmatic in at least two senses. First, Indians would not trade with Virginias if they knew that doing so would render them vulnerable to enslavement. Second, trading with Indian was more profitable to Virginians than enslaving Indians.

This statute was restated in 1705 with, "An Act for prevention of misunderstandings between the tributary Indians, and other her majesty's subjects of this colony; and dominion; and for a free and open trade with all Indians whatsoever."[46] The repetition of these statutes brought

much confusion in the courtroom. Judges had to determine whether the 1705 statute was a "refresher statute," that simply reminded its citizens of the 1691 statute, or if the 1705 was the implementation of the 1691 statute. The former interpretation would maintain that the 1691 act was enforceable; the latter interpretation would make the 1691 statute unenforceable prior to 1705. Indeed, determining which statute held precedent was a major concern in *Hudgins.*

A final change in Virginia law occurred in a 1705 Act entitled, "An act concerning servants and slaves." This act provides that:

> All servants imported and brought into this country by sea or land, who were not Christians in their native country, (except Turks and Moors in amity with her Majesty, and others that can make due proof of their being free in England, or any other Christian country, before they were shipped, in order to transportation hither) shall be accounted and be slaves, and such, be here brought and sold, notwithstanding a conversion to Christianity afterwards.[47]

In 1772, The Virginia Supreme Court interpreted this act as prohibiting slavery against Indians.[48] The Court's reasoning was that the statute is inapplicable to Indians, since they were never "servants" and because there were never "shipped."[49] This reading of the statute should strike the reader as controversial, particularly because the stated does not employ the term "shipped" but instead "imported." Nevertheless, that is the way the Court read the statute, and, as discussed more fully below, that reading would become relevant in the *Hudgins* litigation.

During the eighteenth and nineteenth century, Native Indian identity complicated the law, which was structured around white/black binary in U.S. law.[50] This white/black paradigm entitled Whites to freedom and citizenship and forced Africans into slavery with no hope for citizenship. Courts had to figure out where Native Indians fitted into this arrangement. This created some difficulty because Native Indians were, on the one hand, subjugated and perceived to be racially inferior. On the other hand, they were deemed sovereign and sometimes treated as

a nation within a nation.[51] Thus, Native Indian identity "complicated this theoretically clean racial divide."[52] This complication led to ambiguities in racial classification. For example, the term "mulatto" could at times refer to Native Indian children, children mixed with Native Indian blood, or a child mixed with African blood.[53] Further, "[b]y the end of the eighteenth century, some jurisdictions [began using] the term 'persons of color' or 'negro' in place of mulatto."[54] In this way, Native Indian identity was conflated with African identity. Indeed, many slave owners referred to all of their slaves as "negro" irrespective of race—resulting in an erasure of Native Indian identity to maintain the black/white paradigm.[55] Nevertheless, sovereignty of Native Indian tribes made complete erasure impossible.

To combat this racial confusion, Virginia determined race through bloodline. In a 1785 statute, 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."[56] This statute was to be read in tandem with the 1662 Virginia Law that declared the status of a child is determined by the status of the mother.[57] The 1785 statute helped to integrate Native Indian identity into the racial paradigm making a racial spectrum instead of a racial binary. Native Indians were thus, "both people of an 'intermediate or third [racial] class,' between whites and blacks, but also had an anomalous status as members of 'domestic, dependent nations."[58]

The growth of the "possibility of ambiguity created by people of contested racial identity was a source of great anxiety to elite white Southerners, who expended a great deal of energy trying to foreclose the possibility of white slaves, 'passing' blacks, and the interracial sex that lay behind both."[59] In addition to elite whites detesting racial ambiguity, white slave owners feared black and red alliances. By allying with Native Indians, slaves had access to, "freedom on the grounds of their 'Indian' identity [, to] a safe haven in Indian territory[,]" and to weaponry.[60] White fear was exacerbated after they created miscegenation laws to prevent white/non-white

relations.[61] One such text reads: "no White man or woman shall intermarry with a Negro, Mulatto or Indyan [sic] Man or Woman."[62] These laws unintentionally promoted racial mixing between non-whites.

In order to quash racial alliances, elite whites attempted to create tension between slaves and Native Indians. The predominant way elite whites did this was through oppositional racial description. During the eighteenth century, "Africans were frequently contrasted with Indians, who at this point were citizens of sovereign nations with a formidable degree of military power. Africans, … became 'negroes'--members of a degraded, enslaved race who frequently, unfavorably contrasted with 'noble Indian nations.'"[63] By placing the Native Indian race above the African race, elite whites hoped to instill a feeling of superiority within Native Indians—a feeling that would lead to their disassociation from Africans. Consider the following excerpt from Thomas Jefferson's writings to understand the extent to which Native Indians and Africans were oppositionally positioned. In a description of Native Indians as uneducated, Jefferson claims that they nevertheless,

> 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 a plain narration...Among the blacks is misery enough, God knows, but no poetry.[64]

Thus, by framing Native Indians as superior to Africans, elite whites also framed Native Indians as similar to themselves. According to Jefferson, "The Indian [is] in body and mind equal to the white man."[65]

To be sure, Native Indians did experience discrimination at the hands of whites, often referring to them as "heathens" and "savages" because of their religious and social customs.[66] Whites employed this understanding of Native Indians to justify their discriminatory practices against Native Indians. For example, "treaties with Indians were broken, abrogated, forced, or signed by trickery" even though "the U.S. government continued to treat Indian tribes as nations

...through the treaty process."[67] Also, in a 1705 Virginia statute, people of color were excluded from the ability to hold office and to serve as witnesses in court.[68] In addition, just like black women, Native Indian women were not protected from rape.[69] Nevertheless, unlike blacks, the dominant view of Native Indians was that they could eventually assimilate into white culture if properly instructed.[70]

Despite elite white attempts to prevent racial social and sexual mixing, "a significant number of people, slave, and free, traced their roots to both Indian and African ancestors--a fact that many slaves employed in their claims to freedom."[71] These slaves argued that trade laws beginning in 1691 in effect prohibited the enslavement of Native Indians.[72] The 1691 Statute reads, "from henceforth there be a free and open trade for all persons at all times, and at all places with all Indians whatsoever."[73] The dominant understanding of this statute is that because all Native Indians can trade freely, they must be free persons. A slave would not be awarded the same rights. Because of the known difficulty of providing documentary proof,[74] many people with mixed ancestry would claim Native Indian heritage as a means to procure freedom.

Thus, although the 1785 statute, which details how to determine Native Indian identity through bloodline, helped to integrate Native Indian identity into Virginia's racial landscape, Virginia courts still had difficulties classifying a plaintiff's race. "While nineteenth-century white Southerners may have believed in a racial 'essence' inhering in one's blood, there was no agreement about how to discover it. Legal determinations of race could not simply reflect community consensus, because there was no consensus to reflect."[75] Courts had to quickly come up with a set of rules outside of the law to determine race. The speed in which these rules were established was crucial given the fact that "there w[ere] a substantial and growing number of people of mixed racial ancestry."[76] This dramatically increased the number of plaintiffs making these racial claims during the late eighteenth and early nineteenth centuries. Indeed, out of the

18 cases the Virginia Supreme Court of Appeals heard between 1792 and 1811 involving slaves challenging their enslavement, "[s]ix of those cases involved plaintiffs who called themselves Indians and who relied on Indian ancestry as the basis for their claim to freedom."[77]

The following are examples of cases that were decided between the late 18th and early 19th centuries. Though the majority of these cases reached the Virginian Supreme Court, it is important to note that many more cases like these exist that did not reach the higher courts. *Hook v. Nanny Pagee and her Children*, is one such example. Before discussing Hook, I discuss three cases that did reach the Virginia Supreme Court: *Robin v. Hardaway, Coleman v. Dick and Pat, Jenkins v. Tom and Others, Hook v. Nanny Pagee and her Children,* and *Butt v Rachel and Others.*

Robin v. Hardaway, Jefferson 109, 114, (1772)

In this case Robin, one of several slaves, filed suit against their slave owner, Hardaway, for illegally keeping them as slaves.[78] Robin's argument sounded in the language of property. According to Robin's, his enslavement constituted an illegal trespass, assault, and battery. These slaves "were descendants of Indian women brought to [English Territory] by traders, at several times between the years 1682 and 1748, and by them sold as slaves under the act of Assembly made in 1682," which repeals the act of 1670, which provided limitations to the length of time a Native Indian can be a slave.[79] The plaintiffs, however, argued that the 1682 act was repealed in three different moments: the act of 1684, entitled, "An act for the better defence [sic] of the country"; the act of 1691, entitled, "An act for a free trade with Indians"; and the act of 1705, entitled, "An act concerning servants and slaves."[80] Ultimately the court decided that it is only the act of 1705 that repeals the 1682 act. Thus, "Indians brought into Virginia after 1705 could

not be enslaved."[81] As discussed in the next section, this question regarding the point at which the law limited enslavement in Virginia is one that *Hudgins v. Wrights* engages.

Coleman v. Dick and Pat, 239 (1792)

Coleman v Dick and Pat is another case that interprets the 1705 statute. In a 1792 district court, "Dick and Pat, Indians" won a freedom suit against Williamson Coleman on the basis of Native Indian ancestry. Upon appeal, the Supreme Court of Appeals upheld the district court's decision. According to the court, the 1705 act mandated 'a compleat [sic] repeal of all former laws on the subject,' and 'since that period, no American Indian, can be reduced into a state of slavery.'[82]

Jenkins v. Tom and Others, I Washington 123 (1792)

The same year that *Coleman v. Dick and Pat* was decided, another case regarding Native Indian identity and slavery reached the Virginia Supreme Court. "In 1792 …[a] number of slaves owned by William Jenkins, among them one named 'Tom an Indian,' sued for their freedom."[83] Tom and the others claimed to be descents from Mary and Bess, two Native Indian women. They were brought to Virginia as slaves years earlier. The plaintiffs argued that their ascendants were wrongfully kept as slaves. Both the appellate court and the Virginia Supreme Court ruled in favor of the plaintiffs.[84]

Hook v. Nanny Pagee and her Children, 2 Mundford 379 (1811)

In addition to determining which statute restricted Indian slavery and when, there was also a question of what reach these restrictions had on Native Indian offspring held as slaves. In 1811, Isabell brought a suit against her slave owner Elizabeth Pegram. She claimed that she was

entitled to freedom on the basis of Native Indian identity. She showed that her mother, Nanny, had previously won her freedom on the basis of Native Indian ancestry in 1799. Thus, she argued, because her mother was granted freedom, she too was entitled to freedom. Pegram's attorney argued that Isabell was possibly born when Nanny was still a slave. This status, he continued, held precedent. "Isabell's lawyer, George Keith Taylor, countered that, as an Indian, she had a right to her freedom regardless of when she was born."[85] The court was unable to determine Isabell's status. The case went through the appellate court at least three times. Never reaching the Virginian Supreme Court, there is no record as to the outcome of her case.[86]

Butt v Rachel and Others, 4 Munf. (18 VA.) 209, 209-210 (1814)

There was also a question of whether the statutes pertained to Native Indians who were slaves prior to coming to Virginia. In 1814, "Rachel and 13 other slaves in Norfolk County challenged Nancy Butt's right to hold them in bondage."[87] They claimed to be descendants of a Native Indian woman named Paupouse, who was brought to Virginia from Jamaica in 1747. Butt's attorney, Wickham, claimed that because Paupouse was a slave before entering Virginia (owned by Mr. Ivey) she could still be a slave once in Virginia. Specifically, the 1691 act prevented a person from *becoming* a slave but not from *remaining* a slave. The plaintiff's counsel, Wirt, argued that the 1691 act prevented Native Indians from being *held* as slaves, irrespective of their prior status. Both the appellate court and the Supreme Court ruled in favor of the plaintiffs.[88]

It is worth mentioning that although the aforementioned cases relied on existing statutes, these statutes were used solely to determine one's legal status. Before these statutes can be applied, the plaintiffs' race must be determined. There was no dispute in any of the foregoing

cases about the actual identity of the litigants. The only question was whether they were to be enslaved because they were covered by some specific statutory regime.

But what if the racial identity of the person seeking freedom is unclear? How would courts determine freedom under those circumstances. One method many courts consistently employed to determining ones racial status was by an analysis of a plaintiff's visual markers.[89] Because the majority of litigants of color lacked ancestral documentation, plaintiffs relied on witnesses. According to Deborah A. Rosen,

> plaintiffs had to present witnesses who could testify that their appearance, behavior, perceived status, and reputation in the community were consistent with their Indian or white race. Thus, the success of their lawsuits depended on their displaying their own bodies—or those of their mothers and grandmothers--as evidence of their right to freedom. In many freedom trials, testimony focused on witnesses' descriptions of visible markers of race. It was assumed that race could be determined visually, and slave or free status was thus read on the bodies of litigants and their families.[90]

With respect to one's features, courts often relied on "expert" judges on race.[91] These judges claimed to be able to differentiate the races by understanding blood patterns. In these judges view, "[a]lthough a 'common observer' could tell whether a person had some African ancestry, only an expert could determine blood quantum of less than one-quarter."[92] Apparently, depending on the amount of blood a person had of a particular race, one's appearance is altered in a particular way.

However, expertise was not determined in any concrete way. Any person with constant contact with different races could claim to be an expert. For example, a man who had "twelve-year[s] experience as an owner and manager of slaves, claimed expertise in classifying people as white, Negro, or Indian."[93] According to courts such expertise was admissible because "[t]he effect of intermixture of the blood of different races of people, is …a matter of science, and may be learned by observation and study."[94] The title of "expertise" therefore did not require one to be a "distinguished comparative anatomist."[95] With these loose sets of qualifications, many

whites had authority in the courtroom over racial status of their neighbors' slaves. In *Hudgins*, the courts took seriously neighbors who testified on behalf of Jackey.

It is important to note that standing alone, these visual cues did not determine race. In addition to a plaintiff's features, courts also determined ones racial status by analyzing a plaintiff's racial behavior. Did the plaintiff act white, black, or Native Indian? In her discussion of performance, Ariela Gross details the way in which racial behavior operates. In discussing *Hudgins*, Gross states, "their fate as either free American Indian women or legally defined black slaves depended not just upon the fairness of their skin or the straightness of their hair but the exercise of the non-black identity and their recognition as non-black by neighboring whites."[96] However, Gross does not detail how exactly one might *act* Native Indian. Notwithstanding her discussion of Native Indian identity, Gross conceptualizes performance in white and black terms. She goes into extensive detail to describe how plaintiff's performed whiteness to prove they were not black. However these examples concerned plaintiffs arguing a freedom claim on the basis of whiteness, not Native Indian identity.

Deborah Rosen provides a glimpse of how a plaintiff might perform their Native "Indian-ness." According to Rosen, one of the way's a plaintiff proved their race was to exercise legal rights allotted to that race. With respect to Native Indian Identity, plaintiffs might present weapons they own or contracts they made with whites. The law prohibited blacks from such ownership and engagement.[97] Thus, "[t]his testimonial practice appears circular: in order to exercise certain rights, one must be [Native Indian], but in order to be (recognized as) [Native Indian], one must exercise rights."[98]

In *Hudgins,* the plaintiffs do not exercise specific rights to prove their Indian identity in court. Further, aside from phenotype and ancestry, little additional information is given of these women. However, it is clear that performance played a significant role in the case. As stated

earlier, the court gave weight to the testimony of the plaintiff's white neighbors. To be sure, the way that neighbors determined race was in the same intersectional manner as the court—considering ancestry, physical features, and behavior. Therefore, in order for a neighbor to make a racial determination, a person must *look* as well as *act* like a particular race. The neighbors' perception of a plaintiff's race determined the communal reputation of that plaintiff.

In *The Myth of the Noble Savage*, Ter Ellingson explores common (mis)conceptions of Native Indian Identity. Although myths, these conceptions prove useful in explaining how one might act Native Indian in society and court. Whites often imposed these descriptions onto Native Indian identity. It is therefore likely that in an attempt to be recognized as Native Indian, women like Hannah and Jackey performed these myths. For example, one myth concerns Native Indian speech. French novelist Francois-Aguste-Rene describes the way Native Indians speak in his fictional novels. In his description of a Native Indian man, Rene writes, "His language is harmonious and smooth. Not even old age can rob the sachems of the joyous simplicity."[99] In addition to speech, Rene describes Native Indians as wearing "raven's feathers on their heads and rings in their noses."[100] It is quite possible that the women in *Hudgins* spoke in this poetic manner and wore ornaments such as feathers in their community and when they addressed the court.

While the actual nature of their performance is unclear, what is clear is the extent to which courts take racial performance into consideration in tandem with other racial triggers. As the study will show, in rendering its decision, the court intersectionally constructs race, drawing on the following factors to do so: hair texture, skin color, family, reputation in their community, white testimonials, personal perspectives on slavery, and gender.

HUDGINS VERSUS WRIGHTS: A CASE DESCRIPTION

In an 1806 case, *Hudgins v. Wrights*,[101] the Virginia Supreme Court of Appeals decided the racial identity and legal status of a woman and her children. In this case, the plaintiffs, Jackey and her three children, were all slaves owned by Holder Hudgins in Mathews County, Virginia. Holder Hudgins planned to sell the Jackey and her two infant children to Mr. Cox, who lived out of Virginia in another southern state.[102] Jackey, however, believed that she and her children were entitled to their freedom. In order to take her freedom claim to court in Virginia, she went to Petersburg, Virginia and filed a writ *ne exeat*, an order that prevented Hudgins from transporting her and her two children out of the state while she pursued her freedom claim.[103] Chancellor George Wythe of the Richmond District approved the writ and heard her case.[104]

According to Virginia law, slaves had only one legal right—the right to claim freedom.[105] Further, there were only two ways in which a slave could make a freedom claim. First, they had to show documentation that they were legally emancipated prior to being enslaved. Second, they had to show proof that they were descendants of an emancipated woman.[106] Jackey argued on the basis of this latter ground. She maintained that they were entitled to freedom because they were descendents of a free Native Indian woman, Butterwood Nan. Their attorney, George Taylor, (who just so happened to be John Marshall's brother in-law),[107] contended that the act of 1691 abolished Native Indian slavery. Therefore, all Native Indians brought to the United States or born since the year 1691 should be granted their freedom. Taylor argued that Jackey's ascendants were born after 1691. The defendant argued that the plaintiffs were mixed with African ancestry and were thus black, enabling Hudgins to keep them as slaves.

The Chancellor ruled in favor of the Wrights. However, his decision did not address the 1691 statute. Instead, according to Chancellor Wythe, the plaintiffs were free on two grounds: (1) racial identity, and (2) birth right. First, they appeared white. In Wythe's view, the Wrights

possessed no African blood. Rather, Jackey and her two infant children "were the descendants of free white men and Native American women."[108] Moreover, because they appeared white, and because white people are entitled to freedom, the burden of proof fell on the defendants to prove that they were slaves. The defendant's evidence on this matter did not convince Wythe. Second, Wythe argued that all individuals are entitled to freedom upon birth. He cited the bill of rights to substantiate his claim. According to the bill of rights, he maintained, "freedom is an inherent blessing, of which … they could not be deprived; and therefore [since defendants had introduced no evidence of African descent] [plaintiffs] were free."[109] Subsequent to Wythe's decision, Hudgins appealed to, and was heard by, Virginia's Supreme Court of Appeals.

At the Supreme Court of Virginia, George Taylor, brought forth a witness, Mary Wilkinson, in order to corroborate the plaintiff's racial identity. Wilkinson, who had seen Butterwood Nan when she was alive and described her as "an old *Indian."*[110] However, the court still could not easily or definitively determine Butterwood Nan's race. Indeed, one witness "prove[d] that the *father of Butterwood Nan* was said to have been an *Indian,* but … [was] silent as to her mother."[111] According to 1662 Virginia Statute, social status, not racial status, was determined by the status of the mother.[112] What is interesting in *Hudgins* is the way in which the 1662 statute was de-facto employed to determine racial status as well as social status. In other words, the court also used the maternal line as a means by which to determine the race of the plaintiffs. It is likely that this is because the paternal line is assumed to be white. Recall that Chancellor Wythe had assumed that the plaintiffs' paternal line was white. Although Judge Tucker does not go as far as Wythe to infer the racial status of the paternal line, his observation of the plaintiffs (with their gradual "whitening") would lead him to make the same conclusion. Thus, African or Native Indian identity would have to fall from the maternal line. This would

explain why the plaintiffs brought in Hannah and Butterwood Nan as proof of Native Indian identity but do not mention the paternal line.

Unfortunately, in common with the majority of people of color during this time, Butterwood Nan did not have any written documentation proving her ancestry.[113] Judge Tucker expounded upon this common difficulty of providing documentation. He explained that "there is no *Herald's Office* in this country, or even a *Register* of births for any but white persons, and those *Registers* are either all lost, or of all records probably the most imperfect."[114] It was on these grounds—the absence of documentary proof—that the Holder Hudgins contended that Butterwood Nan could be a descendant of an African mother, a claim that would permit the legal enslavement of Butterwood Nan and her offspring. In order for the courts to determine the racial identity of Nan, then, they had to consider factors other than documentation of bloodline. These factors included: the presence of immediate family, the women's physical appearance, the women's reputation in their community, and reliable testimonies from witnesses.

Taylor understood the way in which the courts would employ the foregoing factors in their decision. He therefore gave a description of the plaintiffs and brought forth Hannah,[115] who was claimed to be Butterwood Nan's daughter, Pheobe's mother, and Jackey's grandmother. Taylor drew on Chancellor Wythe's argument that "the youngest of the appellees was perfectly white, and [...] there were gradual shades of difference in colour between the grand-mother, mother, and grand-daughter."[116] However, unlike Chancellor Wythe, Taylor did not go so far as to suggest that white men fathered the three generations.[117] Nor does Taylor offer any other explanation for why the women appeared to be increasingly white from the older to the youngest, who, again, "was perfectly white." Consistently reproducing with Native Indians would not typically make one's skin lighter. In order for their skin to lighten with each generation and in

order for Jackey to have blue eyes,[118] at least Jackey's mother likely had sexual relations with a white man.

There are a few possible forms that this sexual relationship might have taken: (1) rape, (2) prostitution, (3) concubinage, and (4) the "the placage system" in which women freely had sexual relationships with white men. To understand the first three explanations, it is helpful to know a little more about Holder Hudgins.

There are a few different listings of Holder Hudgins on ancestry.com (a useful database of textual archives of people who have lived in the United States throughout history). However, the listing that most fit the age and time period of *Hudgins* was a Houlder Hudgins who was born in 1738 and who died in 1815.[119] According to *The Daily Press New Dominion*, which published a series of newspaper articles on the Hudgins family tree, Houlder Hudgins came to Virginia from Liverpool, England in 1743 with his parents, William and Mary Hudgins, and brothers, William, Lewis, Robert, and William. Hudgins was educated by his wealthy uncle Robert and eventually took over Robert's "Clifton" manor, which stood on a huge plot of land. As an adult, Houlder was described as someone who "built an operated two naval shipyards," a "naval officer and Captain of the Royal Navy," and a person "appointed one of five Justices of the Court of Oyer and Terminer for Gloucester."[120]

Houlder Hudgin's Will complements the newspaper articles in that it discusses his personal life. In his Will, Hudgins names one wife, Harriot Hudgins, and several children: Charolotee, William, Nancy Berry, Houlder, Ariadne Vaughan, Thomas, Mary Winder, and Robert. He also had many slaves: Becco, Charley, James, Will, Ino, Edom, Tomy, Eve, Crecy, Ginny, Henry, Fanny, Kitty, Easter, Peter, Molly, Rose, Harry, and Cloe, among a few others not named.[121]

The foregoing information suggests a few things about the case that is relevant to this argument. Given that Houlder operated and ran a manor as well as shipyards, one can infer that he was very much a businessman. Further, his abundance of slaves in his homes is a reflection of how much he partook in the slavery system. It is possible he used the shipyard to transport slaves who were captured during battle overseas. This investment in the slavery system explains why he vehemently argued in court that the plaintiffs were rightfully slaves. His finances, that is, selling the plaintiffs to Mr. Cox, depended on the racial status of the plaintiffs. Given that he died within ten years of the case, there is reason to believe that he was concerned about his old age and wanted to ensure that his wife and many children had enough money after his death. In this way, every sale, including the potential sale to Mr. Cox, was a crucial one.

In addition to understanding Hudgins' desire to keep them as slaves, we also can infer his expectations in the courtroom. It is possible that he expected his status as a member of the Virginia courts to privilege him in the court's decision-making. Often members of the same community, even a legal community, protect each other. Finally, Hudgins' Will in tandem with the newspaper articles gives some insight on the gradual lighter shades of the plaintiffs. As mentioned earlier, Hudgins was a financial figure who participated in both the buying and selling of slaves. He therefore might have had an incentive to do a couple of things. First, it is possible that the Wright family were victims of rape. Hudgins or his sons, might have raped Jackey to meet his sexual needs, to evidence his dominance and control over them.[122] It is also equally likely that Jackey was raped as an attempt to breed more slaves. Breeding slaves would produce more money for the Hudgins family if the slaves born were sold. Indeed, breeding slaves was very common in Antebellum Virginia. As Joshua D. Rothman states, "[t]ravel narratives from the antebellum period are replete with references to children with light brown skin who bore remarkable resemblance to male members of their owners' families if not the owner himself."[123]

Second, Holder could have rented out Jackey as a prostitute, thus making the father of her children a neighbor or passerby. As Brenda Stevenson explains, much "profit …could be garnered from the 'fancy girl' market…[And] [w]hat, after all, could be more valuable than a woman of 'white complexion who could be bought as one's private 'sex slave'?"[124] In this way Hudgins would have profited from the slaves in two ways: renting them as sexual objects, and selling the offspring of those unions to other slaveholders.

It is also possible that Hudgins or one of his sons used Jackey as a concubine. Brenda Stevenson suggests that whites often purchased concubines as a means to have a family-like structure without the "expense of rearing legitimate families."[125] This last point suggests that if concubinaage *did* occur, it was most likely with one of Hudgins' un-married sons, as Hudgins already had multiple children.

There is yet another explanation as to how the plaintiffs acquired their gradual lighter shades—one that gives agency to the plaintiffs. Predominant in Louisiana, but not unheard of in Virginia, women of color sometimes purposely engaged in what is known as "the placage system." Under this system, women chose to have relationships with white men.[126] Although there are several explanations as to why women of color did this, for the purposes of this thesis only one is relevant. Perhaps, Jackey decided to have relationships with men in order to lighten their next generation. She might have believed that her children would have a better opportunity in life if they could pass for white. As Gould states,

> While there is little proof that many people passed, there is circumstantial evidence that it did happen...[W]ills and other documents of certain elite free women of color which were recorded late in the antebellum did not include their racial designation as defined by law. According to oral histories taken by Marcus Christian many of these people successfully passed into the white population of the city.[127]

In this way, being free based on Native Indian identity was not enough for the Wright family. They wanted all the social and political benefits of a white person. They therefore were pragmatic in choosing their relationships in order to meet this end.

Significantly, each of the foregoing hypothesis links Jackey and her offspring to whiteness, not indigeneity—and, more particularly, to white men.[128] This would explain the differing skin colors among the three generations of women, a characteristic upon which Taylor elaborated. In his focus of the defendant's skin color, he attempted to prove that if they were mixed with black blood, it would not be possible for the youngest plaintiff to look so white.

As Taylor anticipated, Judge Tucker used this description in his analysis. According to Judge Tucker, "This is not a common case of mere *blacks* suing for their freedom; but of persons perfectly *white.*"[129] Further, "[i]f one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave [because] [a]ll *white persons* are and ever have been FREE in this country."[130] Thus, the court treated the Wrights as though they were white and were therefore presumed free. This, again, is curious against the backdrop of the litigants basing their claim on indigenous identity. Perhaps the explanation is that, on the one hand, the courts were not comfortable declaring these women white when there was likely some "drop" of black blood. On the other hand, the court wanted to articulate a legal regime that protected whites from being falsely enslaved. Recall the Virginia Law that states that "those who had 'one-fourth or more Indian blood' and no 'negro blood' were Indians."[131] It may therefore be possible to consider a person who is less than one-fourth Native Indian blood and no African blood white. In this way, and as Adrienne D. Davis explains, "[t]he appellees, though claiming freedom substantively through Native American ancestry, employed the rhetoric of the scopic economy, hence invoking whites' fear of being accidentally enslaved."[132]

There is another subtext to the Court's racial determination that scholars have not commented on. Under English common law, one's social status derives not from the maternal line, but from the paternal line.[133] Although Virginia departed from that in formal law, that understanding likely was still a part of judges' consciousness. Understood in this way, the court may have presumed the plaintiffs free because they believed, as discussed earlier, that the paternal line is white.

The court also examined Hannah's appearance to determine Butterwood Nan's racial mixture: "Hannah had long black hair, was of copper complexion, and generally called an *Indian* among the neighbors; —a circumstance which could not well have happened if her mother had not had an equal or perhaps a larger portion of Indian blood in her veins."[134] In Judge Roane's view, "If *Hannah's* grandmother...were a *negro,* it is impossible that *Hannah* should have had that entire appearance of an Indian."[135]

Judge Tucker's analysis of race is even more descriptive. In his opinion he writes,

> Nature has stampt upon the *African* and his descendants two characteristic marks...a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the *African* constitution is this latter character, that is predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or *Indian;* giving to jet black lank hair of the *Indian* a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native *Americans*...Upon these distinctions not unfrequently does the evidence given upon trials of such questions depend; as in the present case, where the witnesses concur in assigning to the hair of *Hannah,*...the long, straight, black hair of the native aborigines of this country. That such evidence is both admissible and proper, I cannot doubt.[136]

It is Judge Tucker's contention, then, that if Butterwood Nan were mixed with African ancestry it would be apparent in Hannah's hair texture. Thus, according to the courts, race and racial mixtures can be determined visually. Under this understanding of race, because Hannah looks like an Indian, the court concluded that her mother, Nan, must be an Indian as well.

In addition to visual cues to establish race, the courts relied on witnesses. As the court document states, "[o]ne of the witnesses who had seen [Butterwood Nan] describes her as an old *Indian.* Others prove, that her daughter *Hannah* had long black hair, was of the right *Indian* copper colour, and was generally called an *Indian* by the neighbours, who said she might recover her freedom, if she would sue for it; and all those witnesses deposed that they had often seen *Indians.*"[137] These witnesses drew on their "racial expertise" (they had seen Indians; they know what Indians looked like) to shore up their claim that one or more of the women in question were Indian. Significantly, all these witnesses were white, since only whites could give testimony of this sort. Therefore, these women's racial claims were bolstered through white public support.

Finally, the witness stated that a neighbor advised Hannah to sue for her freedom suggests that Hannah had a positive reputation in her community. It is unlikely that a troublesome slave would have received the same advice and encouragement. As mentioned earlier both Jackey might have had intimate connections to whites in the neighborhood. It is possible that Hannah had an intimate connection as well. This may have had an impact in how the neighbors viewed all of the women. Indeed, these defendants might have been the descendants of one of the neighbors. Often, an intimate connection to whites resulted in a higher reputation among the community than slaves who are not intimately connected to white men. It also led to the likelihood of being manumitted.[138]

Stevenson explains how this connection could have occurred without a sexual relation. She describes the extent to which gender shapes ones chances for freedom. "Women…had to rely more on close, personal ties with employers and patrons in their time of need."[139] Stevenson gives the example of a slave who, upon the threat of being moved out of her town and separated from her family, requested the assistance of her employer to gain money to purchase her freedom. Because of her "extraordinary character" her employer agreed.[140] This might explain

Hudgins. Taylor brought forth four white women to testify on behalf of the plaintiffs in the district level court (Mary Denhart, Pattey Burge, Frances Temple, and Mary Wilkinson).[141] It is plausible that Hannah and Jackey both had close emotional ties to these women because of work. And because of their "extraordinary character" their employers agreed to testify on their behalf.

Moreover, the fact that neighbors encouraged Hannah to sue for her freedom, suggests that she likely performed her identity as a Native Indian as well. That is to say, she likely acted like an Native Indian, rather than an African slave; this would help to explain why her neighbors believed that she was entitled to freedom. Indeed, Judge Rosen makes this very point, observing that the "general reputation and opinion of the neighbourhood is certainly entitled to *some* credit: it goes to repel the idea that the given female ancestor of *Hannah* was a *lawful* slave; it goes to confirm the other strong testimony as to *Hannah's* appearance as an *Indian.*"[142]

In addition to "lawfulness," Hannah may have proven to be of good moral character by converting to Christianity. As C.L. Higham writes, white Christians believed that Native Indians were savages because they remained at a human primal level. However, they had the potential to become civilized human beings. In order to redeem the Native Indian race, white missionaries converted them to Christianity.[143] It is possible that Hannah's religious affiliation placed her on good footing with her neighbors. In fact, Hannah being a Christian is even more probable when one considers her children. According the court they have all the attributes of a white person. This would, presumably, include religious affiliation.

In the end, Butterwood Nan passed the intersectional test for Native Indian identity. The particular way in which lineage, skin color, hair texture, reputation, and credible testimony from white neighbors intersected persuaded the court that Butterwood Nan and subsequently her descendants were Native Indian. Yet, the Wrights' fight in court was not over.

The second task for the defense was to prove that Butterwood Nan, a slave, was legally entitled to status of free person. To do so, Taylor relied on two Virginia Statutes regarding trade with Native Indians, both of which is discussed in Part Two. The first written in 1691 and the second in 1705, these statutes authorized its inhabitants to trade freely with Native Indians. According to Virginia Courts, this authorization, "effectively repealed the state's laws permitting Indian slavery."[144] In *Hudgins*, the court agreed that the 1705 statute restricted Native Indian slavery. However, they were unclear as to whether the 1691 statute restricted slavery. This detail was important to the court because the restriction of Native Indian slavery did not apply to all Native Indians. Rather, it applied to those Native Indians who were born after the date of the statute. In this way, depending on age in conjunction with the understanding that only the 1705 statute prohibited Native Indian slavery, Butterwood Nan could be a slave legally. Edmund Randolph, Holder Hudgins attorney, understood this and argued that "[i]n all the cases decided by this Court on the present question, the act of 1705 has been considered as restricting the rights of making slaves of *Indians:* and those cases are authority with me."[145] His hope was that Butterwood Nan's birth would be prior to the 1705 statute.

Consequently, in their decision-making, the court debated "whether the pertinent language first appeared in 1691 or in 1705."[146] Ultimately, the court concluded that the 1691 statute not only restricts Native Indian slavery but also abolishes Native Indian slavery. In response to a previous case that ruled that the 1691 statute "did repeal the acts of 1879 and 1682,"[147] Judge Tucker made clear that he thought that that case was properly decided:

> I concur most heartily in that opinion, referring the commencement of that act to 1691 instead of 1705...Consequently I draw this conclusion, that all *American Indians are prima facie FREE:* and that where the fact of their nativity and descent, in a *maternal* line, is satisfactorily established, the burden of roof thereafter lies upon the party claiming to hold them as slaves.[148]

Judge Roane agreed with Judge Tucker's analysis and made an additional claim. He contended that "[e]ven under the act of 1705, the calculations and inductions of the appellees' counsel have entirely satisfied me that *Nan could not* have been brought into this country *prior* thereto."[149]

In sum, by employing the 1691 statute and an intersectional framework, the court decided that Butterwood Nan was both Native Indian and free, thereby granting Jackey and her children their freedom.[150] Indeed, this decision would be challenged in subsequent court cases. For the most part the battle became whether a Native Indian could be a slave. *Pallas v. Hill*[151] is one such example.

In 1807, twenty-two slaves, including Pallas sued for their freedom on the grounds of Native Indian ancestry. They produced evidence that they were descended from a Native Indian woman named Bess, "who had been 'brought into Virginia in or about the year 1703.'"[152] The plaintiff's attorney argued that Bess' enslavement was not permitted under the 1691 statute regarding Native Indian trade. Thus, the enslavement of her offspring was also illegal. The appellate court did not agree. Instead they argued that it is the 1705 statute that revoked the ability to enslave Native Indians. In this way, only those Native Indians born or brought to the United States after 1705 are free. The plaintiffs appealed to the Supreme Court in 1808. While the plaintiffs make the same argument, Hill's attorney, Hay, made a different argument. Most likely Hay knew that Judge Tucker had previously ruled, in *Hudgins v. Wrights*, that the 1691 statute did in fact end Native Indian slavery. Hay therefore argued that the 1691 statute itself was questionable. Hay was not convinced that the 1691 statute was legitimate. Judge Tucker however did not agree and the court upheld the *Hudgins v Wrights* ruling and ruled in favor of the plaintiffs.[153]

While declaring the 1691 statute as precedent is a major decision in *Hudgins v Wrights*, equally important is the manner in which the court relied on non-legal frameworks for

determining race. In fact, it is most likely *because* of the non-legal nature of many racial determinations that led slave owners to focus on the statutes regarding Native American enslavement rather than the actual identity of the slaves.

HUDGINS AND INTRA-CATEGORICAL INTERSECTIONALITY

The decision in *Hudgins v. Wrights* shows the extent to which courts construct race intersectionally. An intra-categorical approach to intersectionality helps to reveal this dynamic. Consider each feature the court employed to determine race. They included: immediate family lineage, phenotype, skin color, hair texture, performance, reputation, and judges' personal views on slave systems. Each of factors is racially constitutive. One can understand these factors as sets of conditions displayed in the following table:

Racial Identity Chart

	White	**Black**	**Native Indian**
Ancestry	Mother appears white	Mother appears black	Mother appears Indian
Phenotype	Small pointed Nose	Large flat nose	Defined straight nose
Skin	Light	Dark	Copper
Hair	Straight, loose	Curly, thick	Straight, long thick, black
Performance	Virtuous, chaste, civilized	Sexually deviant, degraded, and un-civilizable	Noble, heathens, and civilizable
Reputation	Respected by whites	Loathed by whites	Tolerated by whites

An intra-categorical intersectional analysis of this case also reveals how the court prioritized the factors that intersectionally construct race. Specifically, courts established hierarchies among these traits, allotting certain traits more value. For example, Judge Tucker concluded that hair texture could be dispositive. He explained that because hair is "so strong an ingredient in the *African* constitution[,]" any percentage of African blood would give the "black lank hair of the *Indian* a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native *Americans.*"[154] In this sense,

because Hannah's hair was straight, she could not have been mixed with African ancestry. Thus, when intersectionally determining race, it is not necessary the case that the factors are accorded the same weight. Had Hannah's hair been curly, presumably the Court would have declared her black, even if she had light skin.

Although Judge Tucker explicitly references hair texture as a deciding factor, skin color, too, is also privileged in this case. In *Hudgins*, Jackey's children are referred to as being "perfectly white."[155] This is because, as Trina Jones's explains, "[t]he lighter or more white one's skin, the more likely one is to be categorized as Caucasian or White. The darker or more brown one's pigmentation, the more likely one is to be categorized as Negroid or Black."[156] Indeed, the question of racial determination in *Hudgins* implicates hierarchical social meanings and relationship to citizenship and belonging. Whiteness is associated with citizenship, blackness is associated with slavery, and Indian-ness is associated with sovereignty. These social meaning are at play in the cases. Subsequent to Jackey's children's description and appearance as white, the court treated the women as though they were white, notwithstanding these women's racial claim to Indian identity. According to Judge Tucker, "all *white persons* are and ever have been FREE in this country. If one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave."[157] In other words, if one appears to be of a race with legal freedom then the burden of proof is to provide evidence suggesting that one is a slave. In this way, because of skin color, the courts compared these women to whites and treated them as though they were white in their analysis.

However, if Jackey's children were old enough and made a racial claim to whiteness, it is likely they would loose, for color alone does not determine race. Indeed, their skin color only went so far as to alter the language of the burden of proof. Hannah's presence prevented this white racial classification from extending any further. As Jones notes, "even if one is so light as

to appear White, if one's immediate ancestors are [understood to be Indian], then one might still be considered [Indian]."[158] This was what happened in *Hudgins*. Although Jackey's children both exhibited all of the characteristics of a white person, they were nevertheless deemed Native Indian because their grandmother's appearance as a Native Indian. Further, because Judge Tucker believed that "all *American Indians* are …free,"[159] the burden of proof that he extended to whites was also applied to Native Indian identity.

In addition, an intra-categorical intersectional framework for understanding *Hudgins* makes clear the fact that visual cues alone do not determine race. According to Judge Roane, determining race through appearance alone is impossible. Thus in cases like *Hudgins* race "may be as well ascertained … by the testimony of witnesses."[160] Testimonies of witnesses can either affirm or deny a plaintiff's racial claim.

Although it is unclear how heavily witness testimony weighed in the analysis, it is clear that this factor played a role in the court's decision-making. If, for example, Hannah was deemed a slave or as black by her neighbors, the court would be more skeptical of Jackey's racial claim. However, because her neighbors affirmed her racial claim, the court' was more willing to conclude that the women were not black. According to Judge Roane, "[i]t is not to be believed but that *some* of the neighbours would have sworn to that concerning which they *all* agreed in opinion…"[161] In other words, Roane interpreted the testimony of some of Hannah's neighbors as the testimony of all her neighbors. In this way, witness testimony was given considerable weight in determining the reputation of a plaintiff. Reputation, in turn, determined the extent to which the court relied on visual markers to determine race. Indeed, Roane contends, "[n]o testimony can be more complete and conclusive than that which exists in the cause to sh[o]w that *Hannah* had every appearance of an *Indian*."[162]

In addition, the court appeared to have used the witness' testimony over that of the plaintiffs. According to Jackey's initial petition (written by Taylor), Jackey claimed that her mother was Phoebe, her grandmother Betty Mingo, and great grandmother Frances Wilson.[163] According to the petition, Witness Diana Farell was available to corroborate this lineage.[164] However, during the Virginia Supreme Court proceedings, the defendant's witness, Mary Wilkinson, is the only witness who testifies as to the family's lineage. According to Wilkinson, Phoebe's mother is Hannah, and her grandmother is Butterwood Nan.[165]

Wythe Holt provides a possible reason for this change. Perhaps, he suggests, Mary Wilkonsin's testimony was stronger.[166] This could very well be the case. It would explain, for example, why Taylor crossed Diana Farrell's name off the witness list and instead relied on the defendants witness, Mary Wilkonsin.[167] However, it is also likely that Taylor understood the racial dynamics of trust. In other words, Taylor knew that the testimony of a white person on behalf of a Native Indian (Jackey) would be weaker than the testimony of a white person on behalf of a white man (Hudgins). In this way, it is not just a matter of whether a white person is testifying. It is also a question about on whose behalf that person is testifying.

Taylor might have thought that, if he continued to rely on Diana Farrell's testimony, the court would dismiss Jackey's claim altogether in light of Wilkonsin's testimony. The court might ruled against Jackey's claim to freedom if it believed her to be a liar. Note that the very fact that she was non-white already raised questions about her credibility. This explains why non-whites were barred from testifying in court against whites. Indeed, while Phoebe Wilson was in the courtroom at the District level, she did not testify to her own lineage. Taylor, therefore, may have decided to use the testimony of the defendant's witness, Mary Wilkinson, in the Supreme Court to prevent any complications. In any case, whether considering Holt suggestion or this thesis's, Taylor privileges the defendant's witness over that of his own client's. In this respect,

Jackey was lucky that the witness nevertheless attested to Jackey's Native Indian identity, albeit through a different lineage (it is the defendant, not the witness, who suggests that there is Negro blood in the Butterwood Nan family line).

Finally, the judges' personal stance concerning slavery may have played a role in their decisions. Consider Chancellor Wythe of the District Court of Richmond. Chancellor George Wythe, Tucker's former professor (Indeed, Wythe is the first United States law professor; Judge Tucker would become the second), ultimately argued that Jackey and her children should be granted freedom on two grounds. First, they are Native Indians. Second, because the bill of rights stated that freedom was a birthright to all.[168] However, he came to the conclusion that the plaintiffs are Native Indians extremely quickly. According to Wythe, because they look white, they cannot be of African ancestry, and therefore their claim to Indian Identity must be granted. Unlike Tucker, Wythe did not go through an extensive outline on natural history of human kind to determine racial classifications. One possible explanation for this is that granting Native Indian identity was not Wythe's main concern. Rather, he used this decision simply to bolster his main argument—that slavery should be abolished because freedom is a birthright. Wythe had opposed slavery throughout his life (notwithstanding he himself owned slaves, whom he freed late in life).[169] Further, Wythe was very open about his feelings regarding slavery. It stands to reason, then, that Wythe was more concerned with granting the plaintiffs' freedom rather than their claim to racial identity. He simply used racial classification as a mechanism to grant freedom.

Now consider Judge Tucker. In his decision, Tucker reasoning appears go against his personal views of slavery. In 1796, he wrote his dissertation at William and Mary College.[170] In it Tucker proposed the end to slavery in Virginia. Specifically, he argued that slavery was

economically detrimental to Virginian society.[171] However, rather than basing his conclusion on Chancellor Wythe's bill of rights analysis, in *Hudgins*, Tucker contended:

> I do not concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no concern, agency or interest."[172]

In other words, the Bill of Rights only applied to freeperson and the system of slavery is therefore not inconsistent with the Bill. Moreover, in his final decision, Tucker claimed that blacks were to be automatically presumed as slaves, "unless they could prove otherwise.[173]

At first blush, it would seem, then, that Tucker not only detracted from his views on slavery, but he also re-enforced the slavery system by tightening "the chains of bondage on the common-wealth's huge black population."[174] However, upon a closer examination, there is some convergence between Tucker's view on slavery and the opinion he rendered. First, Tucker's complex system of racial classifications facilitates his project of gradual abolition. If racial determinations were easy, based, for example, simply on how someone looks, more slaves would be granted their freedom. Second, Tucker interest in gradual abolition was pragmatic. He understood that the immediate abolition of slavery would engender economic hardships.

Third, Tucker's specific approach to gradual abolition explains the outcome of the case. Tucker recommended that all female children of slaves were to be free and serve as indentured servants until age twenty-eight. All the men however would be slaves for life.[175] Thus, by declaring three women free but maintaining the system of slavery, Tucker was effectively employing the law to obtain his ideal society in Virginia. In this way, gender might have also contributed to Tucker's racial determination. Because the plaintiffs were women, Tucker had an incentive to confirm their racial claim.

In many ways, *Hudgins* is fundamentally about when blood won't tell. That is, documentation of bloodline is not always available to determine race. It is precisely against the backdrop of that absence that one can expect courts to intersectionally construct race along the lines this thesis has described.

CONCLUSION

By using an intra-categorical lens, this thesis broadens scholars' frameworks for thinking about the social construction of race. Race was not always determined through ancestral information. Rather, when blood won't tell—and quite often it didn't—courts relied on a number of factors to intersectionally construct race. As discussed earlier, courts did not always accord equal weight to these factors, but they all mattered, as *Hudgins* makes clear.

Explicating *Hudgins v. Wrights* also illuminates the ways in which intersectionality can be conceptualized in intra-categorical terms. This understanding broadens and deepens how one thinks about social categories, on the one hand, and social disadvantages and privileges, on the other. Just as it is important for scholars employing intersectionality to consider how experiences are shaped by a combination of social categories, such as race and gender, it is equally important for scholars to consider how each of these categories is itself intersectionally constituted. Under an intra-categorical intersectional framework, one has a clearer understanding of the multiple factors that produce race. This understanding in turn puts one in a better conceptual position to grapple with how discrimination on the basis of race occurs.

Finally, there is contemporary significance to this approach. Consider the criminal justice system as an example. The intra-categorical intersectionality of race often shapes sentencing patterns.[176] This helps to explain why men of color, particularly black men, constitute one of the largest populations of prison inmates since emancipation.[177] An intersectional analysis would reveal that this problem of over-representation is not just about being black, but it is also about how one is intersectionally constituted as black. For instance, a 2006 study, conducted by Jennifer L. Eberhardt and others, revealed that color plays a significant role in sentencing patterns among black men.[178] The purpose of the study was to determine why "murderers of White victims are more likely than murderers of Black victims to be sentenced to

death."[179] In one component of the study, researchers presented photographs of black men who were convicted of murdering a white victim to a number of participant observers. These observers did not know that the men were convicted murderers. The observers s examined photographs of the men and rated them on how stereotypically black they appeared to be in terms of skin color, hair, phenotype, etc. The results revealed that the men the observers rated to be the most stereotypically black were sentenced to death at a higher rate than those they considered less or not stereotypically black.[180]

In addition to color, performance also shapes racial perceptions in the criminal justice system. More particularly, the police consider the extent to which one conforms (or does not) to white middle-class norms when determining the particular racial makeup a suspect. In his article, *Cultural bias in the American legal system,*[181] Swett describes this very phenomenon. According to Swett:

> Any member of an ethnic minority may be perceived, initially, as culturally different on the basis of physical appearance, such as skin color, alone. If, however, the subject's dress, bearing, and speech are in general conformance with the middle-class American norm for the circumstances, the perception is revise to one more nearly approaching cultural similarity than cultural difference. Another revision of the perception takes place as the subject's behavior is considered. The officer's ultimate action in any given situation will, if all other factors are neutral, be governed primarily by this perception of cultural similarity or difference.[182]

Swett's point here is that there are at least two levels of racialization. In one level, the police perceive a potential suspect to be a member of a particular group. In the second level, the police determine whether one is performatively white in terms of cultural behavior and self-presentation. Under this system, being black but having a white cultural orientation can diminish (though not eliminate) the extent to which one experiences bias.

Intra-categorical intersectionality does not solely apply to the criminal justice system. Employment discrimination can also be understood through an intra-categorical intersectional

lens. Trina Jones, for instance, describes the issue of colorism with respect to racial discrimination in the workplace. In her work, Jones discusses the case, *Walker v. Internal Revenue Service*.[183] In *Walker*, the plaintiff, a light-skinned black employee argued a color discrimination claim against her dark-skinned black supervisor under Title VII clause of the 1964 Civil Rights Acts.[184] Jones uses this case to demonstrate the extent to which intraracial colorism can occur. But she also is clear to point out that interracial colorism (a person from one racial background discriminating against a person from a different racial background on the basis of color) exists as well.[185] Overall, Jones reveals that the particular way in which color constructs one's race shapes how one experiences racial discrimination in the workplace.

The preceding examples suggest that it is important to conceptualize race via an intra-categorically intersectional approach. Doing so reveals that it is precisely the way in which one's race is intersectionally constructed that predicts experiential outcomes.

Endnotes

[1] G.K. Taylor, "Appeal from the Richmond Chancery District Court," *Hudgins v Wright*, (Nov. 11, 1806), in "*Hudgins v Wrights"* folder, Box 71 Tucker-Coleman Collection, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary.

[2] *Hudgins v. Wright,* 11 Va. (Hen & M.) 134 (1806).

[3] Jack D. Forbes, *Africans and Native Americans: The Language of Race and the Evolution of Red-Black People*, 2nd ed. (Urbana: University of Illinois Press, 1993), 195.

[44] 1 William Waller Hening, *Statutes at Large; Being a Collection of all the Laws of Virginia* (Richmond: Samuel Pleasants, 1809-1823), II, 170.

The text reads: "Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be a slave or free, be it therefore enacted and declared by this present Grand Assembly, that all children born in this country shall beheld bond or free only according to the condition of the mother; and that if an Christian shall commit fornication with a Negro man or woman, he or she so offending shall pay double the fines imposed by the former act."

[5] *Hudgins (134).*

[6] *Hudgins (1806).*

[7] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics**," (**U. CHI. LEGAL F. 139 1989).

[8] Ian F. Haney Lopez, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice," (29 *Harvard Critical Race and Critical Legal Law Review. 1.* 1994).

[9] In this section, I rely on the Laws of Virginia, Thomas Jefferson's Notes on Virginia, William Hening and historical works by Ariela Gross, Deborah Rosen, and Trina Jones.

[10] Crenshaw, (1989).

[11] Crenshaw, (1989). 57, 63.

[12] Ibid.

[13] Kathy Davis, "Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful," (Sage Publications, 2008).

[14] Jennifer C. Nash, "Re-thinking Intersectionality," (Feminist Review, 2008).

[15] *See* Berta Esperanza Hernandez -Truyol, "Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex," (Miami Law Review, 1999).

[16] *See* Mignon Moore, *Invisible Families: Gay Identities, Relationships, and Motherhood among Black Women*, (University of California Press. 2011).

[17] S*ee* McCall, Leslie, "The Complexity of Intersectionality," (THE UNIVERSITY OF CHICAGO PRESS. Vol. 30, No. 3. Spring 2005), 1771-1800.

[18] Peter Wallenstein, *Tell the Court I Love my Wife: Race, Marriage, and Law: An American History*, (Palgrave Macmillan, 2002), 36.

[19] Lopez, (1994). 7.

[20] Ibid.

[21] Ibid. at 28.

[22] *See* Ian F. Haney Lopez, *White By Law: The Legal Construction of Race*, (New York University Press, 1996).

[23] *See* Cheryl Harri, "Whiteness as Property," (HARVARD LAW REVIEW VOL. 16 NO. 8 June 1993).

[24] *See* Jerry Kang, "Trojan Horses of Race," (Harvard Law Review, Vol. 118. 2005).

See Kimberle Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," (12 GERMAN LAW JOURNAL 247-284, 2011).

[25] Jack D. Forbes, *Africans and Native Americans: The Language of Race and the Evolution of Red-Black People*, 2nd ed. (Urbana: University of Illinois Press, 1993), 195.

[26] Ibid.

[27] 1 William Waller Hening, *Statutes at Large; Being a Collection of all the Laws of Virginia* (Richmond: Samuel Pleasants, 1809-1823), II, 170.

The text reads: "Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be a slave or free, be it therefore enacted and declared by this present Grand Assembly, that all children born in this country shall beheld bond or free only according to the condition of the mother; and that if an Christian shall commit fornication with a Negro man or woman, he or she so offending shall pay double the fines imposed by the former act."

[28] Lopez, (1994). 3.

[29] Lopez, (1994). 7.

[30] Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880*. (University of Nebraska Press. 2007), 130.

[31] Ariela Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," (YALE LAW JOURNAL VOl. 108. No.1. 1998. Pg 109-188), 112-114.

[32] Angela Onwuachi-Willig, "Multiracialism and the Social Construction of Race: The Story of *Hudgins v. Wrights*," In *Race Law Stories*. Ed. Rachel Moran and Devon W. Carbado. (Thomson Reuters/Foundation Press, 2008), 172.

[33] Lopez, (1994). 2.

[34] Lynn Rainville, "Virginian Indians at the turn of the 20th Century," Virginia Foundation for the Humanities at Sweet Briar College, January 13, 2008. (Accessed Feb. 15, 2012), <http://www.locohistory.org/Amherst/VAIndiansExhibit/tribes.html.>

[35] Stit Robinson, "Tributary Indians in Colonial Virginia," (The Virginia Magazine of History and Biography, Vol. 67. No. 1, Jan. 1959), 49-64.

[36] Sit Robinson, "The Legal Status of the Indian in Colonial Virginia," (The Virginia Magazine of History and Biography Vol. 61 No. 3, July, 1953, pg. 247-259*,* 247.

[37] Gary B. Nash, *Red, White, and Black: The Peoples of Early North America*, (Pearson Education, Inc. 2006), 105.

[38] "Ordinance for the Regulation of Indian Affairs, August 7, 1786." In *Documents of United States Indian Policy* Ed. Francis Paul Prucha, (University of Nebraska Press, 2000).

[39] Ibid.

The text reads, "*Be it ordained, by the United States Congress assembled,* that from and after the passing of this Ordinance, the Indian department be divided into two districts, viz. The *Southern*, which shall comprehend within its limits, all the Nations in the territory of the United States, who reside southward of the river Ohio; and the *Northern*, which shall comprehend all the other Indian nations within the said territory, and westward of Hudson river…"

[40] Robinson, (1953*).* 247.

[41] Ibid.

[42] *Robin v. Hardaway*, Jefferson 109, 114, (1772)**.** It reads,

> Whereas some disputes have arisen whether Indians taken in war by any other nation, and by that nation that takes them sold to the English, are servants for life or term of years; it is resolved and enacted, that all servants not being Christians, imported into this country by shipping, shall be

slaves for their life time, but what shall come by land shall serve, if boys and girls, until thirty years of age; if men and women, twelve years and no longer. (Robin, 1772).

[43] *Robin, (1772)*. It reads,

> All servants except Turks and Moors, whilst in amity with his Majesty, which from and after the publication of this act, shall be brought or imported into this country, either by sea or land, whether Negroes, Moors, Mulattoes, or Indians, who, and whose parents and native country were not Christians, at the time of the first purchase of such servants by some Christian, although afterwards and before such their importation and bringing into this country, they shall be converted to the Christian faith, and all Indians which shall hereafter be sold by our neighboring Indians, or any other trafficking with us and for slaves, after hereby adjudged, deemed and taken, and shall be adjudged, deemed and taken to be slaves. (*Robin, 1772)*.

[44] Laws of Virginia, Apr. 1691, 3d William & Mar, Act IX, at 69.

[45] *Robin, (1772)*.

[46] 1 William Walter Hening, Statutes at Large; Being a Collection of all the Laws of Virginia (Richmond: Samuel Pleasants, 1809-1823), IV. 482-499. Ch. LII. "An act for prevention of misunderstandings between the tributary Indians, and other her majesty's subjects of this colony and dominion; and for a free and open trade with all Indians whatsoever." (1705).

[47] *Robin*, (1772).

[48] Ibid.

[49] Ibid.

[50] Juan Perea, "The Black/White Binary Paradigm of Race: Exploring the 'Normal Science' of American Racial Thought," (California Law Rev., 1997).

The Black/White Binary is the notion that society is structured to think about race in categorically simple terms of black and white, with no other race in-between. Under this view, the white race is understood as superior and black race is understood as inferior. Consider the following excerpt from Winthrop D. Jordan's book *White over Black: American Attitudes Toward the Negro, 1550-1812.* (Published in 1968 by University of North Carolina Press):

> As descried by the *Oxford English Dictionary*, the meaning of *black* before the sixteenth century included, "Deeply stained with dirt; soiled, dirty, foul…Having dark or deadly purposes, malignant; pertaining to or involving death, deadly; baneful, disastrous, sinister…Foul, iniquitous, atrocious, horrible, wicked…Indicating disgrace, censure, liability to punishment, etc." Black was an emotionally partisan color, the handmaid and symbol of baseness and evil, a sign of danger and repulsion. Embedded in the concept of blackness was its direct opposite—whiteness. No other colors so clearly implied opposition, "beinge coloures utterlye contrary"; no others were so frequently used to denote polarization: 'Everye white will have its blacke, and everye sweete its sowre.' White and black connoted purity and filthiness, virginity and sin, virtue and baseness, beauty and ugliness, beneficence and evil, God and the devil. (Jordan, 7).

Further, this racially oppositional framework is enforced and re-enforced in the law.

[51] Rosen, (2007).

[52] Ariela Gross, "'Of Portuguese Origin': Litigating Identity and Citizenship among the 'Little Races' in Nineteenth-Century America," (Law and History Review Fall 2007, Vol. 25, No. 3), 83-84.

[53] Rosen, (2007). 92**.**

[54] Ibid.

[55] Gross, (2007). 477. Because of this conflation, many Indians remained in slavery until the end of the Civil War.

[56] Ibid. at 178.

[57] Hening, (1809-1823).

[58] Gross, (2007). 471.

[59] Ibid.

[60] Ariela Gross, *What Blood Won't Tell: A History of Race on Trial in America*, (Harvard University Press, 2008). 18.

[61] Hening, (1809-1823). Citing Act 12 of 1662, 2 Va. Laws 170, 170; Act 16 of 1691, 3 Va. Laws 86,86- 87; Act of 1705, ch. 4. 3 Va Laws 250, 252.

Meghan Carr Horrigan, "The State of Marriage in Virginia History: A Legal Means of Indentifying the Cultural Other," (9 GEO. J. GENDER L. 383, 2008).

[62] Rosen, (2007). 110. Beginning in 1662 and continuing into the eighteenth and nineteenth century, laws were made to prohibit sexual relations between races.

[63] Gross, (2008). 20.

[64] Gross (2008). 21.

Thomas Jefferson, *Notes on the State of Virginia*, 1743-1826, (J.W. Randolph, Richmond, VA 1853).

[65] Gross, (2008). 21.

[66] Rosen, (2007). 83-84.

[67] Gross, (2008). 21-22.

[68] Trina Jones, "Shades of Brown: The Law of Skin Color," (DUKE LAW JOURNAL VOL. 49: 1487, 2000), 1504.

[69] Rosen, (2007). 112.

[70] Rosen, (2007). 83-84.

[71] Gross, (2008). 18.

[72] While there is debate as to whether a 1691 or 1705 trade law statute was the first to use language that restricted Indian slavery, by 1808 Indians were pronounced free independent persons.

[73] Robinson, (1935). 255.

[74] Rosen, (2007). 88.

[75] Gross, (1998). 112.

[76] Gross, (1998). 122.

[77] Wallenstein, (2002). 30. *See* the appendix for descriptions of some of these cases. In all six cases, the defendants were granted their freedom.

[78] *Robin v. Hardaway*, Jefferson 109, 114, (1772)

[79] Ibid. at 109.

[80] *Robin*, (1772). The plaintiffs also argued that Native Indians are free because of natural law, but this argument was quickly dismissed.

[81] Wallenstein, (2002). 29.

[82] Wallenstein, (2002). 30.

[83] Ibid.

[84] Ibid.

[85] Catherine Clinton and Michele Gillespie, Eds., *The Devil's Lane: Sex and Race in the Early South*, (Oxford University Press, 1997), 67.

[86] Ibid.

[87] Wallenstein, (2002). 34.

[88] *Butt v Rachel and Others, 4 Munf. (18 VA.) 209, 209-210 (1814).*

[89] Ibid. at 112.

[90] Rosen, (2007). 88.

[91] Ibid. at 93.

[92] Gross, (2007). 471.

[93] Rosen, (2007). 93.

[94] Ibid.

[95] Ibid.

[96] Onwuachi-Willig, (2008). 165.

[97] Rosen, (2007). 93.

[98] Gross, (2007). 471.

[99] Ter Ellingson, *The Myth of the Noble Savage*, (University California Press, 2001),200.

[100] Ellingson, (2001). 198.

[101] *Hudgins* (1806*).*

[102] Wythe Holt, "George Wythe: Early Modern Judge," (ALABAMA LAW REVIEW. Vol. 58:5:1009, 2007), 1031.

[103] Ibid.

[104] Paul Finkelman, *The Law of Freedom and Bondage: A Casebook.* (Oceana Publications, 1986), 22-24.

[105] 1 Samuel Shephard, THE STATUTES AT LARGE OF VIRGINIA, 1792-1806, BEING A CONTINUATION OF HENING 363-65, (AMS Press, Inc. 1970) (1835), *Discussed in* (Holt, 2007. 1031).

[106] Holt, 2007. 1031.

[107] Ibid.

[108] Petition of Wright, "*Hudgins v. Wrights,*" (1806), in folder. Box 71, Tucker-Coleman Collection, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary.

[109] Ibid.

[110] *Hudgins,*133.

[111] *Hudgins,* 134.

[112] Hening**, (**1809-1823), II.

[113] Rosen, (2007). 88.

[114] *Hudgins*, 136.

[115] G.K. Taylor, "Appeal from the Richmond Chancery District Court," *Hudgins v Wright*, (Nov. 11, 1806), in "*Hudgins v Wrights"* folder, Box 71 Tucker-Coleman Collection, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary.

Hannah was the property of Samuel Temple Jr. She had three children, Pheobe, Amey, and Charles. She was encouraged to sue for her freedom by her neighbors but did not because she lacked financial means. According to the court, "It is proved that *John* (a brother of *Hannah,*) brought a suite to recover his freedom [but lost]; and that *Hannah* herself made an almost *continual claim* as to her right to freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject." (*Hudgins*, *141-142.)*.

[116] *Hudgins,* 134.

[117] *Hudgins.*

[118] Holt, (2007). 1032. As testified by witness, Diana Farrell, who will be mentioned later in the thesis.

[119] "Climbing the Family Tree," *The Daily Press New Dominion*, (New Port News, VA. Sunday March 10, 1974), Accessed March 7, 2012, http://www.jhudgins.com/genealogy/newsthesis/06-740310.pdf.

[120] Ibid.

[121] The Last Will and Testament of Houlder Hudgins 1, 12 December, 1815. Will Book 1, pages 24-28, Mathews County, Virginia.

[122] Brenda Stevenson, *Life in Black and White: Family and Community in the Slave South*, (Oxford University Press, 1996), 194.

As Stevenson explains, when they raped their slaves, slaveowners "meant to shame them, to strip [slave] women, both privately and publicly, of their humanity, femininity, and power (sexual, emotional, and moral) that they held within their families and communities" (Stevenson,194).

[123] Joshua D. Rothman, *Notorious in the Neighborood: Sex and Families Across the Color Line in Virginia, 1787-1861*, (The University of North Carolina Press, 2003), 133.

[124] Stevenson, (1996). 181.

[125] Ibid. at 180.

[126] Teresa C. Zackodnik, *The Mulata and the Politics of Race*, (University Press of Mississippi, 2004), 15, 81.

[127] Lois Virginia Meacham Gould, *In Full Enjoyment of their Liberty: The Free Women of the Gulf Ports of New Orleans, Mobile, and Pensocola*, (Emory University, 1991), 144-145.

[128] All of these scenarios are also plausible with respect to Pheobe, Jackey's mother who was had multiple owners (John Stewart, Fulwell, Delante, and finally Peyton).

[129] *Hudgins, 137.*

[130] *Hudgins, 139.*

[131] Jack D. Forbes, *Africans and Native Americans: The Language of Race and the Evolution of Red-Black People*, 2nd ed., (Urbana: University of Illinois Press, 1993), 195.

[132] *Hudgins,*139-40.

[133] Joel Thomas Rosenthal, *Patriarchy and Families of Privilege in Fifteenth-Century England*, (University of Pennsylvania Press, 1991), 29.

[134] *Hudgins,* 137.

[135] *Hudgins,* 142.

[136] *Hudgins,* 139-140.

[137] *Hudgins,* 133.

[138] Stevenson, (1996). 262-263.

[139] Ibid. at 262.

[140] Ibid. at 263.

[141] G.K. Taylor, "Appeal from the Richmond Chancery District Court," *Hudgins v Wright*, (Nov. 11, 1806), in "*Hudgins v Wrights"* folder, Box 71 Tucker-Coleman Collection, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary.

[142] *Hudgins,* 142.

[143] C.L. Higham, *Noble, Wretched, and Redeemable: Protestant Missionaries to the Indians in Canada and the United States, 1820-1900*, (University of New Mexico Press, 2000), 33.

[144] Rosen, (2007). 85.

[145] *Hudgins,* 135.

[146] Rosen, (2007). 85.

[147] *Hudgins,* 139.

[148] *Hudgins,* 139.

[149] *Hudgins,* 143.

[150] It is unclear as to whether Hannah requests her freedom or remains a slave, although the court claimed that she is entitled to freedom.

[151] Catherine Clinton and Michele Gillespie, Eds., *The Devil's Lane: Sex and Race in the Early South*, (Oxford University Press, 1997), 66-67.

[152] Ibid.

[153] Ibid.

[154] *Hudgins,* 139-140.

[155] *Hudgins*, 134.

[156] Jones (2000). 1494-1495.

[157] *Hudgins,* 139.

[158] Jones (2000). 1495-1496.

[159] *Hudgins*, 139.

[160] *Hudgins, 141.*

[161] *Hudgins, 142.*

[162] Ibid.

[163] Holt, (2007). 1032.

[164] Ibid.

[165] *see* appendix for a family tree.

[166] Holt, (2007). 1032.

[167] Ibid.

[168] Finkelman, (2006).

[169] Holt, (2007). 1034.

[170] Paul Finkelman, "The Dragon St. George Could Not Slay: Tucker's Plan to End Slavery," (47 Wm. & Mary L. Rev. 1213, 2006).

[171] Moran and Carbado, (2008). 157.

[172] *Hudgins* 140.

[173] Finkelman, (2006). 1214.

[174] Ibid.

[175] Moran and Carbado, (2008). 158.

[176] *See* Charles Ogletree., *The Presumption of Guilt: The Arrest of Henry Louis Gates Jr. And Race, Class, and Crime in America,* (Palgrare MacMillan, 2010).

[177][177] *See* Angela Y. Davis, *Are Prisons Obsolete?,* (New York: Seven Stories Press, 2010).

See Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, (University of California, 2007).

See Loic Wacqant, *Punishing the Poor: The Neoliberal Government of Social Insecurity,* (Duke University Press, 2009).

[178] Jennifer L. Eberhardt, Paul G. Davis, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson, "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Captial- Sentencing Outcomes," (Association for Psychological Science, 2006).

[179] Ibid. at 383.

[180] Ibid. at 384.

[181] Daniel H. Swett, "Cultural Bias in the American Legal System," (*Law & Society Review* 4, no. 1, 1969), 79-110.

[182] Id. at 89.

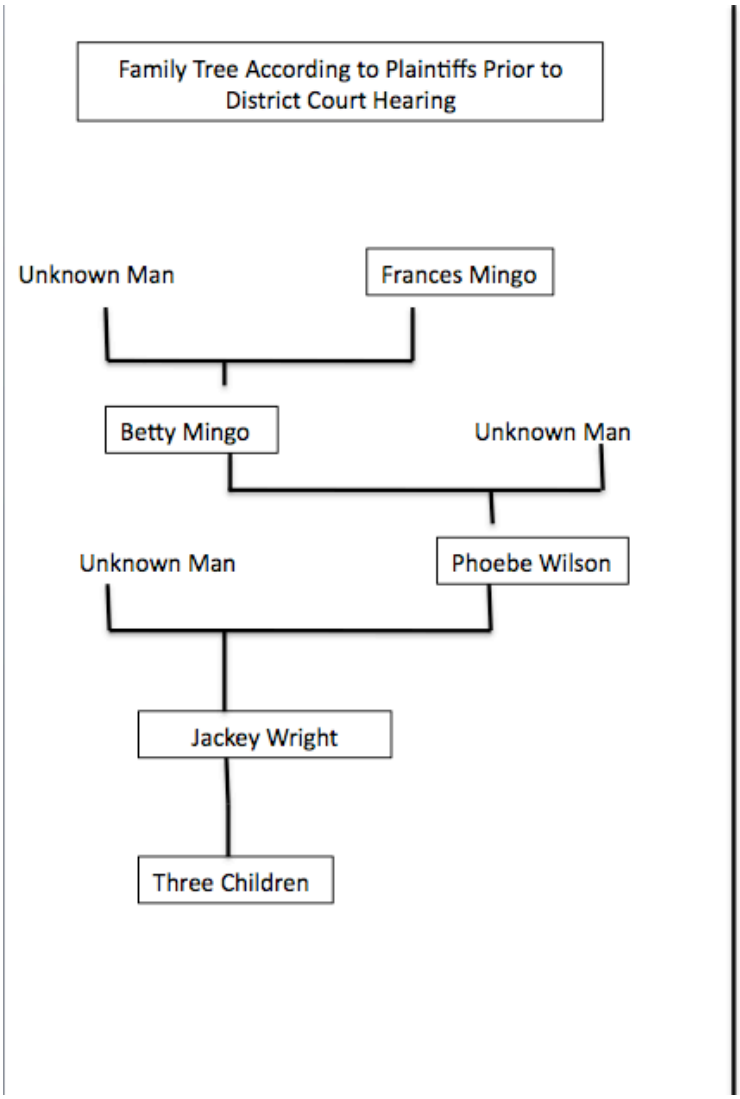
[183] 713 F. Supp. 403 (N.D. Ga. 1989).

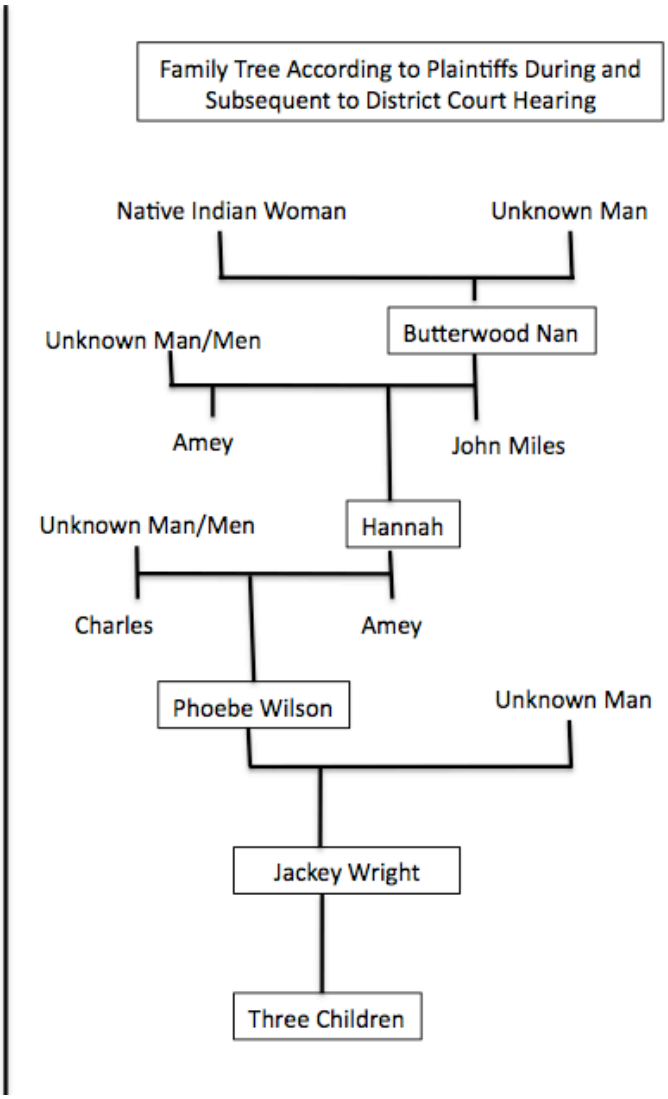
[184] Jones, (2000), 1540.

[185] Ibid at 1542.

APPENDIX A

Jackey Wright Family Trees





APPENDIX B

Relevant Excerpts of the Laws in Colonial Virginia:

-1662: Virginia law enacted: "*Negro womens children to serve according to the condition of the mother":*

> WHEREAS some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or ffree, *Be it therefore enacted and declared by this present grand assembly,* that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall committ ffornication with a negro man or woman, hee or shee so offending shall pay double the ffines imposed by the former act. (Hening, 1823).

-1670 Virginia statute, "an act concerning who shall be slaves":

> Whereas some disputes have arisen whether Indians taken in war by any other nation, and by that nation that takes them sold to the English, are servants for life or term of years; it is resolved and enacted, that all servants not being Christians, imported into this country by shipping, shall be slaves for their life time, but what shall come by land shall serve, if boys and girls, until thirty years of age; if men and women, twelve years and no longer (*Robin v. Hardaway,* 1772*)*.

-1682 statute, "An act to repeal a former law, making Indians and others free":

> All servants except Turks and Moors, whilst in amity with his Majesty, which from and after the publication of this act, shall be brought or imported into this country, either by sea or land, whether Negroes, Moors, Mulattoes, or Indians, who, and whose parents and native country were not Christians, at the time of the first purchase of such servants by some Christian, although afterwards and before such their importation and bringing into this country, they shall be converted to the Christian faith, and all Indians which shall hereafter be sold by our neighboring Indians, or any other trafficking with us and for slaves, after hereby adjudged, deemed and taken, and shall be adjudged, deemed and taken to be slaves. (*Robin v. Hardaway,* 1772).

-1691 Act, “An act for a free trade with Indians” (restated in 1705 and 1733):

> All former clauses of former acts of Assembly, limiting, restraining, and prohibiting trade with Indians be, and stand hereby repealed, and they are hereby repealed; and that from henceforth there shall be free and open trade for all persons, at all times, and at all places, with all Indians whatsoever. (Laws of Virginia, 1961).

-1705 Act, “An act concerning servants and slaves”:

> All servants imported and brought into this country by sea or land, who were not Christians in their native country, (except Turks and Moors in amity with her Majesty, and others that can make due proof of their being free in England, or any other Christian country, before they were shipped, in order to transportation hither) shall be accounted and be slaves, and such, be here brought and sold, notwithstanding a conversion to Christianity afterwords. (*Robin v Hardaway,* 1772).

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