“WHAT’S PAST IS PROLOGUE”:
NORTH CAROLINA’S FORGOTTEN BLACK CODE

by

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ABSTRACT

JOHN THOMAS WARLICK, IV. “What’s Past is Prologue”: North Carolina’s Forgotten Black Code. (Under the direction of DR. JOHN DAVID SMITH)

Between late 1865 and early 1867, after the South’s failure to preserve slavery through armed conflict, lawmakers in eleven southern states enacted racially repressive legislation with the intention of codifying a hierarchical caste system reminiscent of their abolished “peculiar institution.” Those so-called “black codes” sought to achieve through statutory regimes the dominion that the slaveowner once held over all aspects of a slave’s existence.

Adopted in March 1866, following the enactment of several more detailed and racially explicit codes in other states, the North Carolina Black Code has been largely overlooked by the relevant historiography. The scant consideration accorded North Carolina’s Code has dismissively characterized the state’s laws as fair or mild derivative imitations of other black codes, liberal and even progressive in their impact on the freedpeople. Such descriptions ignore the scope of racially divisive subjugation that North Carolina legislators surreptitiously achieved.

Availing themselves of antebellum judicial precedent legitimizing a race-based structure of tiered citizenship, the state’s lawmakers relegated all blacks to a single inferior class with constrained rights and enhanced restrictions. A tripartite legislative strategy of stratification, accommodation, and control mollified a hostile Congress while covertly sustaining white North Carolinians’ supremacy over the newly emancipated. The Code, a combination of retrofitted slave laws with deceptively race-neutral statutes, all enforced according to the unchecked discretion of local officials, facilitated a scheme of

racial separation and subservience. Neither repealed nor replaced, North Carolina's Black Code instead lingered on throughout the remainder of the nineteenth century. Its provisions offered the foundation for the Old North State's eventual escalation to full-scale segregation. A forgotten chapter in the state's history, North Carolina's Black Code provided the prologue for Jim Crow's entrance into the Tar Heel State.

DEDICATION

For my father,

who lit the flame, and

for Tyler and Hannah,

who keep it burning bright.

ACKNOWLEDGEMENTS

This should never have happened. But after twenty-six years of practicing law, something needed to change. In the fall of 2016, on something between a whim and a "Hail Mary," I enrolled as a post baccalaureate student in a colloquium in the graduate History program at the University of North Carolina at Charlotte. The course, taught by Dr. John David Smith, a gifted educator and prolific scholar on the Civil War, Reconstruction, and all things southern history, focused on American history prior to 1865. It was a mistake. I got hooked.

I am grateful to the wonderful faculty of the History department at UNC-Charlotte for their support, patience, guidance, fellowship, and willingness to accept a second-career grad student who, according to my fellow grad students, only knew so much history because I had lived through so much of it. I am particularly indebted to Drs. David Goldfield, Carol Higham, Steve Sabol, Aaron Shapiro, Ritika Prasad, Benny Andrés, Gregory Mixon, and Peter Thorsheim for the privilege of studying and working with them. Special thanks must be extended to Drs. Sonya Ramsey and Shepherd McKinley who, in serving on my thesis committee, had no suspicion of what they were getting themselves into, and yet graciously gave me the benefit of their time, knowledge, training, and feedback on what became a behemoth of a thesis.

As for Dr. Smith, he deserves the credit (or blame) for convincing me to enter the Master's program. He then sagely proposed North Carolina's Black Code as a thesis topic, patiently waited as I thrashed about trying to rationalize taking on any subject other than the Black Code, and enthusiastically agreed to serve as my advisor and thesis committee chair once I finally acknowledged the wisdom of his recommendation. He has

endured endless drafts, course-corrected innumerable wild-goose chases, exhausted a trove of red pens, offered a host of invaluable resources, provided insightful feedback, and salvaged the occasional train wreck. He has been a teacher, a guide, a critic, an advocate, a mentor, and a friend. “Thank you” is wholly inadequate. This paper and I have benefitted mightily from his gifts, talents, and humor.

Through Dr. Smith, I have been introduced to other scholars who have patiently answered my questions and graciously offered feedback, most notably Drs. Jeffrey Crow and Paul Escott, and North Carolina State Archivist Sarah Koonts. The knowledgeable and multitalented staff at the North Carolina State Archives, and particularly Doug Brown and his Reference department, proved adept at identifying and adopting a bewildered graduate student researcher and incredibly patient in helping to find answers to my many questions. I was also the frequent beneficiary of the time, talents, knowledge, and good will of the amazing Special Collections staff at the Wilson Library at the University of North Carolina at Chapel Hill. They truly represent the very best of my beloved alma mater. The frequent visits to both the State Archives and Wilson Library required for my research were funded by the Kings Mountain Research Scholarship for Southern History, a grant available through the UNC-Charlotte History department thanks to the continued generosity and support of Gilbert and Jancy Patrick.

My father was the first historian I ever knew. It was his passion rather than his profession. A urological surgeon by trade, he also had a sixth sense for discovering all things historic (sites, museums, graveyards, events, traditions, narratives, etc.) for every location we ever visited, and the instant recall and storytelling magic to bring it to life. What he did not know, he spun into a breathtaking epic of Faulknerian scope. My mother

meanwhile lovingly encouraged and endured every interest, curiosity, dream, wild hair, and pursuit I could conceive, with the implicit message that the only limitations were my own. Everything has been because of their love, support, and faith.

But the credit for this paper (especially the tables!), and this inane midlife left turn, all goes to my best friend, dearest love, and partner-in-crime Katie. Instead of laughing or choking when I announced my desire to study history, she figured out how to make that pipedream a reality. Our children Tyler and Hannah have enthusiastically and indulgently provided the encouragement and commiseration that only fellow students can offer, but Katie has provided the inspiration, faith, opportunity, and occasional swift kick in the backside to make it happen. As always, she has been the rock and the sunshine. Thank you for joining me on this crazy path. To the moon and back. And, by the way, I once again have one more graduate degree than you do.

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INTRODUCTION

Carolina! Carolina! Heaven's blessings attend her!
While we live we will cherish, protect and defend her;
Though the scorner may sneer at and witlings defame her,
Our hearts swell with gladness whenever we name her.
Hurrah! Hurrah! The Old North State forever!
Hurrah! Hurrah! The good Old North State!

Though she envies not others their merited glory,
Say, whose name stands the foremost in Liberty's story!
Though too true to herself e'er to crouch to oppression,
Who can yield to just rule more loyal submission?

-William J. Gaston
"The Old North State" (1835)

The spirited debates of his fellow delegates to North Carolina's 1835 constitutional convention heartened North Carolina Supreme Court justice William J. Gaston, prompting him to pen "The Old North State." Gaston and his unabashedly exuberant paean to his home state, described as "probably the best-known expression of North Carolina's attitude in the constellation of American states," offer an interesting perspective of the state's antebellum period.[1] In his own efforts during that convention "to cherish, protect and defend her," Gaston unsuccessfully argued against the disenfranchisement of free black property owners, who had been permitted to vote since the state's 1776 constitution.[2] A staunch opponent of slavery as "the worst evil that

afflicts the Southern part of our Confederacy," Gaston's prolific body of work also included judicial opinions that recognized a slave's right of self-defense against an overseer's lethal attacks and that acknowledged a manumitted slave's citizenship.[3] At the time of his death in 1844, however, Gaston owned more than 200 slaves.[4]

"The Old North State" was sung by North Carolinians throughout the nineteenth century, even when, "too true to herself e'er to crouch to oppression," North Carolina succumbed to a more ominous southern siren song and joined the Confederacy in defense of slavery. Following that costly defeat, North Carolina lawmakers begrudgingly ratified the Thirteenth Amendment upon the insistence of the federal government, forever abolishing slavery in the Old North State. Those legislators did not "yield to just rule more loyal submission," however. They instead enlisted enthusiastically in the black code movement, an oft-forgotten southern legislative phenomenon intended to negate emancipation by forcing the freedpeople back into subjugation.

Under North Carolina's postbellum laws, the newly emancipated could engage in commercial transactions, subject to that largely illiterate population's required use of written contracts witnessed by a disinterested white person. The freedpeople gained limited testimonial rights against white North Carolinians, contingent upon the departure of occupying military forces and the hated Freedmen's Bureau from the state. Black children orphaned or left destitute after the war found themselves bound by court-ordered indentures for multiyear apprenticeships, with their former masters holding preferential rights for their continued involuntary service. A criminal act uniquely limited to black men – the physical assault of a white woman with the intent to commit rape – required punishment by death.[5] Meanwhile, Gaston's song, destined to become the state song of

North Carolina, continued its inquiry: "Say, whose name stands the foremost in Liberty's story!"[6] Indeed, whose?

* * *

Uncertainty still surrounds North Carolina's involvement in the black code movement. Some historians have suggested that North Carolina had no black code or that if it did, it was never enforced.[7] Given postwar legislative enthusiasm throughout the South for legal schemes dealing specifically with the freedpeople, inaction by any southern state on such an emotionally charged issue would have been unlikely. In his revolutionary 1935 history of Reconstruction, W. E. B. Du Bois aptly described the frenetic mood of the day: "[J]ust as before the war public opinion was hammered into idolatrous worship of slavery, so after the war, even more bitterly and cruelly, public opinion demanded a new unyielding conformity."[8] North Carolina was hardly contrarian, despite state officials' often reticent acquiescence to the Confederate government's agenda. After all, although the Tar Heel State was the last of the eleven states of the Confederacy to secede from the Union, white North Carolinians still took that fatal step with their southern brethren.[9]

Nor was postbellum North Carolina a likely bellwether for southern racial reform or activism. Yet the limited historiography of the black code movement that has acknowledged North Carolina's participation has agreed unanimously that the North Carolina Black Code surpassed other southern black codes in terms of its liberality, fairness, and moderation.[10] That ignominious distinction – the southern state with the least racist race-specific postbellum legislative code – is hardly laudable for the state Gaston praised as "foremost in Liberty's story." Indeed, North Carolina's involvement in

the black code movement casts the entirety of his "The Old North State" in a different light. As part of a regional phenomenon of legislatively sanctioned racism, the allegedly progressive character of North Carolina's Code becomes more dubious. Within the broader context of the black code movement – the postwar conditions that faced southern legislators, the available legislative responses, and the actual import and enforcement of the legislation adopted –North Carolina's Black Code embodied a more ominous agenda.

Freedmen's Bureau district chief Brvt. Col. Clinton Cilley recognized that agenda. In a May 1866 letter to Bureau Assistant Commissioner for North Carolina Col. Eliphalet Whittlesey, Cilley described North Carolina's Code as a testament to state lawmakers' resolve "to impress it thoroughly on blacks that they are inferior and must be so kept by the law."[11] Members of the state's General Assembly shared their southern colleagues' desire for control over the freedpeople. The legislative means to that end may have diverged, but the subtle veneer of North Carolina's forgotten Black Code did not mitigate the detriment it imposed on the state's black populace.

Black Code Historiography: The Pitfalls of Extrapolation and Statutory Analysis

The black codes have generated only fleeting consideration within the prolific historiography of the post-Civil War era. Given what the codes represented – the inherent race-based agenda, the blatant disregard for northern criticism during the expedited legislative process, and the foreshadowing of Jim Crow segregation – the dearth of black code scholarship is an academic oversight. Perhaps the brevity of the black code movement relegated the subject to an afterthought. The War Department and the Freedmen's Bureau countermanded much of the first two black codes, the handiwork of lawmakers in Mississippi and South Carolina, almost immediately.[12] Explicitly racial

provisions in subsequent black codes quickly became moot in the face of contemporaneous congressional activity: the passage of the April 1866 federal Civil Rights Act, the success of Radical Republicans in the 1866 national elections, the assumption of congressional control over Reconstruction, and the adoption of the Fourteenth and Fifteenth Amendments. The racial overtones that permeated the black codes amounted to self-inflicted wounds by southern legislators, providing the impetus for those swift federal reactions.[13] Yet the black code experiment – institutionalized racism backed with legal force – has rarely prompted more than passing reference as a temporary postbellum phase between Reconstruction and segregation.

The scant black code historiography that does exist has emphasized causation. Within six months of surrender, the newly-elected white legislators of the eleven defeated Confederate States of America returned to the very race-based distinctions that had prompted armed conflict in the first place. Those politicians, charged by their constituents to facilitate reunification with already-suspicious northerners, inexplicably embraced a singular cause, the state-sanctioned subjugation of blacks as a replacement for slavery. How and why, in that hostile political environment, less than one year after the end of the Civil War, could so many white southerners consider a racially-divisive code to be a viable option? Searches for fully-articulated legislative intent to unravel that anomaly have proven largely fruitless, due primarily to insufficient recordkeeping by those state legislatures.

Alternative methodologies to divine some modicum of legislative intent from the few surviving records have also proven inconclusive, largely tainted by generalities. Most efforts to explain the black code movement have adopted a three-step process to

extrapolate a thematic hypothesis from some quantifiable commonality within the codes. Unfortunately, because those commonalities are of such varying applicability to the individual codes, no single universally-valid hypothesis has been found. Some historians have instead favored a careful textual parsing of one specific black code as the basis for generating a checklist of statutory restrictions within that one state's black code. That checklist has then been compared against other black codes in hopes of revealing a quantifiable legislative purpose by so contextualizing the initially analyzed code. Studies using that alternative approach rarely venture beyond the printed pages of the statutes, generating little insight into legislators' motivations or the actual impact of the legislation. Neither approach has rendered a fully-satisfactory explanation for the black code movement.

The extrapolation model typically begins with the identification of a pervasive challenge stemming from social upheavals caused by emancipation, some systemic problem that vexed a postbellum southern state. William A. Dunning, one of Reconstruction's earliest and most castigated historians, identified the ex-slaves as that problem. In *Reconstruction Political and Economic 1865-1877* (1907), he described southern blacks as an "inferior class," not "on the same social, moral, and intellectual plane with the whites." Their emancipation unleashed the "social and economic chaos" previously contained by slavery.[14] Extrapolation analysis then shifts from cause to effect, searching for legislative solutions within the earliest black codes to resolve the identified challenge. For that reason, the Mississippi and South Carolina Black Codes – the first, and generally considered the most oppressive, of the eleven codes – factor most prominently in the relevant historiography. The final analytical step casts the solutions

adopted by those earliest black codes in broad terms, so as to trace the trajectory of that challenge/solution combination through subsequent black codes.

In Dunning's case, he identified the "conscientious and straightforward attempt" of the Mississippi Black Code to address "the well-established traits and habits of the negroes" as that state's solution for perceived emancipation-induced chaos. Given the specific Mississippi statutes emphasized in his analysis – mandating restricted access to weapons, limited rights to testify in court, and strict compliance with labor contracts – Dunning evidently considered violence, duplicity, and irresponsibility among the ex-slaves' most objectionable anti-social habits. He lauded Mississippi's strict vagrancy laws as an effective response to the freedpeople's "problems with destitution, idleness, and vice." Citing selective passages from comparable provisions in South Carolina and Louisiana's subsequent black codes, Dunning then pronounced his assessment of the overall black code movement: "As in general principles, so in details, the legislation was faithful on the whole to the actual conditions with which it had to deal."[15] In short, Dunning positioned the black codes as a common-sense response to emancipation: former slaves had to be relegated to a separate lower class because of their innate inferiority, necessitating legislative subjugation to whites. Dunning's sweeping generalizations dominated black code historiography until at least the mid-twentieth century.

Generality has also negated efforts to infer legislative intent from meticulous dissections of individual black codes. Such statutory analyses usually center upon the linguistic minutia of a state's final codified statutes, overlooking insights that may be gained from legislative precedent, preliminary statutory drafts, or subsequent

enforcement history. James Browning's article "The North Carolina Black Code" (1930) typified that analytical process.[16] Following a summary description of social conditions in postbellum North Carolina, Browning ticked through in approximate numeric order the constituent sections of North Carolina's 1866 "Act Concerning Negroes and Persons of Color or of Mixed Blood," offering brief observations as to the gist of each provision. Historians engaged in such painstaking statutory analysis are then left with little more than a laundry list of summarized statutes. In Browning's case, his analysis resulted in a narrow litany of legal impediments foisted upon North Carolina's newly-freed blacks.

Without context, statutory analysis rarely uncovers legislative intent. Browning offered context with an invocation of the Mississippi and South Carolina Codes. Rather than discuss the contents or distinguishing aspects of those codes, however, Browning delivered a one-sentence comparative analysis of the North Carolina Code vis-à-vis its Mississippi and South Carolina counterparts: "As compared with the stringent enactments of the legislatures of South Carolina and Mississippi, the North Carolina Code, with that of Virginia running a close second, however, was perhaps the most liberal of all the black codes." From that cursory reasoning, Browning posited the legislative intent of members of North Carolina's General Assembly: "The factors which seemed uppermost in the minds of the law makers were the preservation of white civilization by refusing to recognize the equal political rights of the blacks, and an understanding from the beginning that the Negro should be made to know his place in the new social and economic order by the hostile legislation which cramped his activities." The favorable status Browning then ascribed to twentieth-century black North Carolinians – "[i]n liberality toward the Negro population North Carolina leads the South" – seemingly

emerged from that perceived progressivism of North Carolina's nineteenth century Black Code.[17] In other words, given North Carolina's reputation for exceptionalism (in the case of Browning's argument, as to race relations), logic dictated that the state's Black Code must also have been appropriately progressive and liberal.[18]

Browning's conclusions suggest the deceptive influence of generalizations within black code historiography, at least with respect to the North Carolina Black Code. Historians offering hypotheses about the black code movement have typically glossed over North Carolina's Code. That disregard may be attributable to the fact that North Carolina's postwar circumstances did not necessitate the adoption of race-specific legislation. North Carolina's Code instead represented an overreaction by state lawmakers to erroneously perceived circumstances. The disproportionate cause and effect reflected in North Carolina's Code is not conducive to the extrapolation of a viable legislative intent. Because of antebellum judicial precedent that rationalized racial disparity, North Carolina's Code also lacked the overt racist language of other black codes that have received more analytical attention. The resulting scant analysis has prompted little more than cursory observations and faint praise for North Carolina's Code as a more liberal or progressive entrant in the black code movement.

In his 1914 survey of southern legislation during Presidential Reconstruction, North Carolina historian J.G. de Roulhac Hamilton, a Dunning protégé, echoed his mentor's rationale for the necessity for black codes. The North Carolina Black Code, according to Hamilton, represented a logical model for addressing the labor implications and legal status of the freedmen: "North Carolina's [Black Code] was not at all open to attack, being all that could be demanded in reason and justice by any one, and going

further in the direction of equality before the law than a large number of Northern states."[19] Hamilton offered little evidence or analysis to support that presumptive unassailability of North Carolina's code. Such unsubstantiated generalizations provide no useful insights into the actual or perceived need, deployment, or impact of race-based controls in a postbellum Tar Heel State.

Other historians who instead pursued statutory scrutiny of the North Carolina Black Code have echoed Browning's vague assessment of its progressive nature. Theodore Brantner Wilson's *The Black Codes of the South* (1965) remains the most detailed study of the eleven black codes. Wilson devoted a mere four pages of his 152-page work to the North Carolina Code, briefly summarizing portions of the so-called "Act Concerning Negroes" and offering scant reference to additional statutes proposed by the state's freedmen commission. He considered North Carolina's Code among the "milder" black codes, a derivative legislative scheme that selectively copied portions of more aggressive codes adopted by Mississippi and South Carolina.[20] Likewise, in her 1985 study of North Carolina during Presidential Reconstruction, Roberta Sue Alexander agreed that "North Carolina's Black Code . . . was fairer than codes in some other southern states."[21] But de jure race neutrality does not necessarily mean de facto race progressivism, or even moderation.

North Carolina Exceptionalism

No satisfactory explanation has been offered for the generally positive views of North Carolina's Black Code within the historiography of the black code movement. Admittedly, a side-by-side comparison of North Carolina's Code with its counterparts from Mississippi, South Carolina, and elsewhere quickly reveals an array of statutory

distinctions. They differ in length, language, specificity, restrictiveness, and other respects in varying gradations of relative fairness. But that methodical juxtaposition ignores the striking commonality of race-based oppression that fueled the black code movement. Given the scant attention for North Carolina's Code, overlooking that commonality obfuscates the motivations and actions of postbellum North Carolina lawmakers. To credit the state's Code for its relative liberality, fairness, and moderation without also accounting for the comparatively inconsequential role that slavery played in North Carolina is at best short-sighted. What spawned the enduring perception that North Carolina lawmakers somehow distinguished their Code as the least egregious of the racially egregious?

Justice Gaston was not the first person to proclaim that North Carolinians were a most exceptional people living in the South's most progressive state, a belief historian Milton Ready has described as a "Garden of Eden feeling . . . in the southern part of heaven."[22] In his appropriately entitled textbook *North Carolina: The Story of a Special Kind of Place* (1987), William S. Powell traced one longstanding state sobriquet, "God's crowning achievement," to a 1629 regional land grant by King Charles I.[23] Yet the genesis of that self-aggrandizing North Carolina exceptionalism remains unclear.

By the mid-1800s, when, according to historian Guion Griffis Johnson, "[t]he glimmer of an enlightened self-interest was broadening up toward morning," white North Carolinians' self-image of their home state as "a benevolent and enlightened republic led by virtuous statesmen" was firmly entrenched.[24] Viewing North Carolina as a southern bastion of reasonableness, a *New York Times* columnist reported with dismay in December 1865 when North Carolina legislators refused to move quickly to protect the

state's freedpeople: "Before the election we had hoped better results in the old North State. Standing in a semi-neutral position between hot-headed South Carolina and pride-driven Virginia, she seemed to be a sort of neutral ground, where there was at least hope that the seeds of Union might fructify; but we fear that the waves of poison from the North and the South have rolled over her barren plains and infected her with all the virus of her neighbors."[25] Yet even as Jim Crow laws later gripped North Carolina, the state's black Protestant leaders still preached to their congregations about the virtues of life in the South's most racially progressive state.[26]

Contemporary postwar efforts to downplay or divert attention from the more objectionable aspects of North Carolina's Black Code may also have contributed to subsequent positive views of the state's legislative strategy. In reporting on the racially divisive legislation enacted in other southern states in 1865 and 1866, members of North Carolina's press favored the derisive "Black Code" moniker coined by the northern press. In contrast, period coverage by Tar Heel reporters described similar race-specific legislation under development by North Carolina lawmakers with the more affirmative "Freedmen's Code" label.[27] The freedmen commission responsible for crafting North Carolina's Code offered insights into their thoughtful deliberations with an exhaustive twenty-one-page report that accompanied the proposed legislation. The report served as a preemptive measure to position the purportedly rational benevolence of the race-based Code. Over time, even history textbooks willingly applied the North Carolina exceptionalism dogma to the "mild" North Carolina Black Code, referencing it in passing as "more liberal than most" southern black codes.[28]

North Carolina's reputation for progressivism and exceptionalism has often provided convenient cover for state lawmakers, enabling them to "explain away many habits and instincts that, according to other measures, might seem entirely unprogressive," according to historians Larry E. Tise and Jeffrey J. Crow.[29] The historiography of North Carolina's participation in the black code movement has aptly reflected that distractive influence of the state's reputation. If, as justice Gaston's "The Old North State" claims, North Carolina's "name stands the foremost in Liberty's story," the mere adoption of a black code, even one purportedly mild, fair, or liberal, surely stands as a sad chapter in that story, requiring the renewed attention of historians and a reconciliation for "God's crowning achievement."

* * *

The scant historiography of the black code movement had long been dominated by the incitant narrative of the early and egregious. Lawmakers in Mississippi and South Carolina adopted the inaugural postwar legal codes solely and distinctly intended for the governance of the black populace. Those comprehensive racially divisive schemes – of equal audacity as to breadth and content – have controlled the history of the black code movement. Studies of subsequent black codes have been inextricably recorded and analyzed only by analogy to those earliest codes, understood not as separate legislative measures but rather in comparison with those initial starkly overreaching regimes. Black code historiography has accordingly developed as something of a patchwork quilt. Stitched together from generalizations, assumptions, and ensuing misperceptions, its methodology has concealed state-specific details of individual codes that could offer significant localized insights into the nineteenth century's turbulent transition from

involuntary servitude to freedom. The evolution and role of North Carolina's Black Code from early Reconstruction into the Jim Crow era is one such forgotten chapter of the black code historiography. This paper serves as a reminder that, much like the past provided prologue for Antonio and Sebastian's conspiratorial activities in *The Tempest*, the state's Black Code past served as prologue for segregation in the Old North State.[30]

The first chapter focuses on the North Carolina Code as enacted, in an effort to identify and defuse misconceptions associated with that legislation. To avoid the generalities that have plagued black code historiography, the chapter deconstructs the traditional extrapolation and statutory analysis methods, borrowing elements from each to provide a more holistic, and therefore accurate, view of the Code. Drawing from prior studies of other states' black codes, the discussion identifies motivating factors previously credited for the genesis of those other codes, considering their potential applicability to North Carolina's unique circumstances. Finding those factors inapposite to North Carolina, the analysis transitions to the Code's ratified language to demonstrate that, contrary to the limited relevant historiography, the legislation neither constituted new law nor plagiarized the statutory schemes of other states. Lawmakers instead repurposed the state's existing antebellum slave statutes and judicial precedent (including a significant opinion authored by justice Gaston) to achieve surreptitiously – by way of a tripartite legislative strategy of stratification, accommodation, and control – the continued subjugation of the state's black residents, even after slavery's demise.

Chapter two focuses on the legislative history of the Code which began, not in the halls of the state capitol building, but rather in the sanctuary of Raleigh's Methodist African Church, with the first convention of North Carolina's freedmen. The chapter

details how, in a cruel twist of irony, the response of the state's constitutional convention to the freedmen delegates' plaintive requests for legislative support devolved into a statutory racial caste system. Tracing the Code through a series of legislative gyrations – from constitutional convention committee to a special "freedmen commission" of gubernatorial appointees to the inexplicable deliberations of the state's House of Commons seated as a committee of the whole – the discussion seeks the underlying legislative intent that prompted the Code's final form. The chapter offers detailed analyses of the explanatory report offered by the freedmen commission in defense of their proposed legislation, and of the contemporary press coverage of the legislative deliberations, sources that previous studies have only referenced in passing.

The final chapter examines what the relevant historiography has identified as the premature demise for the North Carolina Black Code. Theories as to the actual cause of death have varied: censure by proactively zealous officials of the Freedmen's Bureau, legislative repeal, or impotence attributable to the Fourteenth and Fifteenth Amendments. The general consensus, however, has been that any North Carolina Black Code ended before it ever actually began. In fact, the Code survived and thrived. It remained in effect and effective – as enforceable law, as precedent for subsequent legislation, and as the legal and social precursor of Jim Crow segregation – for the remainder of the nineteenth century. Using three arenas of racial coexistence (criminal law and punishment, apprenticeships, and labor contracts), the chapter demonstrates how the Black Code persisted on as a means for dividing the races and constraining the advancement of black North Carolinians.

* * *

An appellate brief filed with the United States Supreme Court in 1895 pronounced that "a perpetually recurring injury done by statute upon the ground of Color alone,–*Color* referable distinctly to that slavery which but a few years ago so generally attended upon it,–creates a status of American '*servitude*' with the XIIIth amendment." Thirty years earlier, shortly after ratifying that Thirteenth Amendment and thereby abolishing slavery in North Carolina, members of the state's General Assembly adopted a series of laws that operated on the ground of color alone. According to the 1895 brief, the race-based distinction at the heart of that Black Code, whether progressive or egregious, moderate or onerous, constituted a status of involuntary servitude violative of the Thirteenth Amendment.

The co-author of that brief, Samuel F. Phillips, former solicitor general of the United States, spent most of his legal career in the courts of North Carolina. He also served in the state's legislature, including as speaker of the House of Commons in March 1866 when lawmakers enacted the state's Black Code. Phillips, a staunch white supremacist, argued passionately in 1866 against the injustice of race-based restrictions on the rights of the freedpeople to testify in North Carolina courts. Thirty years later, having renounced his earlier racist views, Phillips again argued passionately that "the United States cannot allow the matter of the Color of its citizens to become a ground of legal disparagement, or legal offense within the States, unless with a disparagement of itself." Phillips' continued need in 1895 to argue against race-based legal restrictions, then on behalf of his client Homer Plessy, suggested that the mistake of the black code experiment may have already been forgotten. Phillips' ultimately unsuccessful representation of Plessy confirmed that memory lapse.[31]

End Notes

[1] Larry E. Tise and Jeffrey J. Crow, "A New Description of North Carolina," in *New Voyages to Carolina: Reinterpreting North Carolina History*, ed. Larry E. Tise and Jeffrey J. Crow (Chapel Hill, NC: University of North Carolina Press, 2017), 359.

[2] Guion Griffis Johnson, *Ante-Bellum North Carolina: A Social History* (Chapel Hill, NC: University of North Carolina Press, 1937), 601-03; J. Herman Schauinger, *William Gaston Carolinian* (Milwaukee, WI: Bruce Publishing Company, 1949), 184-85.

[3] William J. Gaston, *Address Delivered Before the Philanthropic and Dialectic Societies at Chapel Hill, June 20, 1832, by the Hon. William Gaston* (Raleigh, NC: Jos. Gales & Son, 1832), 14; *State v. Will*, 18 N.C. 121 (1834); *State v. Manuel*, 20 N.C. 144 (1838). In the early 1800s, Gaston also advised North Carolina's Religious Society of Friends as to legal procedures for manumission of their slaves. Johnson, *Ante-Bellum North Carolina*, 460.

[4] Charles H. Bowman Jr., "Gaston, William Joseph," *Dictionary of North Carolina Biography*, 6 vols., ed. William S. Powell (Chapel Hill, NC: University of North Carolina Press, 1986), 2:285.

[5] *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866*, ch. 40, §§ 7, 9, 4, 11 (Raleigh, NC: Wm. E. Pell 1866).

[6] The North Carolina General Assembly adopted Gaston's composition as the official state song of North Carolina in 1924. William S. Powell, "Old North State," in *Encyclopedia of North Carolina*, ed. William S. Powell (Chapel Hill, NC: University of North Carolina Press, 2006), 847; N.C. Gen. Stat. § 149-1.

[7] According to Robert Cruden, North Carolina had no black code. Robert Cruden, *The Negro in Reconstruction* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1969), 21; Simon T. Cuthbert-Kerr, "Black Codes," *The Jim Crow Encyclopedia*, 2 vols., ed. Nikki L.M. Brown and Barry M. Stentiford (Westport, CT: Greenwood Press, 2008), 1:80 ("in North Carolina, no formal Black Code was passed"). E. Merton Coulter, Walter L. Fleming, and John Mecklin all posited that no black code ever went into effect in any state, crediting the Freedmen's Bureau for their suspension. E. Merton Coulter, *The South During Reconstruction, 1865-1877* (Baton Rouge, LA: Louisiana State University Press, 1947), 40; Walter L. Fleming, *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial 1865 to the Present Time*, 2 vols. (1906; Gloucester, MA: Peter Smith, 1960), 1:245; John M. Mecklin, "The Black Codes," *South Atlantic Quarterly* 16 (July 1917): 258. According to historian Robert D.W. Connor, because North Carolina's Code "failed to win the approval of the Freedmen's Bureau . . . [the state's constitutional convention] abolished all discriminations before the law between the two races." R. D. W. Connor, *North Carolina: Rebuilding an Ancient Commonwealth 1584-1925*, 4 vols. (Chicago: American Historical Society, Inc., 1929), 2:279. In his study of early American criminal punishment, George Dalzell traced the historical distinctions between capital punishment and other criminal penalties in North and South Carolina, detailing at length adoption of a South Carolina black code and the bewildering array of onerous punishments it enabled. He made no mention of the existence of any black code in North Carolina. George W. Dalzell, *Benefit of Clergy in America & Related Matters* (Winston-Salem, NC: John F. Blair: 1955), 257-66.

[8] W. E. B. Du Bois, *Black Reconstruction*, rev. ed. (1935; New York: Atheneum, 1992), 166.

[9] Mark L. Bradley, *Bluecoats and Tar Heels: Soldiers and Civilians in Reconstruction North Carolina* (Lexington, KY: University Press of Kentucky, 2009), 7. After most southern states had already left the Union, members of North Carolina's Southern Rights party couched their matter-of-fact argument for secession rather dispassionately, in terms of shared "social institutions" and "pecuniary interests" that "naturally and imperatively demand[ed]" a unified defense against their common "enemies" in the North. Joseph Carlyle Sitterson, *The Secession Movement in North Carolina* (Chapel Hill, NC: University of North Carolina Press, 1939), 235-37; "The Disunion Platform," *North Carolina Standard* (Raleigh, NC), April 3, 1861, 4. "When North Carolina did finally secede from the Union, the state became a cantankerous partner in the quest for Southern independence. North Carolinians questioned the authority and decisions of the Confederate administration more often than the citizens of any other state in the Confederacy." Deborah Beckel, *Radical Reform: Interracial Politics in Post-Emancipation North Carolina* (Charlottesville, VA: University of Virginia Press, 2011), 17-18; Paul D. Escott, "Unwilling Hercules: North Carolina in the Confederacy," in *The North Carolina Experience: An Interpretative and Documentary Experience*, ed. Lindley S. Butler and Alan D. Watson (Chapel Hill, NC: University of North Carolina Press, 1984), 267 ("probably no state raised more obstacles to the execution of policies of the [Confederate] central government than North Carolina").

[10] Theodore Brantner Wilson, *The Black Codes of the South* (University, AL: University of Alabama Press, 1965), 114 (North Carolina's Code among the "milder" black codes);

Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67* (Durham, NC: Duke University Press, 1985), 50 (North Carolina Code "fairer" than other black codes); Connor, *North Carolina*, 2:278 (North Carolina Code "notable for its liberality toward the negro" although "it did not admit the negro to entire equality before the law with the whites"). In a passing contradiction, W. McKee Evans characterized North Carolina's Black Code as "the legal definition of the Conservative social order" in its codification of race subordination reminiscent of the antebellum era. W. McKee Evans, *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear* (Chapel Hill, NC: University of North Carolina Press, 1967), 67-68.

[11] Darin J. Waters, "Life Beneath the Veneer: The Black Community in Asheville, North Carolina from 1793 to 1900" (PhD diss., University of North Carolina at Chapel Hill, 2012), 140.

[12] Wilson, *The Black Codes of the South*, 70, 75.

[13] According to historians Hugh Lefler and Albert Newsome, North Carolina's Black Code "played squarely into the hands of [the Joint Committee on Reconstruction] and of the Radicals in Congress." Hugh Talmage Lefler and Albert Ray Newsome, *North Carolina: The History of a Southern State* (1954; Chapel Hill, NC: University of North Carolina Press, 1973), 486. See also Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper & Row, 1988), 199; Coulter, *The South During Reconstruction, 1865-1867*, 42; Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861 to 1866* (Westport, CT: Greenwood Press, 1976), 157.

[14] William A. Dunning, *Reconstruction Political and Economic 1865-1877* (New York: Harper & Brothers, 1907), 56, 58.

[15] Ibid.

[16] James B. Browning, "The North Carolina Black Code," *Journal of Negro History* 15, no. 4 (Oct. 1930): 461-73.

[17] Ibid., 472-73.

[18] I am indebted to Dr. John David Smith for the theory that the historiographical consensus as to the liberality of the North Carolina Black Code may be a byproduct of widespread "North Carolina exceptionalism." The view that, although *in* the South, North Carolina is not *of* the South, has colored many retellings of North Carolina history, as detailed in an insightful collection of revisionist essays edited by Larry Tise and Jeffrey Crow. Larry E. Tise and Jeffrey J. Crow, eds., *New Voyages to Carolina: Reinterpreting North Carolina History* (Chapel Hill, NC: University of North Carolina Press, 2017).

[19] J.G. de Roulhac Hamilton, "Southern Legislation in Respect to Freedmen, 1865-1866," in *Studies in Southern History and Politics* (1914; reprint, Port Washington, NY: Kennikat Press, Inc., 1964), 157. Other North Carolina historians have perpetuated that view of the North Carolina Black Code as "more liberal" than the codes of other southern states. Lefler and Newsome, *North Carolina*, 486. More recently, noted North Carolina historian William S. Powell devoted only a single paragraph to the state's Black Code in his nearly 600-page tome on the state's four-century history. Describing the Code as a measure to "regulate the conduct of blacks," Powell offered a cursory list of six of the Code's features, overstating their limited benefits for blacks and offering the understated conclusion that the Code "did not guarantee full civil rights for blacks." William S.

Powell, *North Carolina Through Four Centuries* (Chapel Hill, NC: University of North Carolina Press, 1989), 383. Historian Milton Ready has offered a slightly more realistic, albeit similarly brief, description of the state's Code as "a last conservative attempt to define race relations in the absence of slavery." Milton Ready, *The Tar Heel State: A History of North Carolina* (Columbia, SC: University of South Carolina Press, 2005), 252.

[20] Wilson, *The Black Codes of the South*, 105-08, 115.

[21] Alexander, *North Carolina Faces the Freedmen*, 50.

[22] Ready, *The Tar Heel State*, 384.

[23] William S. Powell, *North Carolina: The Story of a Special Kind of Place* (Chapel Hill, NC: Algonquin Books, 1987), 2.

[24] Tise and Crow, "A New Description of North Carolina," 375; Johnson, *Ante-Bellum North Carolina*, 831.

[25] "North Carolina—Unworthy Evasion," *New York Times*, December 19, 1865, 4. A similar oft-repeated sentiment, describing North Carolina's relationship with Virginia and South Carolina as a "vale of humility between two mountains of conceit," has been ascribed to a March 6, 1900, speech to the Mecklenburg Historical Society by North Carolina socialite Mary Oates Spratt Van Landingham. William S. Powell, "Vale of Humility between Two Mountains of Conceit," in *Encyclopedia of North Carolina*, 1157. Yet North Carolinians have long perceived themselves as uniquely distinctive from their bordering neighbors, as evidenced by a 1866 letter from "A Whipped Confederate" to the editor of *Daily North Carolina Standard*, urging North Carolina legislators to accept the results of the Civil War and adopt reasonable legislation to facilitate readmission into the

Union, thereby avoiding "the vain pride of Virginia on the one hand, or the insane blindness of South Carolina on the other." "Our Danger and Our Safety," *Daily North Carolina Standard* (Raleigh, NC), January 30, 1866, 1. In 1949, political scientist V.O. Key, Jr., further explored North Carolina exceptionalism, crediting the state's traditional alignment with national interests as the key to that Tar Heel bias: "Many see in North Carolina a closer approximation to national norms, or national expectations of performance, than they find elsewhere in the South. In any competition for national judgment they deem the state far more 'presentable' than its southern neighbors. It enjoys a reputation for progressive outlook and action in many phases of life, especially industrial development, education, and race relations." V. O. Key, Jr., *Southern Politics in State and Nation* (New York: Alfred A. Knopf, 1949), 205.

[26] Matthew Harper, *The End of Days: African American Religion and Politics in the Age of Emancipation* (Chapel Hill, NC: University of North Carolina Press, 2016), 132-33. Historian John H. Haley has faulted a fallacious narrative of superior race relations in North Carolina as the basis for the "social myth" of the state as the "best place" for blacks in the South. John H. Haley, *Charles N. Hunter and Race Relations in North Carolina* (Chapel Hill, NC: University of North Carolina Press, 1987), x.

[27] "Our Sermon on the Times–Address to Whites and Blacks Alike," *Wilmington Herald*, July 17, 1865, 2 (discussing renewal of Virginia's "black code"); "The Black Code," *Daily North Carolina Standard*, December 21, 1865, 1 (reporting passage of Mississippi's "black code"); "Code for the Freedmen," *Daily Sentinel* (Raleigh, NC), January 31, 1866, 2; "This Week's Legislation," *Tarborough Southerner*, February 3,

1866, 2; "Freedmen's Code," *Hillsborough Recorder*, February 14, 1866, 2; "The Freedmen's Code," *Wilmington Journal*, April 12, 1866, 1-2.

[28] Ready, *The Tar Heel State*, 252; Hugh T. Lefler, *North Carolina History Geography Government* (Yonkers-on-Hudson, NY: World Book Company, 1959), 317. Powell's *North Carolina: The Story of a Special Kind of Place* textbook completely omitted the North Carolina Black Code from its discussion of Reconstruction. Powell, *North Carolina: The Story of a Special Kind of Place*, 332-49.

[29] Tise and Crow, "A New Description of North Carolina," 380. That reputation may also explain why North Carolina was chosen as the "pilot state" for a short-lived 1875 conspiracy among southern states to reverse Reconstruction through state action "because its citizens were least likely to be suspected of extremism in opposition to federal authority." Haley, *Charles N. Hunter*, 22.

[30] William Shakespeare, *The Tempest*, act 2, sc. 1, line 253.

[31] Brief for the Plaintiff in Error, *Plessy v. Ferguson*, case no. 210, United States Supreme Court, October Term 1895, in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, 100 vols., ed. Philip B. Kurland and Gerhard Casper (Arlington, VA: University Publications of America, 1975-1986), 13:16, 13:18; Robert D. Miller, "Samuel Field Phillips: The Odyssey of a Southern Dissenter," *North Carolina Historical Review* 58, no. 3 (July 1981), 265, 269, 275-76; *Plessy v. Ferguson*, 163 U.S. 137 (1896).

CHAPTER ONE: THE REPURPOSING OF NORTH CAROLINA'S ANTEBELLUM SLAVE CODE: "THE PAST IS NEVER DEAD. IT'S NOT EVEN PAST."[1]

The reaction to the wave of postbellum southern legislation was swift and indignant. In February 1866, the *New York Times* lambasted the "poor donkey-brained men" who, in their "repugnant and unstatesmanlike" actions, "maliciously did wrong, and knew that they were doing wrong." The proposed laws "for the control of the freedmen are oppressive and barbarous in their nature," objected Boston's *Liberator*, "and, if adopted, would tend directly to the revival of slavery." It was the duplicity that struck the *Memphis Bulletin* for, after "abolishing slavery by accepting the [thirteenth] amendment, [the new law] restores it, *pro tanto*, by recognizing difference between men equally entitled to *protection as freemen*." The *Chicago Tribune* simply threw down the gauntlet: "[W]e tell the white men of Mississippi that the men of the North will convert the State of Mississippi into a frog-pond before they will allow any such law to disgrace one foot of soil in which the bones of our soldiers sleep and over which the flag of freedom waves."[2] The instigators of this journalistic outrage, Mississippi's lawmakers, had gambled first by seceding with its Confederate compatriots and lost. Now, licking their wounds and rebuilding their state in late 1865, Mississippi state legislators sought to erase that unfortunate memory and return the Magnolia State to its antebellum ways.

Emancipation was an inconvenience that simply required a legislative fix.

That flurry of condemnations targeted the adoption of a black code, namely six racially repressive legislative acts, into Mississippi's postwar legislation. The state's legislators sought to remedy what then-Governor Benjamin Humphreys described as the state's devolution into "the receptacle for all the wicked and lawless blacks in the

country."[3] Northern condemnation did not deter imitation. Nine other southern states, including North Carolina, adopted black codes during the seven-month period between late 1865 and mid-1866. These legislative acts coincided with, and were encouraged and enabled by, President Andrew Johnson's brief but indulgently conciliatory management of the "Presidential Reconstruction" post-Civil War reunification process.[4] Hoping to expedite the South's re-entry into the Union, Johnson issued an abbreviated mandate to the former Confederate states: foreswear slavery, secession, and their war debts, and revise their state constitutions accordingly.[5] Otherwise, the states were left to their own devices. Johnson's *laissez-faire* approach to the region's internal affairs fostered an environment of largely unchecked state-level governmental discretion. Free to experiment with race-based statutory schemes, southern legislators embraced a revitalized hierarchical caste system reminiscent of slavery.[6] What better way to ease the sting of military defeat than to return to the familiar?

The Start of a Movement: The Black Codes in Mississippi and South Carolina

The genesis of the black code movement may be found in the August 1865 deliberations of Mississippi's constitutional convention. The convention charged the state's legislature with the "protection and security" of the freedmen, mandating passage of laws to "guard them and the State against any evils that might arise from their sudden emancipation."[7] The vigorous legislative response focused solely on the state's interests.[8] The restrictive measures adopted between November 22 and December 1, 1865, reasserted labor controls over Mississippi's newly emancipated workforce. By bolstering those controls with the enforcement authority of the state, Mississippi lawmakers effectively placed the state in the disciplinarian role that emancipation had stripped from

slaveowners. Among its provisions, Mississippi's Black Code required persons of color to maintain lawful employment, and possess an annual license or other written documentation evidencing such employment. Failure to maintain such documented employment violated the state's new criminal vagrancy statutes. Any black contract laborer who quit his or her job prematurely was subject to arrest (by anyone who found him) and return to his employer, as well as wage forfeiture. The beleaguered Mississippi economy needed a steady supply of readily available field hands to salvage its all-important agricultural industry from wartime ruin. The Mississippi Legislature proved all too eager to oblige.

Mississippi's Black Code did not stop with labor restrictions. Legislators sought statutory control over all aspects of the freedpeople's daily lives. The code allowed black Mississippians to lease, but not own, land, but only property within the state's incorporated towns or cities, unless further restricted by local laws. Miscegenation, a felony offense, carried a mandatory sentence of life imprisonment. Masters of black apprentices received the statutory right to impose "such moderate corporeal chastisement as a father or guardian is allowed to inflict on his or her child or ward at common law," subject only to an undefined prohibition against "cruel or inhuman punishment." Disturbances of the peace – an overbroad offense ranging from cruelty to animals and riots to preaching the Gospel and "insulting gestures, language or acts" – subjected black offenders to imprisonment and a fine of up to one hundred dollars. Its most audacious provision expressly reinstated "in full force and effect" all antebellum criminal laws and punishments that had been solely enforceable against slaves, free blacks, and mulattoes.[9]

Mississippi's lawmakers demonstrated far more attentiveness to the protection of the state, or rather the white citizenry of the state, than the freedmen.

The ensuing journalistic scorn heaped on Mississippi's legislative activities did little to assuage the zeal of other southern legislators. The ink had barely dried on the Mississippi Black Code when, between December 19 and 21, 1865, members of the South Carolina General Assembly adopted their own black code. Described by historian Theodore Brantner Wilson as "more detailed, more comprehensive, and, in some respects, more discriminatory" than its Mississippi predecessor, the South Carolina Black Code rested upon the principle that persons of color "are not entitled to social or political equality with white persons."[10] South Carolina's Code embraced particularly onerous criminal provisions. One statute authorized anyone who witnessed a criminal act by a black person to arrest and deliver the offender to local officials, effectively subjecting black South Carolinians to limitless surveillance. Enhanced punishments applied exclusively to convicted black offenders, including expulsion from the state, hard labor, solitary confinement, whipping and other corporal punishment, and confinement in the stocks or on a treadmill. Only blacks faced the death penalty for the offenses of willful homicide, assault on any white woman "with manifest intent to ravish her," and intercourse with a white woman by impersonating her husband. White criminals received "no punishment more degrading than imprisonment," unless the specific offense was "infamous." If unable to pay any financial penalties immediately, black offenders received one day of "enforced labor" for each dollar of fine owed. White offenders who defaulted on financial penalties instead received one additional day of incarceration for

each dollar owed.[11] South Carolina's Code adhered strictly to its fundamental principle of denying social and political equality for persons of color.

Race also redefined civil matters in South Carolina's Code. New laws required that only black South Carolinians possess an annual license to work in any occupation other than husbandry, field labor, or domestic service. That licensure required proof of suitable skill, fitness, and good moral character, as well as an annual license fee of ten to one hundred dollars depending upon the nature of employment sought. Licenses could be revoked upon any demonstrated abuse by the licensee. The South Carolina Code granted blacks the right "to sue and be sued" in state courts, but targeted the legal claims of black litigants with abbreviated statutes of limitations measured in months rather than years. A black litigant, for example, who failed to sue within three months of an alleged breach of a verbal contract forfeited any right to recovery, because the code's three-month statute of limitations time-barred his breach of contract claim. Meanwhile, a white litigant with the same cause of action had four *years* from the alleged breach in which to file his or her claim. The South Carolina Code also instituted a unique "color and caste" judicial proceeding for white South Carolinians who suffered the indignity of erroneous racial assumptions by local officials. If treated "in a way that would be proper toward a person of color" or refused on a request "to do what a white person would have a right to demand to be done," the aggrieved white claimant could seek a court order mandating improved treatment consistent with his status as a white person.[12] Like their Mississippi colleagues, the South Carolina legislators aggressively sought to regain virtual control over the newly emancipated.

The Initial Aftermath of the Black Code Movement

Northerners immediately objected to the legislative activity in Mississippi and South Carolina as a blatant ruse to achieve with postwar state legislation what could not be won on the battlefield. "Slavery is not abolished," lamented the *Chicago Tribune*, "the colored race have merely been outlawed." The Mississippi Black Code had initiated an ignominious movement backwards:

> Instead of each slave being the property of one master, as heretofore, the entire four millions of slaves are the property of the eight millions of masters as a class. . . . A third of the population of the South are merely lifted from the lowest of all kinds of slavery, into that ameliorated form of slavery which . . . the Hebrews under the rule of the Pharaohs were subjected to. They are the slaves of the State. . . . But now, as under the state of absolute slavery, the colored population, as a whole, have no rights which the white population are bound to respect. If the whites choose to enact that a negro shall have the right to live, it is the right of the white man so to enact that is respected, not the inherent right of the negro to live. So of all other "rights" that may be extended to the negro.
>
> The fundamental doctrine which underlies all Southern society to-day, and which forms the President's policy of

> reconstruction, is that the negro is not by inherent right a citizen . . . .[13]

In short, as opposed to unalienable rights, the freedpeople received only alienable indulgences. Citizenship for blacks thereby remained an unanswered question until ratification of the Fourteenth Amendment. Pioneered by the Codes of Mississippi and South Carolina, however, the concept of transforming slavery from involuntary servitude to caste system, from private to public property, quickly spread throughout the South.

There had been early hints of that dawning southern legislative movement. The *Chicago Tribune*'s southern correspondent Sidney Andrews discovered those clues among the citizenry of Georgia and the Carolinas during his tour between September and November 1865. In his travelogue *The South Since the War* (1866), Andrews described the brewing controversy: "I did not anywhere find a man who could see that laws should be applicable to all persons alike; and hence even the best men hold that each State must have a negro code. They acknowledge the overthrow of the special servitude of man to man, but seek through these codes to establish the general servitude of man to the Commonwealth."[14] The smoldering discontent of white southerners over the unsettled status of the freedpeople was but a harbinger of what could be expected from their elected officials.

That discontent festered into a contemptuous standoff between southern legislators and congressional leaders over ratification of the Thirteenth Amendment. Southern legislators were generally, albeit reluctantly, willing to accept the abolition of slavery within the Amendment's first section in exchange for readmission into the Union. The Union-restored governments of Virginia and Louisiana adopted the Amendment in

February 1865, followed two months later by the Unionist governments of Arkansas and Tennessee. But the ambiguous breadth of legislative authority granted to Congress by the Amendment's second section delayed further ratification.

The power ceded by that second section, giving Congress an open-ended right "to enforce this article by appropriate legislation," provoked the ire and resistance of state lawmakers. In a December 2, 1865, speech in the North Carolina Senate, senator Dennis D. Ferebee echoed antebellum rhetoric and foreshadowed elements of the state's Black Code as he passionately articulated the concerns of many southern legislators:

> If, therefore, the first section *alone* were proposed and adopted, the objection to it would not be so great or so serious. All legislation for the negro . . . would still be by the States. . . . But the second section of the proposed amendment, presents another, and quite a serious, question. It proposes to legislate for the colored race, within the States, in all matters where it may be supposed they are restrained in their rights and privileges. . . . The Congress of the United States never has had, and unquestionably should not now have, the right to control, by its legislation, the municipal regulations of a State, either as to individuals or classes of individuals. These are properly, and exclusively, the subject of State legislation . . . . [T]he right to legislate for our own domestic institutions–the right to make and enforce laws for the protection of our lives, our

> hearths, and our firesides–to say who shall testify in our courts, or sit in the jury box, or on our judicial benches–who shall be invested with the elective franchise–or whether the negro may be permitted to intermarry with the white race–these rights truly constitute, to the States, the very keystone in the arch, upon which rests the temple of liberty. . . . The freedom of the negro is a question of fact which every one will decide according to his peculiar ideas as to what constitutes freedom. . . . By giving our assent to this Constitutional amendment, we yield into the hands of Congress the right of a State to legislate for itself. When that right is once granted, it can never be recalled. . . . The Negro will not be benefitted by it . . . . His habits, his peculiar temperament, his wants, both physical and moral, are better understood by us, than they possibly can be, by strangers. Nor should we forget the moral tie, which, at the South, binds the two races together. . . . [T]he happiness of the negro–in all that constitutes his moral and physical comforts, and his general welfare–will not be protected by yielding to the Congress of the United States, the right to legislate for him within the States.[15]

Cloaked in claims of benevolent familiarity and moral paternalism for the freedpeople, the objections of southern legislators like Ferebee centered upon a suspected hidden

congressional agenda. Behind that seemingly innocuous second section lurked a perceived hostility that could prove fatal to state autonomy. Ferebee was at least correct in that respect. Congressional leaders did in fact consider the Amendment's second section as the means of ensuring the freedom of the freedpeople, even if that meant universal black suffrage.[16]

That potential for what southern legislators considered unintended consequences further antagonized an already complicated ratification process. In a display of ratification remorse, North Carolina legislators passed an explanatory resolution two weeks after their December 4, 1865, ratification of the Thirteenth Amendment. The Amendment had passed, according to the legislators' post hoc attempt to condition their ratification votes, solely "in the sense given to it by the Honorable William H. Seward, Secretary of State of the United States, to wit: That it does not enlarge powers of Congress to legislate on the subject of freedmen within the States."[17] Similar conditional ratification votes issued from the legislatures of South Carolina, Alabama, and Florida, clarifying the southern consensus that no state legislative authority had been ceded by the Thirteenth Amendment.[18] Ultimately, in order to secure the requisite votes for ratification, congressional Republicans accepted the narrow construction foisted upon the Amendment by southern legislators.[19] Thus constricted, the Thirteenth Amendment only forbade slavery and involuntary servitude. It neither assured nor referenced racial equality. And as evidenced by the proliferation of the black code movement, white Southerners had no intention of affording such equality willingly.

Why a North Carolina Black Code?

Regardless of underlying legislative intent, all eleven black codes incorporated race-based exclusion, in that each accorded different treatment to blacks and whites based solely on race. Such exclusionary measures factored into North Carolina's antebellum laws, but the historiography of the black codes has offered no credible explanation for the state's postwar perpetuation of such measures or participation in the black code movement. Attempts by historians to universalize the underpinnings of the movement – in terms of some philosophical consensus among southern lawmakers for resolving common problems caused by emancipation – have devolved into generalities that ignore North Carolina's specific circumstances and the unique elements of its Code. The ensuing subjective labels applied by historians, categorizing the North Carolina Black Code as moderate or progressive, have provided no insight as the legislative impetus for its adoption. Indeed, such blanket characterizations lack any substantive consideration of whether the state's freedpeople actually received milder, fairer, or more liberal treatment afforded either antebellum black North Carolinians or postbellum freedpeople in other states. Quite simply, the causation and adoption of the North Carolina Black Code have been lost in the mire of shibboleths endemic to the historiography of the black code.

Historians, including Eric Foner and William Cohen, have often pointed to a need for labor control as the foundation for the black code movement. Abolition of slavery eliminated the South's most valued commercial resource – a secure workforce and the lawful means by which to control it. Labor was already "scarce and dear" prior to the Civil War, according to the U.S. Census Bureau's 1860 study of the nation's agricultural industry.[20] Almost singularly dependent upon its agricultural economy, postwar

southerners faced the monumental task of reclaiming scarred battlefields for farmland without the aid of thousands of former farmers killed or maimed in combat. According to white southerners, the further abrupt loss of a captive labor force of nearly four million former slaves threatened cataclysmic repercussions, necessitating an immediate replacement. The most expedient solution was to reenlist that liberated work force, voluntarily or involuntarily.

Foner has argued that, for all their racial differentiation, from marriage rights to trial testimony limitations, the primary goal driving the black codes was resolution of that labor problem, backed by the imprimatur of state law. In his estimation, the codes' "centerpiece was the attempt to stabilize the black work force and limit its economic options apart from plantation labor."[21] Convinced that black persons would only work under compulsion, Mississippi and South Carolina legislators devised a range of creative financial obstacles to return emancipated blacks back to former masters and their failing plantations.

The first black codes allowed the freedpeople to contract out their own labor, subject to strict and severe legal penalties for contractual violations. Enticement statutes entrenched those labor contracts and restrained movement of labor via stiff criminal and civil penalties for contracted workers who abandoned their employment agreements and anyone who persuaded them to do so. Restrictive child apprentice regimes and aggressive anti-vagrancy laws bound laborers firmly to their employers and penalized noncompliant freedpeople with involuntary labor, thereby expanding the labor pool through punitive coercion. Limitations on black ownership or leasing of land, coupled with new license fees on blacks working in any capacity other than as servant or agricultural laborer,

negated economic opportunities for the freedpeople. Provisions authorizing state and local officials to hire out convicts to work off debts and fines were obvious reminders of the labor system that had just been abolished.[22]

Cohen conceded Foner's point of view as to the codes' ultimate goal of labor control, but further condensed the multitudinous provisions of the codes into a single common element, the limitation of mobility. "[T]hrough the creation of an unobtrusive legal structure that could be selectively applied to enforce the contract [labor] system" by constricting worker mobility, Cohen argued, the black codes mitigated the perceived detrimental impact of emancipation. The rapidity and fidelity with which other southern legislators mimicked or refined such legislative measures evidenced a regional desire to impede black mobility and regain control over formerly captive labor.[23]

The sheer size of the former slave populations in Mississippi and South Carolina seemingly demanded some prompt legislative attention. According to Wilson, labor control legislation comprised the urgent concern of the states that, as a result of their large-scale agricultural economies, were most likely to have large populations of former slaves and few previously free blacks. Legislators in those states viewed labor control as a necessary means to reduce the risk that the newly mobile workforce might simply leave fields uncultivated and crops unharvested.[24] Of the seventeen slave-holding states surveyed in 1860 by the United States Census Bureau, Mississippi (436,631 slaves) and South Carolina (402,406 slaves) had the third and fifth largest slave populations, respectively. Their free black populations were inversely minimal. South Carolina's 9,914 free blacks and Mississippi's 773 free blacks ranked as sixth and eleventh in terms of population size among the slave-holding states. North Carolina ranked seventh as to

the largest slave (331,059 slaves) and third as to the largest free black (30,463 free blacks) populations among the same seventeen slave-holding states.[25] Those numbers are deceptive, however. While also sustained by an agricultural economy, North Carolina remained far less dependent upon involuntary servitude to empower that economy. Labor control did not drive North Carolina's participation in the black code movement.

The plantation-based economies that dominated Mississippi and South Carolina did not thrive in the Old North State. The uncompromising terrain of North Carolina, as well as the state's limited land supply in the fertile coastal regions and inadequate transportation infrastructure, frustrated both the congregation of expansive plantations and the large-scale agricultural production of labor-intensive products such as cotton and rice. Without significant cultivation of those crops, North Carolina's agricultural economy developed differently from Mississippi and South Carolina. Smaller farms with greater crop diversity drove agriculture in North Carolina, as shown in Appendix 1.[26] Of the thirty-five agricultural product categories surveyed by the 1860 census, North Carolina's produce yield exceeded both Mississippi and South Carolina in twenty-five produce categories, in nearly every case by substantial margins.

In 1860, the Old North State featured more farms (75,203) of smaller size (46,307 farms under 100 acres each) but with more total cultivable acreage (6,517,284 acres) than either Mississippi or South Carolina. Fewer slaveowners (34,658) operated those North Carolina farms with fewer slaves. Indeed, fewer than four percent of North Carolinians owned *any* slaves and, of those owners, approximately seventy percent owned fewer than ten slaves. Other regions throughout the South that lacked one significant staple crop reduced their dependency on slave labor. White North Carolinians instead clung to

slavery as "their preferred system of labor."[27] The comparative scope and scale of agricultural operations in Mississippi and South Carolina, and the resulting dependency upon slave labor, is evident in the Census data summarized in Appendix 1. According to historian Guion Griffis Johnson, North Carolina's rural landowners survived largely as the result of their own labors.[28]

Johnson also suggested that North Carolina farmers tended to underutilize their slave labor.[29] That view coincides with recent arguments by historians Bradford J. Wood and Larry E. Tise that social convention and white superiority were as important to the institution of slavery in North Carolina as economics. In antebellum North Carolina, slavery was "as much about mastery as about balancing accounts, even though it was clearly about both." Indeed, the state's comparatively smaller slave population suggests less reliance upon the ready availability of slave labor, and therefore less urgency for strict control over such labor. White North Carolinians did not *need* slavery. They *chose* slavery.[30] Likewise, white North Carolinians chose its Black Code and the labor control it afforded.

Theories about the genesis of the black codes frequently credit white fear as motivation for the legislation. With little consensus on the source of such fear, the historiography has focused on a pervasive but amorphic postwar dread that gripped white southerners, the unchecked freedom of millions of former slaves. According to pioneer disciples of historian William A. Dunning, the innate depravities of purportedly inferior blacks prompted a foreboding among whites. "Liberty with the negroes rapidly degenerated into license," North Carolina historian J.G. de Roulhac Hamilton asserted in 1914, and "unconsciously set about the destruction of civilization in the South. . . . [A]

large part of the South became a veritable hell through misrule which approximated to anarchy." The perceived urgency to preserve endangered southern institutions triggered the black codes as defensive mechanisms, that in Hamilton's view were "on the whole reasonable, temperate, and kindly; but in the main, necessary."[31] Indeed, historians have alternatively described whites' responses to reports of freedmen as marauding highwaymen and insubordinate militia as either the legitimate fear of a vengeful population seeking retribution, or a senseless hysteria fed by the unfamiliar and unsettling sight of former slaves roaming free.[32]

A more benign origin story for that white fear has arisen from other alleged inadequacies of blacks, such as ignorance and ineptitude. One author likened emancipation of the unsophisticated freedpeople to "the freedom of the boy who has received an unlooked for holiday from the unpleasant tasks of school."[33] Prompted by some mixture of paranoia and selfish paternalism, whites feared that blacks were ill-prepared for the responsibilities of freedom, necessitating legislation to prevent irreparable disruption of social stability and community safety. Alternatively, the fear may have centered on what white southerners stood to lose as opposed to what freed blacks might do. Historian Robert Cruden, not an adherent to the so-called "Dunning School" of historians, argued that whites' fear of loss outweighed any concern of racial violence or disruption. In that view, the codes provided a legislative balm for white trepidation that emancipation had ended the proverbial "southern way of life" and initiated the demise of the South as "white man's country."[34] Whether prompted by visions of racial violence, institutional upheaval, or fading lifestyles, the anxieties of white southerners shared a common focus, the impending disruption of white superiority.

Proponents of the white fear theory have argued that perceptions of the inevitability of "anarchy, an invitation to theft, vagrancy, and a retrogression to African barbarism" triggered by emancipation necessitated legislative racial controls.[35] The freedpeople's storied proclivity for chaos had to be neutralized, and legislative relegation of all blacks to a subordinate class provided the appropriate vehicle for doing so. Mississippi and South Carolina's Black Codes preserved white superiority by re-shackling the newly emancipated with statutory restrictions on virtually every aspect of their everyday lives. Conversely, at least according to Hamilton, North Carolina's Code – evidencing only "slight discrimination" – "was characterized by justice and moderation."[36] Regardless of the methods employed, racial control revitalized black subordination, and the black codes offered the legal imprimatur for the continuation of that subjugation.

Census data lends some credence to the white fear theory, at least regarding Mississippi and South Carolina. In both states, slaves outnumbered whites. As of 1850, there were 105 slaves for every one hundred white Mississippians and 140 slaves for every one hundred white South Carolinians. Ten years later, slaves comprised fifty-five percent of Mississippi's population and fifty-seven percent of South Carolina's population. The 1860 Census reported slaves outnumbering whites in thirty-one of Mississippi's sixty counties and twenty of South Carolina's thirty counties. In fact, slaves counted for more than sixty percent of the population in each of twenty-three Mississippi counties and thirteen South Carolina counties. The slave population exceeded ten thousand slaves in each of sixteen Mississippi counties and seventeen South Carolina counties. The abolition of slavery only exacerbated the longstanding concerns among

white Mississippians and South Carolinians as to their precarious minority status, fueling the perceived need for black code protection.[37]

North Carolina's slave population was much sparser. Only fifty-two slaves lived in North Carolina in 1850 for every one hundred white North Carolinians. By 1860, slaves outnumbered white inhabitants in only sixteen of North Carolina's eighty-six counties, and thirteen of those counties were concentrated in the eastern part of the state. Only six counties, all in eastern North Carolina, had slave populations exceeding ten thousand and of those, only Warren County's slave population exceeded sixty percent.[38] As compared with Mississippi and South Carolina, more free blacks and fewer slaves called North Carolina home, and they were more dispersed throughout the entire state, making coordinated seditious activity far more complicated and unlikely. White North Carolinians should therefore have been less susceptible than their Mississippi and South Carolina counterparts to frantic anxiety and perceived urgency for legislative protection against the freedpeople.[39] What white fears of black violence that arose in postwar North Carolina had largely dissipated by the time a draft Black Code reached the General Assembly in late January 1866.[40]

Hypotheses such as labor control and white fear offer useful context for the black code movement, but they do not fully explain the adoption of the codes. The clues provided by those theories do not generate a singular cohesive answer, in part because of each state's unique conditions, such as North Carolinians' purported penchant for moderate or even liberal dealings with the state's black population.[41] Although no less insidious, antebellum slavery had been comparatively less pervasive in North Carolina – fewer slaves, fewer slaveowners, and a less prevalent role in the overall labor force.

Labor control thereby fails to explain the state's willing participation in the black code movement.

The postbellum racial composition of North Carolina – a widely dispersed thirty-six percent black population with minimal areas of concentration – similarly casts doubts about white fear as an explanation for race-based constraints. White North Carolinians' peaceful co-existence with one of the largest free black populations in the South actually suggests some level of experience and familiarity likely to assuage white fears. Even racial control, perhaps a more credible rationale for the state's Black Code, seems too rudimentary as an explanation. In truth, the elected officials of the eleven black code states, including those in the North Carolina General Assembly, wanted all of those things: labor control, a salve for white fear, racial control, and more. They did not want a *type* of control. They simply wanted control – unlimited, unquestioned, and unending.

In seeming recognition of the futility of isolating a single explanation for all eleven black codes, in his seminal *Black Reconstruction* (1935), the historian/sociologist William Edward Burghardt Du Bois pointed instead at the big picture: the yearning among white southerners for the way things had always been. After tracing the control mechanisms of the black code movement back to Mississippi and South Carolina, Du Bois castigated the entire movement as a "plain and indisputable attempt on the part of the Southern states to make Negroes slaves in everything but name."[42] Regardless of the relative sizes of their former slave populations or the economic significance of those populations' involuntary servitude, the black code states shared contempt for the black race and aspiration for continued white hegemony. Those two attributes permeated the Mississippi and South Carolina Black Codes, creating what historian John David Smith

has described as catalogs of "blacks' civil disabilities." Infused with unrepentant white superiority, those models of all-encompassing racial caste regimes filtered quickly throughout the South. Self-righteous justifications rationalized such stratification as a purportedly beneficent disciplinary structure intended to protect the freedpeople from their own supposedly innate inferiority and incompetence. According to Smith, the recurrent free-but-not-equal tenet of the black codes, while not "a mere subterfuge for slavery," certainly revealed an intent to maintain blacks "as close to bondage as possible."[43] As envisioned by those southern lawmakers, it would be as if the Civil War had never been fought.

There is little to suggest that North Carolina lawmakers thought otherwise. William Holden, owner and editor of Raleigh's *Daily Standard* newspaper, and President Johnson's appointee in May 1865 for North Carolina's provisional governor, articulated that very agenda of comprehensive societal control shrouded in benevolent paternalism even before Mississippi's postwar legislature convened. In an unusual digression within his June 12, 1865, proclamation calling for a constitutional convention in North Carolina, Holden lectured the state's black population at great length. Convinced of their inferiority, Holden bluntly declared his expectations for the future conduct of black North Carolinians:

> To the colored people of the State . . . . [i]t now remains for you, aided as you will be by the superior intelligence of the white race, and cheered by the sympathies of all good people, to decide whether the freedom thus suddenly bestowed upon you, will be a blessing to you or a source of

injury. Your race has been depressed by your condition of slavery, and by the legislation of your former masters, for two hundred years. It is not to be expected that you can comprehend and appreciate as they should be comprehended and appreciated by a self-governing people, the wise provisions and limitations of Constitutions and laws; or that you can now have that knowledge of public affairs which is necessary to qualify you to discharge all the duties of the citizen. . . . But to be prosperous and happy you must labor, not merely when you feel like it, or for a scanty support, but industriously and steadily, with a view to making and laying up something for yourselves and your families. If you are idle you will become vicious and worthless; if vicious and worthless you will have no friends, and will at last perish. . . . Freedom does not mean that one may do as he pleases, but that every one may, by industry, frugality, and temperance, improve his condition and enjoy the fruits of his own labors, so long as he obeys the laws. . . . [W]hile I am a white man, and while my lot is with my own color, yet I sympathize with you as the weaker race. . . . I will set my face against those of you who are idle and dissipated, and prompt punishment will be inflicted for any breach of the peace or violation of law. In

> fine, I will be your friend as long as you are true to yourselves, and obedient to the laws, and as long as you shall labor, no matter how feebly, if honestly and earnestly, to improve your condition. It is my duty, as far as I may, to render the government "a terror to evil doers, and a praise to them that do well;" . . . .[44]

Holden's incessant emphasis on racial inferiority and the necessity for lawful behavior and persistent hard work signaled his opinion of North Carolina freedpeople. It also validated the creation of a statutory scheme mandating such behavior. Despite addressing the freedpeople, Holden likely intended his diatribe as marching orders for the men who would serve in North Carolina's constitutional convention mandated by his proclamation. They got the message.

On October 11, 1865, less than two weeks after its opening session, the North Carolina constitutional convention received a committee report answering Holden's call. Chaired by John Pool, the committee had been formed by the convention to study a petition delivered by delegates from the inaugural Convention of the Freedmen of North Carolina.[45] Its report recommended appointment of a three-man commission "to prepare and submit to the consideration of the Legislature, at its next session, a system of laws upon the subject of freedmen." Committee members reasoned that it was "the duty of the State to assume control" of the transition of the freedman from slavery to freedom. "It is in the interest of the white race, if [the freedman] is to reside among us, to improve and elevate him by the enactment of such laws" that would instill the former slave – left ignorant and inept, as acknowledged by committee members, "[i]n consequence of his

late condition as a slave" – with the industry, virtue, and lawful behavior needed for survival. Even so couched in terms of the self-interest of white North Carolinians, such aspirational goals seemingly presaged a beneficent black code for the Old North State. Instead, echoing Holden's views of the freedpeople, the members of the Pool committee called for legislation "suited to the actual condition of the parties," and not "theoretical schemes of social and political equality."[46] The remainder of the Pool committee report offered what the committee considered to be the appropriate course of action for the new freedmen commission.

The Pool committee considered racial prejudice to be universal. It could only be mitigated by time, not legislation. Such biases therefore needed to be "respected by legislators, so as to avoid rash attempts at measures that might serve only to inflame and strengthen them." Warned against "[h]asty and inconsiderate action," party politics, and external interference, legislators needed to resist "the agitation of impracticable claims for social and political rights [and] the aid of those whose interference is likely to be regarded with jealousy and met with resentment." The Pool committee members "deplore[d] the premature introduction of any schemes that may disturb the operation of these kindly feelings, or inflame the inherent social prejudice that exists against the colored race."[47] Just as provisional governor Holden had signaled his expectations to the constitutional convention members, the Pool committee signaled their expectations to the proposed freedmen commission that members of the constitutional convention authorized Holden to appoint.[48] Postwar conditions in North Carolina may not have generated the pervasive white anxiety that prompted the social controls of the Mississippi and South Carolina Black Codes or necessitated the Codes' labor restrictions. But North Carolina

legislators unmistakably wanted comprehensive societal control on their own terms to maintain white North Carolinians separate, apart, and above their former slaves.

The North Carolina Black Code: What is Old is New Again

The North Carolina General Assembly ratified the state's Black Code in March 1866, with the unambiguously entitled "Act Concerning Negroes and Persons of Color or of Mixed Blood" as its centerpiece.[49] That Act, a brief six pages of racially explicit legislation, duplicated almost verbatim a draft bill proposed on January 22, 1866, by the freedmen commission formed on the recommendation of the Pool committee. With that proposed bill, the freedmen commission also presented the General Assembly with an explanatory report, as well as eight other bills that did not expressly reference the freedpeople. Although beyond their charge to prepare a "system of laws upon the subject of freedmen," the commissioners considered the additional proposed legislation as their "duty, in view of the very great changes which have so suddenly taken place, to recommend the passage of certain laws equally applicable to both populations."[50] The behaviors targeted for restriction by those eight bills – covering a gamut of subject matters and expressed in racially-neutral terms – betrayed the commission's underlying intent. The criminalized conduct focused on transgressions presumably considered characteristic of an indigent and uneducated people newly left jobless, homeless, and without an immediately foreseeable means for support. Those offenses included vagrancy, trespass, theft of livestock and other property, and insurrection. Punishments were largely discretionary and included stints in the pillory, public whippings, incarceration with forced labor, and death.[51]

Those nine proposed bills were not new. They derived largely from North Carolina's antebellum slave laws, closely tracking then-current legislative language adopted as early as the State's 1837 *Revised Statutes*.[52] Accordingly, in accepting the recommendations of the freedmen commission, members of the General Assembly did not "enact" or "ratify" legislation in the truest sense, but instead reformulated and reaffirmed existing law. Most of North Carolina's Black Code already existed in all but name. It was not, as suggested by most historians, a newly adopted legislative scheme that merely parroted the earlier Mississippi and South Carolina Black Codes.[53] North Carolina's Code instead signified a statutory retrofit, cobbling together a patchwork of the state's antebellum statutes. Appendix 2 summarizes the provisions of the North Carolina Black Code and cites the state's antebellum statutes upon which they were based. In making what was old new again, the freedmen commission and the General Assembly signaled something more than just "a system of laws upon the subject of freedmen." A more surreptitious legislative agenda was in play.

By late January 1865, aggressive black code experimentation by legislators across six other southern states had already riled indignant northerners. The North Carolina Black Code represented a changed tack that sought to placate congressional leadership with an adaptive approach for governing the state's freedpeople. Consistent with the begrudging grants of minimal civil rights within other states' black codes, North Carolina's Code offered limited concessions to its freedpeople, including access to courts, freedom to marry, and opportunity to contract. Other black codes narrowed those rights with exhaustive lists of racially explicit restrictions. The North Carolina Black Code instead simply offset its concessions with seemingly innocuous conditions, such as

the requirement that most contracts with blacks be in writing, signed by all parties, and witnessed by a literate white person. By resurrecting an abbreviated but tested version of the state's antebellum statutory regime, North Carolina lawmakers crafted their Black Code as a re-imagined statutory compilation fueled by the inherent prejudices and societal misgivings of the state's white population. Other states had enraged Congress with explicitly discriminatory black codes intended to secure social stratification and racial control. North Carolina achieved the same agenda through more covert legislative means.

The North Carolina Black Code represented a tripartite legislative strategy of stratification, accommodation, and control. The initial emphasis centered on the resuscitation and clear delineation of the state's societal structure. State legislators reached for the familiar, codifying the traditional antebellum primacy of white North Carolinians in a carefully defined social stratification construct that subjugated "persons of color" with legal force. Political hostility in Congress and across the North complicated the resurrection and preservation of that race-based social structure. Tar Heel lawmakers deployed accommodation to deflect that hostility, granting the state's blacks a limited collection of civil rights judiciously selected to avoid erosion of white privilege. Finally, to secure racial control, legislators codified traditional means for subjugating blacks with a series of race-specific and race-neutral provisions. The purportedly innate proclivity of blacks for misconduct, once suppressed by the master's whip, was now criminalized and punishable by the state. While perhaps more constrained on its face than other states' blatantly discriminatory codes, the North Carolina Black Code and its

underlying tripartite strategy contradict the claims of progressive moderation ascribed to them by the generalities of black code historiography.

Stratification

Social stratification must be based upon differentiation, which in turn requires some specificity of definition. North Carolina lawmakers chose race as the basis for that differentiation. Given the North Carolina Supreme Court's prior determination in *State v. Manuel* (1838) – that all free men of North Carolina, "whatever their colour or complexion," were state citizens – race would appear to have been a curious choice.[54] At issue in *Manuel* were a series of state laws requiring county courts to hire out free blacks financially unable to pay court-imposed fines stemming from criminal convictions.[55] The law did not apply to similarly situated white convicts. Finding free black William Manuel financially unable to pay the twenty-dollar fine imposed for his conviction for assault and battery, the Sampson County Superior Court ordered the county sheriff to hire Manuel out to anyone who would pay the fine in exchange for Manuel's services. In Manuel's appeal challenging the constitutionality of those laws, the state's attorney general foreshadowed the U.S. Supreme Court's grappling with black citizenship in *Dred Scott v. Sanford* (1857) by arguing that free blacks like Manuel had no rights or redress under the state's constitution because they were not citizens of the state.[56]

In his rejection of the state's argument, justice Gaston – who had celebrated his home state as "foremost in Liberty's story" in his composition "The Old North State" – seemingly preordained the appropriate treatment for emancipated slaves in his *Manuel* opinion. He wrote, "According to the laws of this State, all human beings who are not slaves, fall within one of two classes [citizens or aliens]. . . . Foreigners until made

members of the State continued [as] aliens. Slaves manumitted here become free-men–and therefore if born within North Carolina are citizens of North Carolina–and all free persons born within the State are born citizens of the State." In an oft-overlooked passage of that same opinion, however, justice Gaston qualified his definition of citizenship, thereby diluting that apparent gain for free blacks: "But surely the possession of political power is not an essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes are not citizens–and free white men who have paid public taxes and arrived at full age, but have not a freehold of fifty acres, inasmuch as they may vote for one branch and cannot vote for the other branch of our legislature, would be in an intermediate state, a sort of hybrids [*sic*] between citizens and not-citizens."[57] Citizenship, according to justice Gaston, was subject to gradation with varying degrees of political power.

That tiered concept of citizenship similarly excused the challenged statute's disparate treatment for impoverished free blacks. According to justice Gaston, Manuel's "color and his poverty are the aggravating circumstances of his crime," such that punitive distinctions based on those factors were neither arbitrary nor repugnant to the state's constitution:

> Whatever might be thought of a penal Statute which in its enactments makes distinctions between one part of the community and another capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the legislature for the suppression and punishment of crime, they may rightfully so apportion

> punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend, as to produce in effect that reasonable and practical equality in the administration of justice which it is the object of all free governments to accomplish. . . . What would be a slight inconvenience to a free negro, might fall upon a white man as intolerable degradation. The legislature must have a discretion over this subject . . . .

In justice Gaston's estimation, no law that required only indigent free blacks be hired out in satisfaction of criminal fines could "contain such a flagrant violation of all discretion as to show a disregard of constitutional restraints," thereby precluding a finding of unconstitutionality.[58] Therein lay the necessary groundwork for a multitiered citizenship structure both conducive to social stratification and capable of codification and legal enforcement.

The state's supreme court returned to justice Gaston's line of reasoning in *State v. Newsom* (1844) to uphold race-based legal distinctions. Citing "[s]elf preservation [as] the first law of nations," the court found a legitimate state interest in protecting "the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character." The criminal offense with which defendant Elijah Newsom had been charged, outlawing the unlicensed possession of a shotgun by a free black, coincided with the longstanding treatment of blacks as "a separate and distinct class" "[f]rom the earliest period of our history." The framers of the state constitution, cognizant of traditional legal

disabilities predicated solely on race, had not mandated equal treatment for blacks. Nor had the *Manuel* court ruled otherwise. The *Newsom* court considered itself compelled to perpetuate that caste system: "We *must*, therefore, regard it as a principle, settled by the highest authority, the organic law of the country, that the free people of color cannot be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them; so that they do not violate those great principles of justice, which ought to lie at the foundation of all laws."[59] The frequent recipient of accolades for its recognition of the citizenship of a manumitted slave, justice Gaston's *Manuel* opinion actually sowed the seeds for the Reconstruction era's race-based bifurcation of citizenship by North Carolina's Black Code.[60] Lawmakers simply had to determine how to delineate that bifurcation. That task had already previously proven beyond their capabilities.

Prior to 1866, North Carolina's 1854 *Revised Code* provided the most comprehensive redraft of the state's overall legislative code. Its statutory definition of race, despite its basis in the 1835 amendments to the North Carolina Constitution, hardly offered a model of clarity: "All free persons descended from negro ancestors, to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes and persons of mixed blood."[61] The recycling of the convoluted "fourth generation inclusive" evidentiary standard – a timeworn formula first adopted in 1777 and frequently criticized for its mandate of multigenerational sleuthing through litigants' ancestries – further complicated that definition.[62] With its haphazard and often synonymous use of the terms "slave," "negro,"

and "persons of color" to reference people of varying degrees of African descent, the *Revised Code* did little to clarify the definition of race. The omission of the term "persons of color" from the *Revised Code*'s statutory definition of race inadvertently left that term undefined, opening a convenient loophole for canny lawyers.

William Chavers had such lawyers. A free black, Chavers' conviction in the Spring 1857 term of the Brunswick County Superior Court stemmed from his possession of an unlicensed shotgun. Trial evidence of his race included his physical appearance, witness testimony about his father's physical appearance, and Chavers' own alleged out-of-court statements while paying the half-price "colored persons" fare for a Wilmington steamboat. But the indictment charged Chavers as a "free person of color" and not as a "free negro," the term actually used by the statute to identify whose conduct was criminalized.[63]

On appeal to the North Carolina Supreme Court, Chavers' lawyers called the judges' attention to that discrepancy and to the absence of any statutory definition for "free persons of color" in the 1854 *Revised Code*. The court found no clarifying correlation between a "free person of color" and a "free negro" in the state's constitution or legislative code. The court therefore considered the term "free person of color" broader than the statute's express limitation to "free negro," potentially encompassing people not contemplated by the statute, including native American descendants and people removed more than four generations from black ancestors. The indictment's identification of Chavers as a "free person of color" thereby impermissibly expanded the crime beyond the scope of the statute, creating a flaw that nullified Chavers' conviction.[64]

The *Chavers* decision undoubtedly influenced the definition of race in the North Carolina Black Code. After all, North Carolina attorney Bartholomew F. Moore, "the venerable and venerated father of the North Carolina Bar" who co-authored the *Revised Code* at issue in *Chavers*, also chaired the freedmen commission charged with drafting that Black Code.[65] The racial ambiguity identified in *Chavers* lacked the specificity needed to sustain a legislative system of race-based social stratification, particularly under the scrutiny of racially sensitized congressmen. Moore's freedmen commission therefore emphasized clarity of race in its proposed legislation. The commission's recommended definition first grouped blacks and Indians into the singular category of "persons of color," citing various statutory terms previously associated with both races (including "negro" and "person of mixed blood").[66] That recommendation echoed prior legislative efforts dating back to the 1820s to create one nonwhite category of mixed lineage North Carolinians deemed unworthy of political participation.[67] In direct response to the *Chavers* decision, the freedmen commission also proposed a separate provision recognizing "persons of color" as an adequate identification for any person required by indictment or judicial proceeding to be described as "a negro, or Indian, or person of mixed blood." Finally, the commission recommended an express exclusion of any ethnicity other than blacks or Indians from the "persons of color" category: "no other person of mixed blood shall be deemed such negro, Indian, person of color, or person of mixed blood."[68] A system designed to favor one race over another required such meticulous lexical precision.

North Carolina lawmakers ignored those recommendations. Their simplistic solution – one term ("person of color") defined in the single-sentence introductory

section of the Black Code – only generated further ambiguity to the detriment of black North Carolinians. The 1866 Act Concerning Negroes applied to all persons of color, but only "negroes and their issue, even where one ancestor in each succeeding generation to the fourth inclusive, is white, shall be deemed persons of color."[69] The limitation of "persons of color," a broad term of nonwhite race fluidity, to a single race revealed legislators' primary concern: the social dynamic of whites versus blacks. That exclusion of Indians and other ethnicities from "persons of color," and thereby from the Act Concerning Negroes, evidenced a single-minded aversion to a specific race that had to be differentiated from whites at all costs.[70] The other race clarifications proposed by the freedmen commission were similarly omitted from the final version of the Act Concerning Negroes.

Lawmakers also deviated from the commission's recommendations by attempting to clarify the 1854 *Revised Code*'s reiteration of the antiquated "fourth generation inclusive" standard for determining racial lineage. That standard, as articulated by the *Revised Code*, required a "bottom-up" approach emphasizing a reverse generational inquiry ("All free persons *descended from negro ancestors*, to the fourth generation inclusive, though one ancestor of each generation may have been a white person . . ."). To determine a free person's ethnic composition, that formulation traced the free person's lineage back *up* his or her family tree for four generations. The freedmen commission suggested a slight clarification to that standard, designating the free person's parents as the starting point for any generational count.[71] Ignoring that proposal, state legislators seemingly continued the "bottom-up" inquiry in the Black Code's reformulated standard: "negroes *and their issue*, even where one *ancestor in each succeeding generation* to the

fourth inclusive, is white." But the new definition introduced an oxymoronic concept – *ancestors* in *succeeding* generations – suggesting some legislative intent to alter the traditional inquiry. The additional "and their issue" phrase expanded the generational inquiry with a new "top-down" look that also pulled the children of each qualifying generation into the "persons of color" definition. The cumulative impact of that new language increased the number of generations at issue, as the children of the fourth and presumably final generation were now "persons of color" subject to the Black Code.

If the legislative intent had been to expand the "persons of color" category into a *fifth* generation, the Code's revisions to the traditional "fourth generation inclusive" standard represented an unusually subtle and convoluted effort to do so. In prior instances when existing statutes were amended to include additional generations of black inhabitants – such as the 1750 and 1767 amendments to miscegenation penalties and trial witness restrictions, respectively – North Carolina lawmakers simply changed the statutes' numeric references from "Third Generation" to "Fourth Generation."[72] The 1866 Black Code made no such change. As explained by North Carolina's Supreme Court, the *Chavers* court had already clarified the traditional "fourth generation inclusive" standard by "classif[ying] with the whites only persons who were removed beyond the fourth, or belonged to the fifth generation."[73] Unless lawmakers intended to expand the class of affected blacks, the Code's revisions to the "fourth generation inclusive" standard were superfluous. Given the open hostility of congressmen in Washington, such inattentive drafting of race-related statute would be unlikely, and is therefore suspect.

What purpose could have prompted inclusion of "and their issue" and the twisted concept of ancestors in succeeding generations, neither of which had been suggested by the freedmen commission? The effect of the revised definition – whether intentional or inadvertent – remained the same, legislation by obfuscation. In a legislative sleight-of-hand, North Carolina lawmakers expanded the regulatory reach of their Black Code to cover more people of African descent than any prior race-based legislation adopted by the General Assembly.

The race-based social stratification in North Carolina's Black Code necessitated clarity as to the legal definition of persons of color. After all, without definitive classifications, who would be subjugated to whom? Armed with a new definition of race, lawmakers pushed forward with their agenda of social differentiation, delineated according to the antebellum status of free blacks. Section 2 of the 1866 Act Concerning Negroes granted newly freed persons of color "now inhabitants of this State . . . the same privileges" and subjected them to "the same burthens and disabilities" as were applicable to the state's "free persons of color, prior to the ordinance of emancipation, except as the same may be changed by law."[74] A unique structure among the black codes, only the North Carolina Code defined the status of its emancipated slaves in terms of the existing status of free blacks. Other black codes instead defined the status of former slaves in terms of the rights of white citizens, which only emphasized racial distinctions by the significant exceptions and restrictions necessary to maintain the desired racial divide.[75] On its face, North Carolina's approach – the perceived elevation of the freedpeople to a longstanding social distinction (free persons of color) already familiar to North Carolina

blacks and whites – might appear logical and even defensible. Yet the established parameters of that distinction rendered its selection disingenuous.

In the years leading up to the Civil War, state legislators across the South became increasingly hostile toward free blacks, targeting that minority with a deluge of repressive laws. Abolitionist and American Anti-Slavery Society co-founder William Goodell bemoaned the general status of the free black in his 1853 treatise on American slave laws:

> Like the slave, the free coloured person is held incompetent to testify against a white man! Like the slave, he is debarred, to a great extent, from the benefits of education, and from the right of enjoying free social worship and religious instruction! Like the slave, he is required to be passive, without exercising the right of self-defence, under the insults and assaults of the white man! Like the slave, . . . he is denied the ordinary safeguards of an impartial trial by a jury of his peers. Like the slave, he has no vote nor voice in framing the laws under which he is governed. Even in many of the free States he exercises this right only on unequal conditions, or coupled with invidious distinctions! Any yet he is complimented with the title of "free!" To be a "free negro" differs widely, it would seem, from being a free man![76]

The vocabulary became convoluted: free black, free negro, free person of color. The result remained the same: freedmen did not mean free men. For the most part, white southerners could not, or chose not to, see social status in terms of free versus enslaved. But they could see skin color.

Antebellum North Carolina, like the rest of the pre-Civil War South, offered "no place for the free Negro," according to Guion Griffis Johnson in her classic *Ante-Bellum North Carolina: A Social History* (1937).[77] North Carolina's free blacks had been barred from testifying against whites since 1746. Starting in 1785, several North Carolina towns required that free blacks register with the local town clerk and wear cloth badges evidencing their free status.[78] In the decades immediately preceding emancipation, the state's free blacks found their lives "unspeakably harder," as reported in *The Atlantic* magazine in January 1866.[79] North Carolina laws prohibited free blacks from serving in the state militia (1812), migrating into the state (1826), engaging in "idleness or dissipation" if otherwise capable of working (1826), remaining outside of North Carolina for more than 90 days without forfeiting the right to lawful state residency (1830), marrying anyone other than another free black (1831), peddling goods outside their home counties without an annual court-issued license (1831), teaching or preaching in public (1831), voting (1835), selling (1844) or purchasing (1858) spirituous liquors, attending public schools (1854), remaining in North Carolina following manumission (1854), carrying or keeping a firearm (1861), and hiring, controlling, or owning slaves (1861).[80] That persistent erosion of liberties left North Carolina's free blacks free in name only, what historian Ira Berlin termed "slaves without masters."[81]

Despite the reduction of their liberties to "an almost negligible level," North Carolina free blacks still likely received less harsh treatment than their peers elsewhere across the South. Historian John Hope Franklin determined that the Old North State lagged behind its fellow southern states by five to fifty years in terms of the severity and active enforcement of its free black laws. No liberal social philosophy or humanitarian benevolence among white North Carolinians accounted for that discrepancy. Instead, according to Franklin, the comparatively tolerant treatment stemmed from a host of statewide uncertainties, including the "economic instability of the slave system, the unsettled state of economic and social life, the presence of a large yeoman class, and the inarticulateness of a predominately rural population." Nevertheless, the free blacks had become a distinct class, relegated to an inferior position of "quasi-freedom," whose very presence was no longer welcome in North Carolina.[82]

Accordingly, re-classification as "free blacks" provided little benefit for North Carolina's newly emancipated persons. The legislative combination of the newly emancipated freedmen into the existing inferior class of free blacks simply codified antebellum prejudice against free blacks into the state's postbellum laws against all blacks while concealing continued racial inequality. The incorporation of existing race-based restrictions within the Black Code effectively resuscitated the self-preservation instincts of white North Carolinians by reinvigorating the societal, racial, and cultural controls, norms, and expectations of white southerners. As if statutory subordination had proven insufficiently detrimental, state legislators further complicated matters for black North Carolinians with the introduction of status impermanence into the Code's new "person of color" legal construct.

Section 2 of the 1866 Act Concerning Negroes, equating emancipated slaves with antebellum free blacks, ended with a seemingly innocuous proviso: "except as the same may be changed by law." That clause did not signify a mere catchphrase acknowledging the changes made throughout the rest of the Act Concerning Negroes, or anticipating the potential need to remedy statutory mistakes or oversights. Instead it acknowledged that the racial stratification in Section 2, as well as any rights granted by the Act Concerning Negroes or subsequent legislation, remained subject to change. That continued uncertainty of racial definition and legal status prolonged the dependency of black North Carolinians upon their white neighbors who, through the prejudices and whims of a legislature elected and populated exclusively by whites, retained the right to define who the newly freed were and what they could lawfully do. For example, as a result of the "except as the same may be changed by law" proviso, the Act Concerning Negroes continued the antebellum statute that criminalized black migration into North Carolina.[83] Moreover, Section 2 applied only to "persons of color, who are *now* inhabitants of this State," a subtle distinction preventing retroactive application of any benefits under the Act Concerning Negroes to former black residents, and potentially disincentivizing black migration to North Carolina. Combined with the slavery-era migration prohibition, Section 2 thereby entrenched strict antebellum limits on the state's black population levels.

The status impermanence stemming from the "except as the same may be changed by law" proviso permitted other antebellum laws to remain in effect as to free and freed blacks alike. Black North Carolinians remained ineligible for lawful state residency. The statute requiring expulsion of any unlawful black residents under the age of 16 from the

state continued in effect. The prohibition against blacks carrying unlicensed weapons also remained effective.[84] With the Black Code's "except as the same may be changed by law" proviso, lawmakers did repeal most of the 1854 *Revised Code*'s "Slaves and Free Negroes" chapter, including race-based restrictions on blacks' rights to congregate or hire out their labor.[85] Despite the abolition of slavery, however, the fundamental meaning of "except as the same may be changed by law" left blacks with no definitive guaranteed rights that whites were bound to respect in North Carolina.

Accommodation

No good could come from leaving the freedpeople empty-handed. White North Carolinians prioritized swift re-admission into the Union to regain representation in Washington and primacy over their former slaves.[86] Given postwar political acrimony, however, such a reunion seemed unlikely without some accommodation for the state's black populace. Many of the state's white citizens viewed freedmen rights as "perhaps, the most important measure which will come before the Legislature at its present session [as] no other measure so seriously affects the national relations of the State."[87] Noting "the importance of the subject, and the necessity for careful and considerate action," the Pool committee's October 1865 report urged an affirmative legislative response to the Freedmen Convention's petition for assistance. Harkening back to the *Manuel* and *Newsom* decisions, the committee advocated for the creation of a distinct legal code specifically tailored to the freedpeople in the aftermath of emancipation: "[t]he former relations of master and slave having ceased in North Carolina, new and mutual rights and duties have supervened, which require corresponding legislation."[88] The constitution convention delegated legislative responsibility for the freedpeople to the hastily-

assembled three-member freedmen commission. But delegation only forestalled the inevitable.

Impatience also grew among northerners concerned about the lack of definitive action by North Carolina lawmakers. A *New York Times* reporter voiced that frustration after the General Assembly's December 1865 adjournment without addressing the rights of freedpeople: "No amount of willful blindness can obscure the fact that this very question was, of all others, the one that the North Carolina Legislature should have met and disposed of in a broad and liberal spirit. . . . In this action of the Legislature we see nothing but evil."[89] Lawmakers needed a legislative response, one capable of appeasing congressional leaders and quieting northern critics without alienating the General Assembly's overwhelmingly white constituency. The challenge rested in striking that delicate balance.

White North Carolinians were not naïve, however. They knew northerners would require some concessions. After all, North Carolina had been on the losing side of the Civil War. In a January 1866 letter to President Johnson, Kentuckian Taliaferro P. Shaffner, describing his postwar tour of the South that included North and South Carolina, noted white Southerners' realization that "they have committed a great crime in attempting to destroy the greatest political structure ever conceived by man, and that their atonement should be full and unreserved."[90] But concessions would not be gratuitously ceded.[91]

According to Raleigh's *Daily Sentinel*, white North Carolinians could tolerate some form of conciliatory legislation that would "provide for the freedmen whatever humanity, justice and right require." But there were limits to their tolerance. Blacks

should only receive such rights and freedoms as could be "adapted to their new condition and their future improvement and happiness. . . . In a word, the people are willing to confer upon them whatever is essential to their freedom and the enjoyment of the privileges of civil law and right, except such as will recognize them, in any sense, the social and political equals of the whites."[92] Such equality remained a non-sequitur, prompting an ominous warning from the *Sentinel*: "Any attempt to enforce this on the part of Congress will entail upon the South all the horrors of a war between the races, which must result in the utter extinction of the black race."[93] Long-held perspectives of black inferiority prompted suspicion of civil rights for freedpeople. White North Carolinians had been imbued with a systemic skepticism regarding the capabilities of blacks, a primitive race ill-prepared for unfettered freedom and unqualified for responsible citizenship.[94] As white supremacist attitudes combined with evolving paternalistic defenses of slavery's necessity and benefits for both races, white North Carolinians viewed expanded freedoms for blacks with suspicion and hostility.[95]

The November 20, 1865, edition of the *Daily Sentinel* included an anonymous letter that typified the widespread skepticism of North Carolina's white citizenry. It detailed the daily gatherings of fifty to one hundred "black, bull-headed, stupid and stinking sons of Africa" reveling in "one of the beauties of young freedom . . . [t]he luxury of doing nothing."[96] Isolated but well-publicized misconduct by individual blacks only validated such concerns. The editor of the *Daily Sentinel* found ammunition to indict the entire race in reports of a December 1865 accidental (and non-lethal) shooting of a black New Bern resident named George Hatch by his wife:

> We know colored men and women whom we could trust with the highest prerogatives of a citizen. But because there are to be found some who would not use any privilege to the damage of society, does that furnish a good reason why all should be allowed these privileges? Certainly not.
>
> . . .
>
> The masses [of southern blacks] are but children–mere minors in discretion, and their liability to give way to the temptations of anger or other bad passions requires the restraints of law, and the safety and peace of the blacks themselves demand, that the use of fire arms should be greatly restricted among them. This is a matter, too, which should claim the attention of those whose duty it is to prepare and perfect a code for the freedmen.[97]

With respect to freedom, and freedmen, then, the prevailing view held that blacks should only be given just enough liberty, and nothing more. It was for their own good, so reasoned North Carolina's white citizens.

Those same citizens also understood that any restraints placed on the freedmen would risk unwanted northern interference in the state's affairs and congressional delay on readmission to the Union.[98] Avoidance of such external complications required prudence and judicious governance. The *Daily Sentinel* urged caution prior to the General Assembly's January 1866 session. Because of the "immediate bearing" of any freedmen-related legislation upon the state's future relationship with the federal government, "any

code which may be adopted by the Southern States, will be closely criticized and scanned, in order to detect objectionable features for the purpose of future agitation."[99] Lawmakers heeded that warning. To placate northern frustration and congressional impatience, state legislators ceded token civil rights to black North Carolinians. Those limited gains, accommodating the freedpeople with minimal rights bearing only the *appearance* of freedom, lacked substance and masked continued disparate treatment. Guided by entrenched stereotypes of black inferiority, and their white constituency's continued insistence upon racial stratification, North Carolina legislators had no inclination toward revising their traditional regulatory guardrails against blacks.

A flurry of legislative activity accompanied the March 1866 passage of the North Carolina Black Code. Legislators voided decades of race-based legislation by repealing more than one hundred sections from the state's 1854 *Revised Code* (including seventy-three of the seventy-nine sections of the "Slaves and Free Negroes" chapter) and nine other acts ratified between 1859 and 1862 to control the state's blacks.[100] Doors opened for the freedmen, sweeping away much of the onerous and egregious race-based regulations from North Carolina's antebellum slave code. Blacks gained access to North Carolina courts to redress their grievances by jury trial.[101] Sworn trial testimony by black witnesses – long accepted by courts as valid evidence against other blacks – became admissible against white litigants.[102] Blacks could contract for the sale or purchase of goods and services.[103] All state criminal offenses became applicable and punishable "in like manner," regardless of race. Blacks cohabitating as man and wife received legal recognition of their marriage, effective as of the start of each couple's cohabitation. Revised apprenticeship laws required the same "fit and proper" amenities (including

room, board, and education) for black and white apprentices. County judges could establish courts for the wardens of the poor specifically to mitigate the sufferings of colored indigents.[104] Progress, ever so slight, had been made.

That said, these Black Code provisions only partially opened doors for North Carolina blacks. Conditions and qualifications diluted the freedpeople's new legal rights and remedies. Black litigants admitted into state courts faced all-white judges and juries.[105] Blacks could only testify against whites in cases involving a black litigant or party in interest; otherwise, admission of their testimony against whites depended upon the litigants' mutual agreement.[106] Unless in a written document signed by all parties and witnessed by a literate white person, contracts involving one or more black parties had no legal effect. Criminal offenses treated "in like manner" meant only equal *applicability* of the laws, not equal prosecution of the laws as to each race. Nor did that phrase require that equally punishable offenses actually be punished equally upon conviction. Prosecution decisions and sentencing authority remained in the unchecked discretion of the state's predominately white local prosecuting attorneys and judges.

The Code's social provisions remained similarly constrained. Cohabitating couples had six months in which to register their relationships with their local county clerk, under threat of a misdemeanor offense punishable "at the discretion of the court," and an additional misdemeanor offense for each subsequent month of noncompliance.[107] The marriage statute also freed the state of financial obligations for illegitimate children conceived during a black couple's cohabitation. By backdating the freedpeople's constructive marriages to the start date of each couple's cohabitation, the Code effectively legitimized children otherwise born out of wedlock, making those children the

financial responsibilities of their parents. Parents unable to pay court-ordered child support could be imprisoned for up to twelve months or, in the option of the delinquent parent, hired out as laborers by county courts to satisfy any outstanding judgement.[108] As an inexpensive alternative source of long-term compliant labor, apprenticeships essentially became involuntary child labor contracts, affording direct control over the child and, in many instances, over the parent consenting to the child's servitude. The Code sustained the value of apprenticeships for former slaveowners, granting them a preferential right to secure their former slaves as apprentices and thereby reinforcing slavery's patterns of compulsion and dependence.[109] Statutory requirements for any county court for wardens of the poor mandated "two distinct and independent" courts, one each for white and black indigents, allowing race-differentiated treatment as a precursor of Jim Crow's subsequent "separate but equal" mantra.

Despite progress, race-based restrictions continued, legitimized by state legislation and de facto practice. In no event would North Carolina legislators accord social or political equality in their campaign for reunification through congressional appeasement and black accommodation.

Control

As strategic accommodations partially opened some doors for black North Carolinians, state lawmakers rushed to slam other doors shut against further incursion by the freedpeople. The perceived protection that slavery had long provided against the alleged depravity of blacks died with emancipation.[110] Freedom negated control, an unacceptable result for many white North Carolinians. After all, according to North Carolina governor Jonathan Worth, newly elected during the incubation of the state's

Black Code, "[t]he Caucasian race always has been and always will be superior to the negro race."[111] That superiority needed legislative reinforcement. The final strategic piece of the state's Black Code therefore replicated the intrinsic racial controls of slavery by perpetuating extant "protective" measures. Antebellum slave laws had once suppressed and guarded against the purportedly inherent depravity and "native barbarism" of blacks. Those laws received new life within the Black Code as a postbellum shield for whites against the state's freedpeople "lapsing, rapidly back to their ancestral state of savage life in Africa."[112] The need for racial control demanded no less.

Channeling both white supremacist and paternalistic attitudes, North Carolina's Black Code was rife with racially explicit, repurposed antebellum slave laws intended to rein in the freedpeople and their suspected inferiorities. The most striking example simply continued the prewar criminal offense of assault of white women by black men with the intent to commit rape. Unlike rape itself, the crime of assault with the intent to commit rape depended upon race specificity both as to the victim (white) and alleged perpetrator (black). Only rape required physical contact, *i.e.*, that the perpetrator had to "ravish and carnally know" or "carnally know and abuse" the victim. Assault with intent to commit rape required no actual physical contact. It required only an intentional act that attempted harmful physical contact or that placed the victim in imminent fear of such contact, thereby making it a lesser-included offense of rape.[113] Nonetheless, the assault offense carried the same mandatory death penalty as rape.[114] When assault combined with a specific *intent* to commit rape – a state of mind for which most evidence would be subjective at best – only the skin colors of the victim and the convicted offender determined whether the offender would be executed or spend less than two years in

prison for the assault.[115] Significantly, the statute provided no comparable protection for black women, and no comparable punishment for white men.

The statute requiring written contracts for any business or labor transactions with blacks had no specific precedent in the state's slave laws, as slaves had been statutorily prohibited from hiring out their labor and from buying or selling articles of property.[116] The Code's contractual requirements did, however, adapt an arcane rule of contract law to assert racial control through contractual formalities. Ostensibly adopted to protect unsophisticated black persons from unscrupulous business dealings, the Code's statute applied to all livestock sales contracts and all other contracts for sales or payments valued at ten dollars or more whenever at least one contracting party was black.[117] In other words, the statute governed the vast majority of commercial transactions likely to be pursued by any freedperson. Failure to satisfy each statutory requirement – the contract had to be in writing, signed by all parties, and witnessed by a literate white person – automatically voided the contract.[118] Those requirements mirrored the "statute of frauds," a common law relic otherwise applicable only to a narrow range of commercial transactions for the sale or lease of land, mineral rights, or slaves.[119] A similar law imposing comparable formalities already governed agreements with any Cherokee Indians.[120] No such contractual requirements applied to white North Carolinians, unless contracting with a black person or an Indian, or otherwise contracting for one of the traditional statute of frauds transactions.

The requirement that the people most likely to be illiterate or otherwise commercially unsophisticated transact business via written contract was but the most obvious of the statute's discriminatory features. The required attestation by a white

witness was more problematic. In contractual disputes pitting black parties against white parties, the corroborative effect of a white witness' attestation most likely aligned with the white contracting party. In attesting the execution of a written contract, the white witness also gained personal knowledge of the contractual transaction. Such personal knowledge would be admissible evidence as to the validity and gist of the commercial transaction, thereby making the attesting white witness a competent *trial* witness. The sworn testimony of a white person with personal knowledge of the contracting parties' transaction would likely be considered more credible by a white judge and all-white jury than the claims of a black contracting party.

The penalty for a noncompliant contract – the automatic voidance of all related contractual obligations – posed an additional risk for black contracting parties not applicable to contracts between whites. Most transactions that required written contracts under the statute likely involved blacks as contract laborers or purchasers of property. In such scenarios, the black contracting party would typically complete his or her contractual obligation first, either by performing the contracted-for labor or delivering payment for the property. Only then, after the black contracting party had completed his or her contractual obligation, would the other contracting party (whether white or black) logically challenge the contract's noncompliance with statutory requirements. Contracts thereby voided became legal nullities, rendering contractual obligations as if they had never been agreed upon. A contract voided for statutory noncompliance left the black contracting party who had performed his obligations with little practical recourse for recovery, including partial payment or other equitable relief. That potential pitfall even jeopardized one of the few positive accommodations in the Black Code – statutory lien

protection for labor wages payable in crop shares – which, because it required a written contract, necessitated compliance with the contractual formalities of the Act Concerning Negroes in order to be enforceable.[121] Largely exempt from similar contractual formalities, contracts between whites faced far less risk of nullification.

Other racially explicit antebellum control mechanisms recycled by the North Carolina Black Code similarly targeted stereotyped inferiorities of the freedpeople. Steeped in longstanding doubts about the honesty and veracity of blacks, the Code's mandate that trial judges explicitly admonish black witnesses about the necessity for truthful testimony merely reiterated a similar race-based requirement first imposed in 1741.[122] Such officially administered warnings during any trial likely reminded white jurors of those alleged predispositions of dishonesty among the freedpeople. The race-based distinctions incorporated within the Code's apprentice provisions dated back to 1762.[123] Apprentice laws required that all black illegitimate children be bound as apprentices; no comparable requirement applied to white illegitimate children. Apprenticeships for white and black females ended at different ages, eighteen versus twenty-one, respectively. No black apprentice could be removed from the county of his or her apprenticeship. As security against violation of that mandate, the law required a one-thousand-dollar bond for each black apprentice. Those reenactments of slave-era laws, whether verbatim or with slight modification, suggest no change in the antebellum racial animus that had prompted the original adoption of those antiquated laws.

In other instances, rather than restate prior slave laws, North Carolina's Black Code simply referenced the continuation of particularly egregious existing statutes, using formulaic statutory verbiage to bury the import of those perpetuated statutes. Section 15

of the 1866 Act Concerning Negroes listed repealed statutes, including "[c]ertain laws contained in the Revised Code, viz: The entire chapter one hundred and seven, entitled 'slaves and free negroes,' *except* sections fifty four, fifty five, fifty-six, fifty-seven, fifty-eight and sixty-six, and these sections shall be so amended as to read, 'persons of color' instead of free negroes in all cases where the latter words occur."[124] Innocuous on its face, the formality of that phrasing and its obscure statutory references veiled the onerous breadth of those retained provisions.

The first five statutes, a series of related criminal offenses initially adopted in 1826, barred free blacks from North Carolina in a coordinated effort to constrict and ultimately reduce the state's black population. Free blacks could not enter the state. Unless already lawfully residing in North Carolina as of 1826, no free blacks (and no children of free blacks) could gain lawful state residency, regardless of the duration of their stay. Mandatory expulsion from the state applied to any free blacks under the age of sixteen, under penalty of a five hundred dollar fine for noncompliance. Any free black lawfully residing in North Carolina forfeited that residency and all rights to return if he or she left the state for ninety days or more. That series of prohibitions concluded with an unusual show of legislative adamance: a statutorily-imposed "duty" that expressly mandated enforcement of those restrictions by all county solicitors and grand juries.[125] Following emancipation and the resulting escalation of free black populations across the South, the extension of those North Carolina's slave-era migration and residency restrictions to all freedpeople offered the alternative control mechanism of population attrition through exclusion.

The final statute preserved by the Code's section 15 required that free blacks secure an annual license in order to carry or keep weapons.[126] The 1844 *Newsom* decision affirmed a prior iteration of that law as a legitimate state interest, presumably to curb blacks' alleged violent propensities.[127] That restriction also limited the effectiveness of any freedperson's attempt to defend against violent expressions of white supremacy.[128] Inapplicable to whites, the license requirement likely placed most weapons under the control of white citizens. Mandatory licensure also provided local officials with a useful inventory of armed freedpeople and black-owned weaponry within the community in the event of actual or rumored racial unrest. The retention of such expansive antebellum race control mechanisms, veiled in formulaic legal jargon, suggests white lawmakers' desires to preserve their hold over the freedpeople without drawing congressional notice.

The racially explicit control mechanisms of the Act Concerning Negroes have garnered the primary focus of the little historiographical attention paid to the North Carolina Black Code. Historians have generally downplayed the eight other acts proposed by the freedmen commission and adopted by the General Assembly solely because of the racial neutrality of their statutory language.[129] That dismissive gloss is shortsighted, as many of those acts merely sanitized the same antebellum laws that had once beset the state's free blacks. The mere extension of slave-era laws to cover all North Carolinians hardly purged their race-based import, as the discretion for applying those laws – from arrest and prosecution to jury verdict and sentencing – remained with white law enforcement officials, juries, and judges. For example, North Carolina's 1854 *Revised Code* featured two anti-vagrancy criminal statutes, one race neutral, the other specifically targeting free blacks. Three essential elements defined vagrancy under the race-neutral

statute: unemployment ("no apparent means of subsistence" or failure to support self and family by not "applying himself to some honest calling"), loitering ("found sauntering about"), and unsavory commercial activity ("endeavoring to maintain himself by gaming or other undue means"). In addition to a mandatory twenty-day prison term, punishment required a fine and posted security to ensure post-confinement "good behavior," both in amounts set by the court in its sole discretion.[130]

The *Revised Code*'s vagrancy statute that targeted free blacks featured a less stringent definition of vagrancy, thereby increasing the likelihood of criminal liability. Conviction required only that a free black be unemployed or loitering ("found in any county spending his time in idleness and dissipation, or having no regular or honest employment or occupation") despite his or her capacity for labor. That race-specific offense authorized any citizen to obtain a warrant and arrest a free black for vagrancy. Unlike the race-neutral vagrancy statute, the free black vagrancy statute offered no standard criminal procedural rights, such as indictment, jury trial, or conviction. Instead, a judge determined whether the actions of the accused "come within the meaning of this chapter." Upon such a finding, the statute required that the free black offender post a bond, in an amount determined by the court, "conditioned for his good behavior, and industrious, peaceable deportment, for one year." Failure to post the bond or satisfy its requirements or to pay the costs and charges of prosecution resulted in the accused being hired out for a "reasonable and just" period of time "calculated to reform him to habits of industry and morality," again as determined by the court for up to three years *per offense*.[131] Vagrancy posed substantial repercussions for free blacks in antebellum North Carolina.

The Black Code's vagrancy statute represented an amalgamation of those two antebellum statutes. The revised definition of vagrancy selectively combined essential elements from the two prior vagrancy definitions to create two new scenarios for criminal liability. The first targeted people capable of labor and lacking any "apparent means of subsistence" who failed to engage "some honest occupation" to support himself and his family. The second scenario, offering an easier burden of proof for conviction, focused on anyone (with no mention of a capacity for labor) not engaged in work, who instead spent time "in dissipation," "gaming," "sauntering about," or seeking support "by any undue or unlawful means." Upon arrest under either scenario, offenders who posted a bond (as set by the court), paid all costs and charges associated with the arrest, and maintained "good behavior and industrious, peaceable deportment for one year" avoided further penalty. The accused's failure to satisfy any of those requirements, presumably upon determination by the court or a justice of the peace, resulted in prosecution for vagrancy. Upon conviction, sentencing rested solely in the court's discretion, and could include fines, imprisonment, a combination of the two, or commitment to the Black Code's newly-authorized workhouse "for such time as the court may think fit."[132] The likely personal circumstances of freedpeople after years of enslavement – including inadequate financial resources and heightened targeting by presumably biased white law enforcement officials – only increased their vulnerability to the broader scope and unchecked discretionary penalties of the Black Code's reformulated vagrancy statute.

The potential for additional cascading detriment solely applicable to the freedperson convicted of vagrancy lurked within the deceptively race-neutral terms of the Black Code's vagrancy statute. Its newly-revised definition of vagrancy closely tracked

language within apprenticeship laws left largely unchanged by the Black Code. Those apprenticeship laws required courts to bind as apprentices "the children of free negroes, where the parents with whom such children may live, do not habitually employ their time in some honest, industrious occupation." As a result of the common language used in both the vagrancy and apprentice statutes, a freedperson's vagrancy conviction also satisfied the statutory threshold for the mandatory apprenticeship of his or her children. Combined with the Black Code's presumptive right for former slaveowners to apprentice their former slaves, a vagrancy conviction could easily return a freedperson's children back into the service of his or her former master for several years.[133]

Vagrancy convictions also presented the risk, albeit reputably optional, of compelled labor. The Black Code's vagrancy statute granted courts discretion to impose court costs and court-imposed fines upon convicted. Another Black Code provision authorized courts to imprison convicted vagrants unable to pay such penalties, in addition to any other sentence of imprisonment, for up to twelve months. In lieu of such financially-related imprisonment, a convicted vagrant could elect to be bound as an apprentice as a means of satisfying the court-ordered penalty through indentured labor. The sentencing court retained sole discretion to determine the duration and terms of any such apprentice indenture. That option mimicked antebellum compelled labor penalties that required impoverished free blacks unable to pay court-ordered financial penalties be hired out for up to five years to work off any such debt.[134] As a result, the various iterations of apprenticeship under the Black Code, whether applicable to the convicted vagrant's children or to the convicted vagrant in lieu of imprisonment for financial

penalties, threatened a loss of family and freedom indistinguishable from prewar enslavement.[135]

The Black Code's trespass provision offered an alternative means of racial control through impaired mobility, adapting a criminal offense previously applicable solely to slaves. North Carolina law historically treated trespass to property as a civil cause of action. It only escalated into an indictable criminal offense when the offender gained access to the property by forcible entry, an additional affirmative act constituting a breach of the peace. When committed by a slave, however, any willful trespass on the person or property of a free white person, regardless of forcible entry, constituted a criminal offense punishable by up to thirty-nine lashes. The Black Code modeled its trespass statute on that slave-specific antebellum law, creating a criminal offense with minimized culpability by eliminating the essential elements of forcible entry and willfulness. The change hardly benefitted the freedpeople, as few of them owned property. But as conviction under the Black Code's trespass statute required only entry upon another person's property after being previously forbidden to do so, the provision offered a formidable deterrent against any of the newly emancipated no longer welcomed by former owners. Indeed, that minimal burden of proof – likely to devolve into a credibility debate between the accuser and the accused over whether a prior prohibition had been given – was ripe for abuse against the freedpeople. If, in the course of the trespass, the offender took "any wood or other kind of property whatsoever" from the premises, matters got worse, as the misdemeanor offense immediately escalated into larceny.[136]

The crime of larceny itself provided a particularly effective racial control mechanism, as demonstrated by the Black Code's prohibition against the pursuit,

wounding, or killing of livestock.[137] Whether considered particularly heinous or all-too-frequent, the injury of another person's livestock comprised a serious matter under antebellum law. The 1854 *Revised Code* featured four separate statutes criminalizing that act. Intentionally injuring or killing livestock running at large constituted a misdemeanor. Felony larceny punishments applied to convictions for maliciously killing livestock within certain North Carolina counties. The two remaining statutes criminalized injuries to trespassing animals during efforts to remove such animals from the trespassed property. One imposed financial liability for any injury to the trespassing animal on the owner of the trespassed property, if the landowner's inadequate fencing enabled the trespass. The other imposed up to thirty-nine lashes on any slave who injured a trespassing animal while trying to remove the animal. The Black Code combined all four statutes into a single offense that further criminalized any effort to gain possession of livestock that resulted in the death, wounding, or pursuit of the animal, and imposed the same punishment applicable to larceny convictions.[138] The Code also eliminated any requirement of actual possession of the animal; the mere attempt to gain possession sufficed for conviction. Those last two changes significantly enhanced the statute's punitive reach.

Larceny traditionally required a felonious "taking," namely some action that deprived a person of his or her possession of an item. Such possessory deprivation occurred when the accused either obtained actual possession of the item or, as in the case of the antebellum county-specific livestock statute referenced above, constructively deprived the owner of possession by damaging (or, in the case of livestock, injuring or killing) the item. Of the four antebellum livestock statutes, only the county-specific

livestock statute required a felonious taking. Only that antebellum livestock statute could thereby be punished as a larceny, subjecting convicted offenders to imprisonment, forfeiture of goods and chattel, and whipping or other corporal punishment.[139]

By eliminating the possession requirement, and thereby the distinguishing felonious taking element, the Black Code's revamped livestock statute expanded the scope of prohibited activity while also reducing all such livestock-related acts to misdemeanors. That change eliminated corporal punishment as an available penalty for violation of the Black Code's livestock statute, as misdemeanors remained punishable solely by imprisonment or fines. To remedy that incongruity, the Code mandated larceny-like punishment for *any* conduct prohibited by its expansive livestock statute. The resulting statute thereby required corporal punishment for all livestock-related offenses, including non-larceny offenses (such as the pursuit or wounding of livestock) that would not have been subject to corporal punishment under antebellum criminal statutes. That escalation of punishments by the Black Code, authorizing corporal punishment for a specific class of misdemeanor offenses, transferred to the state a right of physical punishment previously reserved to the slaveowner for such nominal offenses.[140]

In a similar vein, the Black Code empowered local law enforcement to punish coordinated insubordination through its anti-sedition statute, much like individual slaveowners had the authority to discipline their own defiant slaves in the antebellum era. As with the vagrancies of slaveowners' discretion to determine conduct susceptible to punishment, North Carolina's anti-sedition laws neither clarified nor limited the nature or target of the criminalized activity. Both the antebellum and the Code's anti-sedition statutes instead outlawed such mutable activity as insurrection, rebellion, and conspiracy,

effectively inviting enforcement overreach. Under the antebellum law, anyone convicted of inciting actual or attempted rebellious activity by slaves or free blacks suffered corporal punishment and one-year imprisonment for the first offense, and death for the second offense. First-time black offenders suffered mandatory sentences of death or deportation, as did black participants in rebellious activities.[141] The Black Code expanded the punitive measures to impose a mandatory death sentence for any actual involvement in active rebellion, and a combination of corporal punishment and a one-year prison term for efforts to incite insurrection. Yet the Code's revised scope of prohibited activity – outlawing only "insurrection, conspiracy, sedition or rebellion against the government of the State" – did little to clarify its nebulous applicability.[142] That statutory imprecision left the authority to define and punish insubordinate conduct to the discretion and animus of local law enforcement officials. Given the trepidation that the mere presence of free blacks generated among most white North Carolinians, and the ensuing desire for renewed racial control, such unfettered local enforcement authority would hardly facilitate the progressive treatment of freedpeople ascribed to North Carolina's Black Code.

The antebellum anti-sedition laws also fortified the institution of slavery by targeting any third-party interference with the master/slave relationship. Those who challenged slavery by encouraging blacks to resist their enslavement suffered severe punishment. The master/servant relationship received similar protection in the anti-enticement statute, which prohibited aid to fugitive slaves by enticing a slave "to absent himself from his owner's service" or by harboring a runaway slave. That criminal offense carried a prison term of at least six months and a variety of substantial financial

penalties.[143] Seeking comparable post-emancipation certainty that contract laborers would fulfill their contractual obligation, North Carolina legislators borrowed that anti-enticement model for the Black Code's prevention of third-party interference with the employer/laborer relationship. No longer a criminal offense, any enticement of a contracted "servant . . . to unlawfully leave the service of his master or employer" or any harboring or employment of a contracted servant known to have abandoned his existing employment prompted severe financial penalties for both the servant and the person facilitating the servant's contractual breach.[144] Such enhanced statutory preservation of labor contracts via repurposed antebellum slave laws, despite the ready availability of recourse through a civil breach of contract action, replicated the proprietary nature of the master/slave relationship venerated by the antebellum anti-sedition and anti-enticement statutes.

Like the more racially-explicit provisions of the Act Concerning Negroes, the eight additional bills proposed by North Carolina's freedmen commission intended to preserve race-based stratification. Giving new life to antebellum slave laws via retrofitted Black Code statutes applicable universally in language only, North Carolina legislators embraced those recommendations in a desperate attempt to recover the racial control necessary for a return to the days of unquestionable white rule. All the while, somehow, unlike their southern legislative colleagues, those lawmakers miraculously managed to remain progressive, moderate, and fair.

* * *

The North Carolina Black Code did not classify persons "having any African blood in their veins" as persons of color, as did Tennessee's Code. Nor did North

Carolina's Black Code require that a person be at least seven-eighths Caucasian in order to avoid the constraints of its Black Code, as did South Carolina's Code.[145] But North Carolina lawmakers did amend the state's traditional definition of persons of color to expand the scope of its 1866 Black Code to include an additional fifth generation of freedpeople.

The North Carolina Black Code did not prevent freedpeople from purchasing, renting, or leasing farmland, as did Mississippi's Code.[146] But North Carolina legislators did complicate nearly all commercial transactions involving a freedperson with a bewildering array of contractual formalities otherwise inapplicable to white North Carolinians.

The North Carolina Black Code did not relegate the legal claims of freedpeople to an entirely separate court system, as did South Carolina's Code.[147] But North Carolina lawmakers did facilitate the separate but unequal treatment of its indigent freedpeople by authorizing a separate network of courts for the wardens of the poor for its black persons.

The North Carolina Black Code did not permit juries to substitute corporeal punishment for any criminal conviction that otherwise permitted only imprisonment or fines, or to impose death penalties for nighttime burglaries, as did Florida's Code.[148] But North Carolina legislators did retain corporal punishment as part of the state's criminal justice system, including mandatory death penalties for the crimes of active insurrection against the state and assault of a white woman by a black man with the intent to commit rape.

The North Carolina Black Code did not amend the definition of vagrants to include common drunkards, runaways, and stubborn servants and children, as did

Alabama's Code.[149] But North Carolina lawmakers did adopt two separate definitions of vagrant so broadly worded as to encompass nearly anyone not actively engaged in labor, regardless of the rationale for such idleness.

The North Carolina Black Code did not subject its convicted vagrants to the ball and chain and a bread and water diet, as did Virginia's Code.[150] But nearly all of the black codes, including North Carolina's Code, incorporated long-term forced labor as punishment for vagrancy and other relatively trivial offenses.

At what point then did the North Carolina Black Code diverge from the norm of other black codes to become mild, fair, or even liberal?[151]

The members of North Carolina's 1866 General Assembly enthusiastically embraced the black code movement. That enthusiasm should not be discounted because of the subtlety of its codification. The North Carolina Black Code comprised a race-based societal stratification system, a minimal and heavily-conditioned grant of the most basic human rights to a people long deprived of the most basic of anything, and a collection of retrofitted antebellum racial control mechanisms designed to maintain as much of the slave-era status quo as possible. While its constituent elements may have been less apparent, less explicit, or less onerous that those adopted in other states, North Carolina's Code nonetheless hardly signifies a paragon of virtue or progressivism. That is especially true given the original request for assistance from the state's freedpeople, the original legislative responded proposed to the General Assembly by the freedmen commission, how that proposed legislation changed, and what became of it after adoption.

End Notes

[1] William Faulkner, *Requiem for a Nun* (New York: Random House, 1951), 92.

[2] Ben C. Truman, "Affairs in the South: Action of the Legislature of Mississippi," *New York Times*, February 4, 1866, 1; "Northern Opinion and Southern Action," *The Liberator* (Boston), November 17, 1865, 2; *Memphis Bulletin*, December 14, 1865 (as quoted in "The Mississippi Black Code: Sensible Talk by a Memphis Paper," *Chicago Tribune*, December 19, 1865, 3) (italics in original); "Black Code of Mississippi," *Chicago Tribune*, December 1, 1865, 2.

[3] Truman, "Affairs in the South," 1. The name "black code" for this string of southern legislation has been credited to the headline of the December 1, 1865, *Chicago Tribune* article cited in note 2. Christopher Waldrep, *Jury Discrimination: The Supreme Court, Public Opinion, and a Grassroots Fight for Racial Equality in Mississippi* (Athens, GA: University of Georgia Press, 2010), 78.

[4] Theodore Brantner Wilson, *The Black Codes of the South* (University, AL: University of Alabama Press, 1965), 139. Mississippi, South Carolina, Alabama, and Louisiana enacted black codes in 1865. In 1866, Florida, Virginia, Georgia, North Carolina, Texas, and Tennessee followed that lead, with Arkansas enacting the final black code in 1867. Ibid., 61-80, 96-115. With the exception of Arkansas, all of the black codes were adopted prior to the end of June 1866. Ibid. Johnson's correspondence with his provisional governor appointees frequently encouraged the adoption of legislation specifically governing the freedpeople. Andrew Johnson to Benjamin C. Humphreys, November 17, 1865, Andrew Johnson to William L. Sharkey, November 17, 1865, Andrew Johnson to Benjamin F. Perry, November 27, 1865, *The Papers of Andrew Johnson*, 16 vols., ed.

Paul H. Bergeron (Knoxville, TN: University of Tennessee Press, 1991), 9:397, 9:400, 9:441.

[5] "Governor's Message. To the Honorable, the General Assembly of North Carolina," November 20, 1866, *Executive and Legislative Documents Laid Before the General Assembly of North Carolina, Session 1866-7*, Executive Document no. 1 (Raleigh, NC: Wm. E. Pell, 1867), 2-3; Dan T. Carter, *When the War Was Over: The Failure of Self-Reconstruction in the South, 1865-1867* (Baton Rouge, LA: Louisiana State University Press, 1985), 28. The federal government also required a sworn oath of loyalty from each southern legislator and candidate for government service. Ibid.

[6] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper & Row, 1988), 189, 199.

[7] *Constitution of the State of Mississippi, as Amended, with the Ordinances and Resolutions Adopted by the Constitutional Convention August, 1865* (Jackson, MS: E.M. Yerger, 1865), art. 8, § 1.

[8] *Laws of the State of Mississippi, Passed at a Regular Session of the Mississippi Legislature, Held in the City of Jackson, October, November and December, 1865*, chs. 2-6, 23, 54 (Jackson, MS: J. J. Shannon & Co., 1866). One postbellum Mississippi statute – Chapter 54, "An Act to Prevent the Hunting of Stock with Guns or Dogs in this State in Certain Cases," adopted on December 1, 1865 – prohibited the same activities by whites and "any freedman, free negro or mulatto" alike, initially excluding it from the other legislative acts comprising that state's Black Code. As it imposed certain additional punishments only upon black offenders, however, that act has subsequently been

considered part of Mississippi's Black Code. Wilson, *The Black Codes of the South*, 69-70.

[9] *Laws of Mississippi, 1865*, ch. 4, §§ 1, 5, ch. 6, § 2, ch. 4, §§ 6, 7, 1, 3, ch. 5, § 3, ch. 23, §§ 2, 4.

[10] Wilson, *The Black Codes of the South*, 71; *Acts of the General Assembly of the State of South Carolina, Passed at the Sessions of 1864-65*, "An Act Preliminary to the Legislation Induced by the Emancipation of Slaves," No. 4730, § 4 (Columbia, SC: Julian A. Selby, 1866).

[11] *Acts of South Carolina, 1864-65*, "An Act to Amend the Criminal Law," No. 4731, §§ 30, 31, 4, 12, 1, 27.

[12] *Acts of South Carolina, 1864-65*, "An Act to Establish and Regulate the Domestic Relations of Persons of Color, and to Amend the Law in Relation to Paupers and Vagrancy," No. 4733, § 72; "An Act Preliminary to the Legislation Induced by the Emancipation of Slaves," No. 4730, § 4; "An Act to Establish District Courts," No. 4732, §§ 34, 33. One interesting example of the four-year statute of limitations for white litigants' breach of contract claims involved a time-barred ten-year-old claim for 1,152 bales of cotton stored for safekeeping at a Columbia, South Carolina, plantation that could not be returned because the cotton had been destroyed when the plantation was burned in 1865 by General Sherman's invading forces. *Cohrs v. Fraser*, 5 S.C. 351 (1874).

[13] "The Political Situation," *Chicago Tribune*, December 26, 1865, 2; Garrett Epps, "The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment," *Temple Political & Civil Rights Law Review*

13, no. 2 (Spring 2004): 422-24; Paul Finkelman, "The Historical Context of the Fourteenth Amendment," *Temple Political & Civil Rights Law Review* 13, no. 2 (Spring 2004): 400.

[14] Sidney Andrews, *The South Since the War as Shown by Fourteen Weeks of Travel and Observation in Georgia and the Carolinas* (1866; Boston: Houghton Mifflin, 1971), 398.

[15] *Journal of the Senate of the General Assembly of the State of North Carolina, at its Session of 1865-'66* (Raleigh, NC: Wm. E. Pell, 1865), 150-54 (italics in original); Epps, "The Undiscovered Country," 417-18, 426. South Carolina legislators shared the same concerns. Benjamin F. Perry to Andrew Johnson, November 1, 1865, in Bergeron, *The Papers of Andrew Johnson*, 9:324-25.

[16] W. E. B. Du Bois, *Black Reconstruction*, rev. ed. (1935; New York: Atheneum, 1992), 208; Foner, *Reconstruction*, 257-59.

[17] *Public Laws of the State of North Carolina, Passed by the General Assembly, at the Session of 1865-'66, and 1861-'62-'63 and 1864, Together with Important Ordinances Passed by the Convention of 1866*, "Resolution Touching the Amendment to the Constitution of the United States, Ratified at this Session of the General Assembly, Known as the Thirteen Amendment," December 18, 1866 (Raleigh, NC: Robt. W. Best, 1866), 140. The reference to Secretary of State Seward alluded to his response to South Carolina provisional governor Benjamin Perry's objection that the second section of the proposed Thirteenth Amendment could empower Congress to usurp state legislative authority by enacting federal law to protect the civil rights of freedmen. Seward responded by telegraph that such an objection was "querulous" given the restrictive character of the clause. Cong. Globe, 39th Cong., 1st Sess. 43 (1865); "The

Constitutional Amendment," *Daily North Carolina Standard* (Raleigh, NC), November 21, 1865, 2.

[18] Du Bois, *Black Reconstruction*, 208. On the same day North Carolina legislators ratified the Thirteenth Amendment, their counterparts in Mississippi rejected the Amendment. Wilson, *The Black Codes of the South*, 70. Mississippi legislators did not vote in favor of the Amendment's ratification until 1995. Even then, because of state officials' failure to provide official notice to federal officials of the favorable ratification vote, the Amendment did not officially become effective in Mississippi until 2008. "148 Years Later, Mississippi Ratifies Amendment Banning Slavery," *Los Angeles Times*, February 18, 2013.

[19] Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015), 103-4.

[20] U.S. Census Office, *Agriculture of the United States in 1860; Compiled from the Original Returns of the Eighth Census, under the Direction of the Secretary of the Interior* (Washington, DC: Government Printing Office, 1864), viii.

[21] Foner, *Reconstruction*, 199.

[22] Ibid., 198-203.

[23] William Cohen, *At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control 1861-1915* (Baton Rouge, LA: Louisiana State University Press, 1991), 31.

[24] Wilson, *The Black Codes of the South*, 144-45.

[25] In order of aggregate 1860 slave populations, the seventeen states surveyed were Virginia (490,865 slaves), Georgia (462,198), Mississippi (436,631), Alabama (435,080),

South Carolina (402,406), Louisiana (331,726), North Carolina (331,059), Tennessee (275,719), Kentucky (225,483), Texas (182,566), Missouri (114,931), Arkansas (111,115), Maryland (87,189), Florida (61,745), Delaware (1,798), New Jersey (18), and Kansas (2). As to the national 1860 free black state populations across thirty-four states, which ranged from 128 (Oregon) to 83,942 (Maryland), the relative rankings for South Carolina and Mississippi for the lowest free black populations – twelfth and twenty-seventh, respectively – are modest at best. North Carolina trailed only Maryland and Virginia in terms of the largest free black populations among the seventeen surveyed slave-holding states, and ranked sixth overall among the largest free black populations nationwide. U.S. Census Office, *Population of the United States in 1860; Compiled from the Original Returns of the Eighth Census, under the Direction of the Secretary of the Interior* (Washington, DC: Government Printing Office, 1864), 594-95; Guion Griffis Johnson, *Ante-Bellum North Carolina: A Social History* (Chapel Hill, NC: University of North Carolina Press, 1937), 468.

[26] Johnson, *Ante-Bellum North Carolina*, 53-54; William S. Powell, *North Carolina Through Four Centuries* (Chapel Hill, NC: University of North Carolina Press, 1989), 133-34, 297; Bradford J. Wood and Larry E. Tise, "The Conundrum of Unfree Labor," in *New Voyages to Carolina: Reinterpreting North Carolina History*, ed. Larry E. Tise and Jeffrey J. Crow (Chapel Hill, NC: University of North Carolina Press, 2017), 86-87, 90-91; Joseph Carlyle Sitterson, *The Secession Movement in North Carolina* (Chapel Hill, NC: University of North Carolina Press, 1939), 5-8, 11-13, 18-20, 22. North Carolina's cultivation of cotton and rice paled in comparison to Mississippi and South Carolina. In 1860, North Carolina produced 145,514 four-hundred-pound bales of ginned cotton as

compared with Mississippi's 1,202,507 comparably sized ginned cotton bales, and harvested 7,593,976 pounds of rice as compared with South Carolina's 119,100,528 pounds of rice. U.S. Census Office, *Agriculture of the United States in 1860,* 185.

[27] Wood and Tise, "The Conundrum of Unfree Labor," 92; John Hope Franklin, *The Free Negro in North Carolina, 1790-1860* (1943; New York: Russell & Russell, 1969), 9 ("[I]t cannot be said that slavery was a growing institution" in North Carolina during the late antebellum period).

[28] Johnson, *Ante-Bellum North Carolina*, 53, 58.

[29] Ibid., 477-81.

[30] Wood and Tise, "The Conundrum of Unfree Labor," 86, 92.

[31] J.G. de Roulhac Hamilton, *Reconstruction in North Carolina* (New York: Columbia University, 1914), 452-53; J.G. de Roulhac Hamilton, "Southern Legislation in Respect to Freedmen, 1865-1866," in *Studies in Southern History and Politics* (1914; reprint, Port Washington, NY: Kennikat Press, Inc., 1964), 156. For similar rationales, see also William A. Dunning, *Reconstruction Political and Economic, 1865-1877* (New York: Harper and Brothers, 1907), 58; John M. Mecklin, "The Black Codes," *South Atlantic Quarterly* 16, no. 3 (July 1917): 257-58.

[32] In this regard, compare Wilson, *The Black Codes of the South*, 27-33, 80, with C. Vann Woodward, *The Strange Career of Jim Crow*, 3d rev. ed. (1955; New York: Oxford University Press, 1974), 23.

[33] Mecklin, "The Black Codes," 249.

[34] Hamilton, *Reconstruction in North Carolina,* 152-53; E. Merton Coulter, *The South During Reconstruction, 1865-1877* (Baton Rouge, LA: Louisiana State University Press,

1947), 38-39; Robert Cruden, *The Negro in Reconstruction* (Englewood Cliffs, NJ: Prentice-Hall, 1969), 20-23.

[35] Michael W. Fitzgerald, *Splendid Failure: Postwar Reconstruction in the American South* (Chicago: Ivan R. Dee, 2007), 30, 32.

[36] Hamilton, *Reconstruction in North Carolina*, 156.

[37] Winthrop D. Jordan, *Tumult and Silence at Second Creek: An Inquiry into a Civil War Slave Conspiracy* (Baton Rouge, LA: Louisiana State University Press, 1993), 1, 13-14; Ethan J. Kytle and Blain Roberts, *Denmark Vesey's Garden: Slavery and Memory in the Cradle of the Confederacy* (New York: The New Press, 2019), 12-13, 19-23.

[38] U.S. Census Office, *A Century of Population Growth from the First Census of the United States to the Twelfth 1790-1900* (Washington DC: Government Printing Office, 1909), 139; U.S. Census Office, *Population of the United States in 1860*, 270, 358-59, 452. North Carolina's free black population mirrored its slave population, both as to sparse dispersal and limited concentrations in the state's eastern counties. Franklin, *The Free Negro in North Carolina*, 15-19.

The sixteen North Carolina counties where slaves outnumbered white inhabitants in 1860 were Anson, Bertie, Caswell, Chowan, Edgecombe, Franklin, Greene, Halifax, Hertford, Jones, Lenoir, Northampton, Perquimans, Pitt, Richmond, and Warren. Only Anson, Caswell, and Richmond counties lie outside of eastern North Carolina. The six North Carolina counties with more than ten thousand slaves each were Edgecombe, Granville, Halifax, New Hanover, Wake, and Warren. U.S. Census Office, *Population of the United States in 1860*, 358-59; Johnson, *Ante-Bellum North Carolina*, 470 and n.9; Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During*

Presidential Reconstruction, 1865-67 (Durham, NC: Duke University Press, 1985), xiv, 178 n.14.

Some slight discrepancies exist between the 1860 Census and books by Guion Griffis Johnson and Roberta Sue Alexander. The 1860 Census reported eighty-six counties for North Carolina. U.S. Census Office, *Agriculture of the United States in 1860*, 222. In its county level reporting of North Carolina's population, however, the Census report listed eighty-*seven* entries under the "Counties" column, erroneously including the town of Lillington, North Carolina, as a county. U.S. Census Office, *Population of the United States in 1860*, 358. The Census Bureau corrected that error elsewhere in its report, and combined Lillington's population (including its 3,228 slaves) into its home county of New Hanover. That adjustment pushed New Hanover County's slave population over ten thousand slaves (which Johnson overlooked in reporting county slave populations that exceeded ten thousand), but the county's white population remained larger than its slave population. Ibid., 680; Johnson, *Ante-Bellum North Carolina*, 469.

In their books' discussions of North Carolina's 1860 slave population, Johnson and Alexander each reported a different number of North Carolina counties, eighty-five and eighty-nine respectively. Johnson, *Ante-Bellum North Carolina*, 469; Alexander, *North Carolina Faces the Freedmen*, xiv-xv. Alexander's book included an illustration entitled "Map I. Distribution of Slaves," which erroneously included three counties (Clay, Mitchell, and Transylvania) that were not formed until 1861. Alexander, *North Carolina Faces the Freedmen*, xv. For a comprehensive list of North Carolina counties, including the years of incorporation, see Powell, *North Carolina Through Four Centuries*, 569-71. Alexander's map indicated that each of those three counties had slave populations under

twenty-five percent, even though the 1860 Census included no separate data for those then-nonexistent counties. Because 1860 slave populations were lowest in the most western regions of North Carolina, where those three counties were subsequently incorporated in 1861, it is unlikely that this discrepancy significantly skewed Alexander's assumptions.

[39] Wilson, *The Black Codes of the South*, 144; Alexander, *North Carolina Faces the Freedmen*, xiv-xvi.

[40] Carter, *When the War Was Over*, 193, 200, 220.

[41] Alexander, *North Carolina Faces the Freedmen*, xiv-xvi; James B. Browning, "The North Carolina Black Code," *Journal of Negro History* 15, no. 4 (October 1930): 472-73.

[42] Du Bois, *Black Reconstruction*, 167.

[43] John David Smith, *An Old Creed for the New South: Proslavery Ideology and Historiography, 1865-1918* (1985; Carbondale, IL: Southern Illinois University Press, 2008), 30.

[44] "Proclamation by William W. Holden, Provisional Governor, to the People of North Carolina," June 12, 1865, *The Papers of William Woods Holden*, 2 vols., ed. Horace W. Raper (Raleigh, NC: Division of Archives and History, North Carolina Department of Cultural Resources, 2000), 1:189-90.

[45] The Convention of the Freedmen of North Carolina (referenced hereinafter as the "Freedmen's Convention") and other groups associated with the state's freedmen-related legislation during this period are discussed in further detail in Chapter Two. Some distinction is required for sake of clarity. The petition for legislative assistance delivered by the Freedmen's Convention prompted the constitutional convention to form a

committee, chaired by John Pool (referenced hereinafter as the "Pool committee"), to respond to that petition. *Journal of the Convention of the State of North-Carolina, at its Session of 1865* (Raleigh, NC: Cannon & Holden, 1865), 19. The Pool committee's report recommended the appointment of three "commissioners" to create a code of laws to govern the freedmen. "Report on Freedmen's Address," *Daily North Carolina Standard*, October 13, 1865, 2. The legislative record alternatively referenced those three commissioners as the "Commission" or the "Committee"; that group is referenced hereinafter the "freedmen commission." Finally, in December 1865, the North Carolina General Assembly formed a parallel eight-member "joint select committee . . . to confer" with the freedmen commission. That joint committee is referenced hereinafter as the "joint freedmen committee." *Journal of the Senate of the General Assembly of the State of North Carolina at its Session of 1865-'66* (Raleigh, NC: Wm. E. Pell, 1865), 47; *Journal of the House of Commons of the General Assembly of the State of North Carolina at its Session of 1865-'66* (Raleigh, NC: Wm. E. Pell, 1865), 63. These procedural gyrations contributed significantly to the unusual manner in which the North Carolina Black Code ultimately came to fruition.

[46] "Report on Freedmen's Address," 2. Sidney Andrews expressed his "sincere and heartfelt thanks" for the report's admission of causation between slavery and the condition of the former slaves: "See how, in an instant, a word of manly truth knocks away all texture of that web of sophistries about the natural inferiority of the negro." Andrews, *The South Since the War*, 162.

[47] "Report on Freedmen's Address," 2.

[48] *Executive Documents. Convention, Session 1865. Constitution of North-Carolina, with Amendments, and Ordinances and Resolutions Passed by the Convention, Session, 1865*, "A Resolution to Constitute a Commission to Prepare and Report to the Legislature, a Code of Laws on the Subject of Freedmen," October 18, 1865 (Raleigh: Cannon & Holden, 1865), 73.

[49] *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866*, ch. 40 (Raleigh, NC: Wm. E. Pell 1866).

[50] *Executive and Legislative Documents Laid Before the General Assembly of North Carolina, Session of 1865-66*, "Report of Committee," Document No. 9 (Raleigh, NC: Wm. E. Pell, 1866), 6. The report is hereinafter referenced as the "Freedmen Commission Report." For the nine bills proposed by the freedmen commission, see North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, House Bills nos. 82-90, State Archives of North Carolina, Raleigh, NC; "A Bill Concerning Negroes, Indians and Persons of Color or of Mixed Blood," *Daily North Carolina Standard*, January 31, 1866, 2. The legislative history of North Carolina's Black Code is the subject of Chapter 2 below.

[51] With few exceptions, to be discussed in Chapter 2, lawmakers made few revisions in their ratification of the nine bills proposed by the freedmen commission. *Public Laws of North Carolina, 1866*, chs. 35, 40, 42, 56-60, 64.

[52] *The Revised Statutes of the State of North Carolina, Passed by the General Assembly at the Session of 1836-37* (Raleigh, NC: Turner and Hughes, 1837).

[53] "As they had done for generations, other southern states copied to a considerable extent the policy and even the language of the first state to make a new departure in regard to Negroes." Wilson, *The Black Codes of the South*, 63.

[54] *State v. Manuel*, 20 N.C. 144, 151 (1838).

[55] *Revised Statutes of North Carolina, 1837*, ch. 111, §§ 86-89.

[56] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[57] *Manuel*, 20 N.C. at 151-52.

[58] *Manuel*, 20 N.C. at 161, 163-64, 162.

[59] *State v. Newsom*, 27 N.C. 250, 252, 254-55 (1844) (italics in original). The *Manuel* and *Newsom* decisions presaged 1860s Republican theories of national citizenship which, while acknowledging the eligibility of blacks for citizenship, refused to equate that citizenship with racial equality. National citizenship might have included fundamental natural rights for blacks, but it did not, in the estimation of those Republicans, entitle blacks to any political rights. Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861 to 1866* (Westport, CT: Greenwood Press, 1976), 27.

[60] In his dissenting opinion in the landmark *Dred Scott v. Sandford* case, United States Supreme Court Justice Benjamin R. Curtis lauded the *Manuel* decision as the "sound law" of North Carolina on the subject of native-born free black inhabitants of North Carolina. They "were not only citizens [of North Carolina], but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens." *Dred Scott v. Sandford*, 60 U.S. 393, 572-73 (Curtis, J., dissenting) (1857). Quoting Justice Gaston's *Manuel* decision at length and referencing the reaffirmation of *Manuel* in the *Newsom* decision (erroneously cited as *State v. Newcomb*),

Justice Curtis did not account for the race-based bifurcated citizenship approved by the *Manuel* and *Newsom* decisions.

[61] *Revised Code of North Carolina, Enacted by the General Assembly at the Session of 1854*, ch. 107, § 79 (Boston: Little, Brown & Company, 1855). The 1835 amendments to the North Carolina Constitution withdrew voting rights from any "free negro, free mulatto, or free person of mixed blood, descended from negro ancestors to the fourth generation inclusive, (though one ancestor of each generation may have been a white person)." *Journal of the Convention, Called by the Freeman of North-Carolina, to Amend the Constitution of the State, which Assembled in the City of Raleigh, on the 4th of June, 1835, and Continued in Session Until the 11th Day of July Thereafter* (Raleigh, NC: J. Gales & Son, 1835), 98 (Art. 1, § 3, subsection 3). The 1837 *Revised Statutes* adapted that restriction to define persons subject to the "Act Concerning Slaves and Free Persons of Color," which comprised the entirety of its chapter 111, aptly entitled "Slaves and Free Persons of Color": "All free mulattoes, descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall come *within the provisions of this act.*" *Revised Statutes of North Carolina, 1837*, ch. 111, § 74 (italics added). The 1854 version of the definition applied across the entirety of the *Revised Code*, and not just to a single act.

The 1854 race definition also substituted "persons" for "mulattoes" which, because left undefined by the 1837 *Revised Statutes*, had fallen to the state supreme court to define in another case involving a free black in possession of an unlicensed firearm. In *State v. Dempsey*, the court adopted the "proper original signification of the term" mulatto – "one begot between a white and a black," or one whose lineage was "half and

half" – which, in the context of the statute only further muddled the already-convoluted "fourth generation inclusive standard." *State v. Dempsey*, 31 N.C. 384, 386-87 (1849).

[62] *Dempsey*, 31 N.C. at 387. "[I]n our country, so little attention is paid to the registry of births and deaths and pedigree generally as to make it extremely difficult, and in some cases impossible to prove the blood of a person even for four generations in any other way [than hearsay testimony]." Ibid., 386.

[63] The statute at issue in both *Newsom* and *Dempsey* prohibited "any free Negro, Mulatto, or free Person of Color" from carrying or keeping at home an unlicensed weapon. *Laws of the State of North Carolina, Passed by the General Assembly, at the Session of 1840-41*, ch. 30 (Raleigh: W. R. Gates, 1841). The 1854 *Revised Code* amended that statute slightly, dropping the mulatto and free person of color references to focus solely on "any free negro." *Revised Code of North Carolina, 1854*, ch. 107, § 66. That modification provided the basis for Chavers' successful appeal.

[64] *State v. Chavers*, 50 N.C. 11, 13-14 (1857).

[65] "Convention–Opinion of Hon. B. F. Moore," *Daily Journal* (Wilmington, NC), November 6, 1874, 2; J.G. de Roulhac Hamilton, "Bartholomew Figures Moore," *Biographical History of North Carolina*, 8 vols., ed. Samuel A. Ashe (Greensboro, NC: Charles L. Van Noppen, 1906), 5:277, 5:282.

[66] "Every person shall be deemed a negro or person of color, or person of mixed blood, who may be descended from negro ancestors to the fourth generation inclusive; and every person shall be deemed an Indian, or person of color, or person of mixed blood, who may be descended from Indian ancestors to the fourth generation inclusive; though in each case one ancestor of each generation may have been a white person." "A Bill Concerning

Negroes, Indians and Persons of Color or of Mixed Blood" House Bill no. 82; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2. Despite the commission's efforts, their use of the undefined phrase "negro ancestors" in an attempt to define "negro" hardly alleviated the ambiguity referenced by the *Chavers* court. As noted in the subsequent legislative debates, the commissioners had thereby "use[d], as it were, the unknown quantity in their answer to the question, '*what is a negro?*' . . . [providing] an evident intention to define, without definition, for the definition contained the very words intended to be defined." "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, January 31, 1866, 3 (emphasis in original) (reporting the comments of Samuel F. Phillips).

[67] Wood and Tise, "The Conundrum of Unfree Labor," 100-2. As an apparent byproduct of those prior efforts to group racial minorities into a single category, the "Slaves and Free Persons of Color" chapter of the 1837 *Revised Statutes* inconsistently referenced Indians as persons of color. *Revised Statutes of North Carolina, 1837*, ch. 111, §§ 50-52. Moore's 1854 *Revised Code* removed all Indian references from its retitled "Slaves and Free Negroes" chapter. *Revised Code of North Carolina, 1854*, ch. 107.

[68] "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[69] *Public Laws of North Carolina, 1866*, ch. 40, § 1.

[70] As reported by the *Standard*, House of Commons member W.N.H. Smith of Hertford County articulated that myopic intent for the Black Code in his arguments against the inclusion of Indians within the proposed legislation: "There was no good reason for degrading [Indians] to a level with the negro." "Proceedings of the Legislature," *Daily North Carolina Standard*, January 31, 1866, 3.

[71] The commission proposed a uniform means for applying the four-generation count: "the mode of ascertaining the generations of people of mixed blood shall be to count their original ancestors as the first generation." "A Bill Concerning Negroes," House Bill no. 82; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[72] In 1723, as a proscriptive measure against miscegenation, the General Assembly imposed additional taxes on "all free Negroes, Mulattoes, and other Persons of that kind, being mixed Blood, including the Third Generation" and anyone married to such persons. A 1749 amendment extended those taxes to include "all Negroes, Mulattoes, Mustees Male or Female, and all Persons of Mixt Blood, to the Fourth Generation." Similarly, as of 1746, "all Negroes, Mulattoes, bond and free, to the Third Generation, and Indian Servants or Slaves, shall be deemed and taken to be Persons incapable in Law to be Witnesses in any Cause whatsoever, except against each other." That testimonial limitation was extended by a 1767 amendment to include "all Negroes, Indians, Mulattoes, and all of mixed Blood descended from Negro or Indian Ancestors to the Fourth Generation, bond or free." *The Colonial and State Records of North Carolina. Published Under the Supervision of the Trustees of the Public Libraries, by Order of the General Assembly*, 26 vols., ed. William L. Saunders, Walter Clark, and Stephen B. Weeks (1886-1907; Wilmington, NC: Broadfoot Publishing Company, 1994), 23:106, 23:345, 23:262, 23:699-700 (*Laws of North Carolina, 1723*, ch. 5, § 2; *Laws of North Carolina, 1749*, ch. 3, § 2; *Laws of North Carolina, 1746*, ch. 2, § 50; *Laws of North Carolina, 1767*, ch. 1, § 53).

[73] *Hare v. Board of Education*, 113 N.C. 9, 15 (1893).

[74] *Public Laws of North Carolina 1866*, ch. 40, § 2.

[75] For example, in Mississippi's "Act to confer Civil Rights on Freedmen, and for other purposes," "all freedmen, free negroes and mulattoes" received an enumerated series of rights "in the same manner, and to the same extent that white persons may" or "in the same manner and under the same regulations that are provided by law for white persons." An express exclusion prevented the freedpeople from leasing or renting land outside of incorporated towns. Similarly, the Code's omission of real property from the list of items "personal property and choses in action") the freedpeople could acquire "in the same manner" as white persons prevented black Mississippians from purchasing land. *Laws of Mississippi, 1865,* ch. 4, §§ 1, 2. Black South Carolinians received "[a]ll rights and remedies respecting persons or property, and all duties and liabilities under laws, civil and criminal, which apply to white persons," subject to numerous restrictions of the South Carolina Black Code and an express disclaimer of any racial equality. *Acts of South Carolina, 1864-65*, "An Act Preliminary to the Legislation Induced by the Emancipation of Slaves," No. 4730, §§ 5, 4. North Carolina's Black Code did include some race-based distinctions in order to clarify the scope of some statutes, such as the entitlement of all persons of color "to all the privileges of white persons" in litigating legal claims or the inadmissibility of black testimony in cases involving only white litigants. *Public Laws of North Carolina, 1866,* ch. 40, §§ 3, 9. But the North Carolina Code included no sweeping grants of rights likening persons of color to white North Carolinians, and the overarching status of North Carolina's freedpeople remained tied to the antebellum status of the free black.

[76] William Goodell, *The American Slave Code in Theory and Practice; Its Distinctive Features Shown by its Statutes, Judicial Decisions, & Illustrative Facts* (London: Clarke, Beeton, and Co. 1853), 334-35.

[77] Johnson, *Ante-Bellum North Carolina*, 582.

[78] Ibid., 599.

[79] David Dodge, "The Free Negroes of North Carolina," *Atlantic Monthly* 57, no. 339 (January 1866): 25.

[80] *Laws of North Carolina, 1812*, ch. 1, § 1 (Newbern, NC: Arnett & Hodge, 1812) (allowing blacks to participate solely as musicians within the State militia); *Acts Passed by the General Assembly of the State of North Carolina at its Session Commencing on the 25th of December, 1826*, ch. 21, §§ 1, 5 (Raleigh, NC: Lawrence & Lemay, 1827); *Acts Passed by the General Assembly of the State of North Carolina at the Session of 1830-31*, ch. 14, ch. 4, §§ 1-3, ch. 7, § 1 (Raleigh, NC: Lawrence & Lemay, 1831); *Acts Passed by the General Assembly of the State of North Carolina at the Session of 1831-32*, ch. 4, § 1 (Raleigh, NC: Lawrence & Lemay, 1832); *Acts Passed by the General Assembly of the State of North Carolina at the Session of 1834-35*, ch. 1, § 7 (Raleigh, NC: Philo White, 1835); *Laws of the State of North Carolina Passed by the General Assembly, at the Session of 1844-45*, ch. 86 (Raleigh, NC: Thomas J. Lemay, 1845); *Public Laws of the State of North Carolina, Passed by the General Assembly at its Session of 1858-'9*, ch. 31 (Raleigh, NC: Holden & Wilson, 1859); *Revised Code of North Carolina, 1854*, ch. 66, § 33, ch. 107, §§ 49-50 (the only exception to the ouster following manumission was for slaves over the age of 50 who were emancipated for meritorious service); *Public Laws of*

the State of North Carolina, Passed by the General Assembly at its Session of 1860-'61, chs. 34, 36 (Raleigh, NC: John Spelman, 1861).

[81] Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York: Pantheon Books, 1974), 188 ("free blacks were more black than free"); Hamilton, *Reconstruction in North Carolina*, 152. Only Upper South states like North Carolina pursued such comprehensive antebellum free black laws. According to Berlin, smaller free black populations in the Lower South negated the need for such laws, "and Lower South whites were too confident about their own future to be much bothered by the anomalous caste." Berlin, *Slaves Without Masters*, 212. North Carolina's uniquely detailed statutory delineation of the antebellum free black's status facilitated its Black Code definition of the freedpeople in terms of that pre-emancipation status.

[82] John Hope Franklin, "The Enslavement of Free Negroes in North Carolina," *Journal of Negro History* 24, no. 4 (October 1944): 404; Franklin, *The Free Negro in North Carolina*, 192-93, 195-96, 225, 223, 221; Johnson, *Ante-Bellum North Carolina*, 601 (antebellum free blacks "enjoyed in North Carolina more privileges than he did in most of the other southern states"). As evidence of white North Carolinians' increasing hostilities, Berlin cited an 1852 petition from Sampson County describing the state's free blacks "'a perfect nuisance to civilized society [who] hold themselves a grade above the slave population and attempt . . . to equalize themselves with the white population, not withstanding the legal restrictions . . . already thrown around them.'" Berlin, *Slaves Without Masters*, 348.

[83] *Public Laws of North Carolina, 1866*, ch. 40, § 15.

[84] The laws that survived the partial repeal of North Carolina's slave code included sections 54 through 58 and Section 66 of the 1854 *Revised Code*'s "Slave and Free Negroes" chapter. *Revised Code of North Carolina, 1854*, ch. 107, §§ 54-58, 66.

[85] *Public Laws of North Carolina, 1866*, § 15.

[86] Hamilton, *Reconstruction in North Carolina*, 137; Alexander, *North Carolina Faces the Freedmen*, 33-34.

[87] "Code for the Freedmen," *Daily Sentinel* (Raleigh, NC), January 31, 1866, 2. Meanwhile, the North Carolina press sought to assure the North that all would be well in time, citing the General Assembly's provision for a code "adapted to the new condition of the freedmen, which will be kind and just, and will look to the future welfare of the colored race. The Legislature will adopt such a code promptly and the people will approve it." "The Terms of Reunion," *Daily Sentinel*, November 18, 1865, 2.

[88] "Report on Freedmen's Address," *Daily North Carolina Standard*, October 13, 1865, 2.

[89] "North Carolina—Unworthy Evasion," *New York Times*, December 19, 1865, 4.

[90] Taliaferro P. Shaffner to Andrew Johnson, January 2, 1866, in Bergeron, *The Papers of Andrew Johnson*, 9:566. The purpose behind Shaffner's unsolicited observations remains unclear. A man of diverse talents who served Denmark during the Dano-Prussian War of 1864, Shaffner advocated tirelessly for international telegraphy (as an early associate of Samuel F. B. Morse), authored historical treatises, and invented various explosive materials. "Shaffner, Taliaferro Preston," *The National Cyclopaedia of American Biography*, 63 vols. (New York: James T. White & Company, 1909), 10:482; "Memorial of Taliaferro P. Shaffner," 35th Cong., 1st Sess., Misc. Doc. 263, March 3, 1857; Tal. P.

Shaffner, *The War in America: Being an Historical and Political Account of the Southern and Northern States: Showing the Origin and Cause of the Present Secession War* (London: Hamilton, Adams, and Co., 1862); Taliaferro Preston Shaffner, *History of the United States of America: From the Earliest Period to the Present Time*, 2 vols. (London: London Printing and Publishing Company, 1863); U.S. Patent No. 87,372 ("War and Signal Rocket"); U.S. Patent No. 93,755 ("Blasting Fuse"); U.S. Patent No. 93,756 ("Manufacture of Nitro-Glycerine").

[91] "The old masters grant [the former slaves] nothing, except at the requirement of the nation, as a military or a political necessity . . . . [The whites] readily enough admit that the government has made [blacks] free, but appear to believe that they still have the right to exercise over him the old control." Andrews, *South Since the War*, 398.

[92] "Code for the Freedmen," *Daily Sentinel*, January 9, 1866, 2; Alexander, *North Carolina Faces the Freedmen*, 39-40 (the General Assembly sought "social order" in the face of changing social structure, but any proposal for legislation fostering equality would be "counterproductive").

[93] "The Stewart Compromise," *Daily Sentinel*, March 26, 1866, 2.

[94] "This is a White Man's Government," *Daily Union Banner* (Salisbury, NC), December 1, 1865, 3 (bemoaning the impossibility of "forecast[ing] the manifold complexities that would arise by extending reform so as to confer upon a class lately steeped in the ignorance of complete and unqualified slavery, the full rights of citizenship").

[95] Smith, *An Old Creed for the New South*, 42, 52.

[96] "Africa on Market Square," *Daily Sentinel*, November 20, 1865, 2.

[97] "Fire Arms Among the Blacks," *Daily Sentinel*, January 6, 1866, 2. Period newspapers frequently chronicled provocative misadventures of southern freedpeople as veiled warnings against racial equality. In one case, the report of an attempted invasion of a white man's home by ten black men from a nearby farm, during which the homeowner killed three of the accused men, concluded by noting that the farm had been leased by freedmen. "This furnishes rather a bad introduction to negro proprietorship. . . having no stock or money with which to buy, they depend upon stealing from their neighbors to supply the deficiency." *New Berne Daily Times*, February 3, 1866, 1. In one illustrative week in March 1866, North Carolina newspapers reported a black South Carolina child knocking down a white child and nearly removing her cloths for refusing his hug, a black North Carolina pastor arrested for looting a burned building, a federal military tribunal's acquittal of four black men for the murder of a white North Carolina man, a Georgia shooting incident between white soldiers and "several negroes" that left two soldiers wounded, a black North Carolina man "well thrashed by several Federal soldiers and citizens" for throwing railroad iron through the glass window of a moving train, and a black Tennessee woman who "threw her child to the hogs." "General News," *Daily Sentinel*, March 29, 1866, 3; "State News," *Daily Journal* (Wilmington, NC), March 27, 1866, 4; "Acquitted," *Daily Dispatch* (Wilmington, NC), March 28, 1866, 3; "General News," *Daily Sentinel*, March 30, 1866, 3; "North Carolina Items," *Weekly Progress* (Raleigh, NC), March 31, 1866, 2; "General News," *Daily Sentinel*, March 31, 1866, 3.

[98] Alexander, *North Carolina Faces the Freedmen*, 39.

[99] "Code for the Freedmen," *Daily Sentinel*, January 9, 1866, 2.

[100] *Public Laws of North Carolina, 1866*, ch. 40, § 15. Consistent with his view of the overall benevolence of the 1866 General Assembly, J.G. de Roulhac Hamilton described that blanket repeal as a necessary measure "in order that the equality might be beyond dispute and to clear the law." Hamilton, "Southern Legislation in Respect to Freedmen," 155. He offered no explanation as to the state's slave laws that remained in force, either as originally enacted or as refurbished by the Black Code.

[101] *Public Laws of North Carolina, 1866*, ch. 40, § 3.

[102] *Revised Statutes of North Carolina, 1837*, ch. 111, § 50; *Public Laws of North Carolina, 1866*, ch. 40, § 9. Blacks had been permitted to testify as witnesses in North Carolina courts against each other since 1741. Saunders, Clark, and Weeks, *The Colonial and State Records of North Carolina*, 23:202 (*Laws of North Carolina, 1741*, ch. 24, § 48); see note 72. As evidenced by the lengthy debates in the House of Commons, the extension of black testimonial rights was one of the few contentious matters to arise during the ratification process for the North Carolina Black Code. "General Assembly," *Daily Sentinel*, February 1, 1866, 2, February 2, 1866, 2, February 3, 1866, 2, February 9, 1866, 2.

[103] *Public Laws of North Carolina, 1866*, ch. 40, § 7.

[104] Ibid., ch. 40, §§ 12, 18, 5, 4, 13.

[105] Martin County Superior Court judge Daniel Fowle is credited as the first North Carolina judge to issue a court order qualifying black jurors, in August 1867. Hamilton, *Reconstruction in North Carolina*, 228. The antebellum justification for barring free black jurors from jury service was specious at best, construing all blacks as *prima facie* slaves, regardless of their actual individual circumstances. As such, free blacks could not

be considered the legal peers of whites, thereby preventing their service on a jury of peers. "Important Decision of Judge Fowle," *Raleigh Register*, August 30, 1867, 3. The abolition of slavery nullified that antiquated presumption. In the absence of any express constitutional or legal prohibition, judge Fowle reasoned that black and white men had become legal peers "entitled to all the rights which were incident to freedmen." Ibid. The article does not mention whether judge Fowle considered the contrary precedent of the *Manuel* and *Newsom* decisions in his ruling.

[106] Subject to generally applicable evidentiary restrictions, including as to witness competency, the new statute expressly authorized black testimony against whites only in those cases "where the rights of persons or property of persons of color, shall be put in issue" or "where the violence, fraud or injury alleged shall be charged to have been done by or to persons of color." *Public Laws of North Carolina, 1866*, ch. 40, § 9.

[107] The statute imposed a September 1, 1866, deadline for the recording of marriages, less than six months after the March 10, 1866, ratification of the statute. *Public Laws of North Carolina, 1866*, ch. 40, § 6. An amendment extended that deadline to January 1, 1868. *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866 '67*, ch. 70, § 1 (Raleigh, NC: Wm. E. Pell, 1867).

[108] *Public Laws of North Carolina, 1866*, ch. 56, § 1.

[109] Rebecca Scott, "The Battle Over the Child: Child Apprenticeship and the Freedmen's Bureau in North Carolina," *Prologue* 10, no. 2 (1978): 102-4.

[110] Smith, *An Old Creed for the New South*, 51 ("Writing in Guilford County, North Carolina, the Reverend John Paris praised slavery's gentle control mechanisms. Slavery

'watched over, and guarded against misconduct' by the blacks, Paris said. Since emancipation, however, crime had increased twenty times.").

[111] Jonathan Worth to Lydia Maxwell, Liberty, IA, January 15, 1867, in *The Correspondence of Jonathan Worth*, 2 vols., ed. J.G. de Roulhac Hamilton (Raleigh: Edwards & Broughton, 1909), 2:875.

[112] Smith, *An Old Creed for the New South*, 46, 53.

[113] *Revised Code of North Carolina, 1854*, ch. 34, § 5; *State v. Davis*, 23 N.C. 125, 127 (1840).

[114] Compare *Public Laws of North Carolina, 1866*, ch. 40, § 11, with *Revised Code of North Carolina, 1854*, ch. 107, § 44, ch. 34, § 5, and *Revised Statutes of North Carolina, 1837*, ch. 111, § 78, ch. 34, § 5.

[115] The severity of an alleged assault determined its status as a misdemeanor or felony charge, which in turn determined the applicable punishment. In postbellum North Carolina, a fine, imprisonment, or both penalties could be imposed for misdemeanor assault. *State v. McNeill*, 75 N.C. 15, 16 (1876); *Revised Code of North Carolina, 1854*, ch. 34, § 120. Felony assault convictions carried a maximum two-year prison term, which could be supplemented with one or more public whippings, a stint in the pillory, or a fine if the offense constituted an "infamous" act. *Revised Code of North Carolina, 1854*, ch. 34, § 27.

[116] Ibid., ch. 107, §§ 28, 31.

[117] "[O]ne of its main objects [of the Code's contract statute] is to protect the colored person from imposition by cunning, and the white man from the effects of corrupt evidence." Freedmen Commission Report, 4. Given the freedpeople's alleged propensity

for depravity and dishonesty, written contracts protected white contracting parties from such "corrupt evidence" as the presumably dubious oral testimony of black witnesses.

[118] *Public Laws of North Carolina, 1866*, ch. 40, § 7.

[119] Compare *Public Laws of North Carolina, 1866*, ch. 40, § 7, with *Revised Code of North Carolina, 1854*, ch. 50, § 11.

[120] *Revised Code of North Carolina, 1854*, ch. 50, § 16.

[121] *Public Laws of North Carolina, 1866*, ch. 59.

[122] Saunders, Clark, and Weeks, *The Colonial and State Records of North Carolina*, 23:203 (*Laws of North Carolina, 1741*, ch. 24, § 51). The admonition requirement remained largely unaltered throughout the nineteenth century prior to its incorporation with the state's Black Code. *Revised Statutes of North Carolina, 1837*, ch. 111, § 51; *Revised Code of North Carolina, 1854*, ch. 107, § 72; *Public Laws of North Carolina, 1866*, ch. 40, § 10.

[123] Saunders, Clark, and Weeks, *The Colonial and State Records of North Carolina*, 23:581 (*Laws of North Carolina, 1762*, ch. 5, § 19). For changes by the Black Code to the then-existing apprenticeship regime, compare *Public Laws of North Carolina, 1866*, ch. 40, § 4, with *Revised Code of North Carolina, 1854*, ch. 5, §§ 1, 2, 5.

[124] *Public Laws of North Carolina, 1866*, ch. 40, § 15 (italics added).

[125] *Revised Code of North Carolina, 1854*, ch. 107, §§ 54-58. For the original versions of these prohibitions, incorporated within both the 1837 *Revised Statutes* and the 1854 *Revised Code* before being retained by the Black Code, see *Acts Passed by the General Assembly of the State of North Carolina, at its Session Commencing on the 25th of December 26, 1826*, ch. 21, §§ 1-4 (Raleigh: Lawrence & Lemay, 1827).

[126] *Public Laws of North Carolina, 1866*, ch. 40, § 15; *Revised Code of North Carolina, 1854*, ch. 107, § 66; *Laws of North Carolina, 1840-41*, ch. 30 (Raleigh, NC: W. R. Gales, 1841).

[127] *Newsom*, 27 N.C. at 254.

[128] The North Carolina Supreme Court's 1834 acknowledgement of a slave's right to self-defense against an overseer's lethal assault likely prompted such continued legislative restrictions on the lawful possession of weapons by blacks as a means for mitigating the effectiveness of any professed right of self-defense. *State v. Will*, 18 N.C. 121 (1834). For discussion of the *Will* decision, see notes 49-51 and accompanying text in Chapter Two below.

[129] Wilson, *The Black Codes of the South*, 107; Alexander, *North Carolina Faces the Freedmen*, 40.

[130] *Revised Code of North Carolina, 1854*, ch. 34, § 43.

[131] Ibid., ch. 107, § 60.

[132] *Public Laws of North Carolina, 1866*, ch. 42. Positioned by the members of the freedmen commission as a sentencing option for local courts, the extensive Black Code act authorizing workhouses – ostensibly for the "safe keeping, correcting, governing and employing of offenders committed thereto" – simply repurposed antebellum compelled labor punishments previously applicable solely to convicted black offenders. Ibid., ch, 35, § 1.

[133] *Revised Code of North Carolina, 1854*, ch. 5, § 1; *Public Laws of North Carolina, 1866*, ch. 42, ch. 40, § 4; Brian Sawers, "Race and Property After the Civil War: Creating the Right to Exclude," *Mississippi Law Journal* 87, no. 5 (2018): 736-37. That result

coincided with earlier Freedmen's Bureau directives noting that children of "parents who have no honest calling, or visible means of support" were suited for apprenticeships. Scott, "The Battle Over the Child," 104. A January 1867 amendment to North Carolina's apprenticeship laws struck the language distinguishing apprenticeship decisions on the basis of the child's race, thereby negating at least the express racial impact that a vagrancy conviction could have on the accused's children. *Public Laws of North Carolina, 1866 '67,* ch. 6, § 1.

[134] *Public Laws of North Carolina, 1866,* ch. 56; *Revised Code of North Carolina, 1854,* ch. 107, §§ 75-77.

[135] *Public Laws of North Carolina, 1866,* ch. 35.

[136] *State v. Ross,* 49 N.C. 315, 316-17 (1857) (the taking of some item from another person's property constitutes a "breach of the peace" that escalates a civil trespass to an indictable criminal offense); *Revised Code of North Carolina, 1854,* ch. 107, §§ 31, 32; *Public Laws of North Carolina, 1866,* ch. 60.

[137] The significance of larceny convictions as racial control mechanisms continued to increased substantially in post-Reconstruction North Carolina. For discussion of burgeoning racially disparate larceny convictions, see notes 34-36 and accompanying text in Chapter Three below.

[138] *Revised Code of North Carolina, 1854,* ch. 34, §§ 104, 105, ch. 48, §§ 3, 4; *Public Laws of North Carolina, 1866,* ch. 57.

[139] Numerous court decisions of the period addressed the essential elements and common-law punishments for larceny and misdemeanors, including North Carolina Supreme Court

decisions in *State v. Haughton*, 63 N.C. 491, 492 (1869), and *State v. Norman*, 82 N.C. 687, 690 (1880).

[140] Corporal punishment remained an important component of social control long after emancipation. Epps, "The Undiscovered Country," 424 ("The whites of the South . . . were uniformly convinced that only one thing could keep the region safe and solvent – the whip, the same mechanism that had preserved slavery for so long.").

[141] *Revised Code of North Carolina, 1854*, ch. 34, §§ 16-17, ch. 107, §§ 35-39. In a partial but implicitly discriminatory concession to the severity of the penalty, the *Revised Code* prohibited the conviction of a black person for any sedition crime solely upon the sworn testimony of one black witness. Ibid., ch. 107, § 38. As for the two-tiered punishment structure for sedition, a February 1861 amended the law to mandate the death penalty for any person convicted of circulating "incendiary" materials or otherwise exciting blacks to "a spirit of insurrection, conspiracy or rebellion." *Public Laws of North Carolina, 1860-'61*, ch. 23.

[142] Ibid., ch. 64, §§ 1-2.

[143] *Revised Code of North Carolina, 1854*, ch. 34, § 81. Conviction under the slave enticement statute required a fine of up to one hundred dollars, as well as another one-hundred-dollar penalty and damages payable to the slaveowner, and an additional one-hundred-dollar penalty payable "to any person suing for the same." Ibid. Similarly structured enticement statutes criminalized the enticement of free blacks to migrate within or outside of North Carolina for purposes of being resold into slavery, under more severe penalties. Unless the conduct resulted in the free black being resold into slavery, in which case the penalty was death, such enticement targeting a free black was subject to a

three- to eighteen-month prison term and a one hundred- to one thousand-dollar fine. Ibid., ch. 34, §§ 12-13.

[144] *Public Laws of North Carolina, 1866,* ch. 58; Freedmen Commission Report, 3. The civil penalty under the statute was a judgment equal to two times any damages assessed against the offender. Because the statute dictated joint and several liability for any financial penalty, the aggrieved employer was permitted to decide whether he or she recovered damages against the breaching servant, the person enticing the breach, or both of them. The penalty apparently lacked an adequate deterrent effect, as the statute was amended within one year of adoption to escalate the activity into a misdemeanor offense, punishable by up to six months imprisonment and a one hundred dollar fine. *Public Laws of North Carolina, 1866 '67,* ch. 124.

[145] *Acts of the State of Tennessee, Passed at the Second Session of the Thirty-Fourth General Assembly, for the Years 1865-66,* ch. 40, § 1 (Nashville, TN: S. C. Mercer, 1866); *Acts of South Carolina, 1864-65,* "An Act Preliminary to the Legislation Induced by the Emancipation of Slaves," No. 4730, § 3.

[146] *Laws of Mississippi, 1865,* ch. 4, § 1.

[147] *Acts of South Carolina, 1864-65,* "An Act to Establish District Courts," No. 4732, §§ 1, 7.

[148] *The Acts and Resolutions Adopted by the General Assembly of Florida, at its Fourteenth Session, Begun and Held at the Capitol, in the City of Tallahassee, on Monday, December 18, 1865,* ch. 1,466, §§ 1, 8 (Tallahassee, FL: Dyke & Sparhawk, 1866).

[149] *Acts of the Session of 1865-6 of the General Assembly of Alabama Held in the City of Montgomery, Commencing on the 3d Monday in November, 1865,* "An Act to Amend Section 3794 of the Code, Relating to Vagrants," No. 107 (Montgomery, AL: Reid & Screws, 1866).

[150] *Acts of the General Assembly of the State of Virginia, Passed in 1865–66,* ch. 28, § 1 (Richmond, VA: Allegre and Goode, 1866).

[151] Wilson, *The Black Codes of the South,* 114 (North Carolina's code among the "milder" black codes); Alexander, *North Carolina Faces the Freedmen*, 50 (North Carolina code "fairer" than other black codes); R. D. W. Connor, *North Carolina: Rebuilding an Ancient Commonwealth 1584-1925*, 4 vols. (Chicago: American Historical Society, Inc., 1929), 2:278 (North Carolina code "notable for its liberality toward the negro").

CHAPTER TWO: "A SYSTEM OF LAWS UPON THE SUBJECT OF FREEDMEN"

At noon on Monday, October 2, 1865, in Raleigh, 110 white delegates convened in the Commons Hall of the state capitol building for the opening of the North Carolina constitutional convention.[1] Elected on September 21, 1865, the delegates prepared to answer provisional governor William Holden's call: revise the North Carolina constitution as needed to expedite reunification with the federal government.[2] They listened as the convention's president, Person County's Edwin G. Reade, opened the proceedings with the simplistic understatement that the state faced "a time of great perplexity." His opening remarks did nothing to address that perplexity.

Reade spoke of his hope for "little conflict of opinion among us" as "the interests of our constituents are the same." He presumably referred solely to the delegates' white constituency, who shared few interests with the state's newly emancipated. Reade made no mention of the freedpeople or emancipation, or of the changed conditions that slavery's abolition had wrought for hundreds of thousands of black North Carolinians. Nor did he intimate how those changed conditions might necessitate the delegates' attention. Reade instead urged swift and calm consensus, couching his description of the prodigal Tar Heel State's forthcoming return to the Union in imagery ominously reminiscent of the antebellum South:

> Fellow citizens, *we are going home*. Let painful reflections upon our late separation, and pleasant memories of our early union, quicken our footsteps towards the old mansion, that we may grasp hard again the hand of friendship which stands at the door, and, sheltered by the

> old homestead which was built upon a rock and has weathered the storm, enjoy together the long, bright future which awaits us.[3]

Reade ignored the reality that emancipation had swept away the old mansion. Reminiscence would not ensure reunion, certainly not on terms that coincided with Reade's "pleasant memories." North Carolinians would return, if at all, to a different mansion, one without slave quarters.

Later that same afternoon, across town, all eyes in Raleigh's Methodist African Church turned to James H. Harris. The former slave, freed in 1848 and college educated, rose with a very different message for a very different audience, one hundred and five black delegates.[4] One observer, a former congressman who had attended both the constitutional convention and the meetings in that church, spoke more highly of Harris' congregation: "'as for brains, they're pretty much all over here at the African church.'"[5] Harris – previously involved with militant Canadian antislavery groups, and once recruited (unsuccessfully) for John Brown's Harpers Ferry raid – now offered a conciliatory address for the delegation's consideration. If approved, that proposed address, an earnest request for legislative relief for the state's freedpeople, would be delivered across town to the constitutional convention. The address, described by one reformer as the "heart throb" of black North Carolinians, would ultimately be approved.[6] It would also be delivered, ignored, and replaced with North Carolina's Black Code.

The Freedmen's Convention of 1865

Like Harris, the delegates seated in the pews of Raleigh's Methodist African Church had been selected from across thirty-four North Carolina districts to represent the state's previously free and recently emancipated blacks at the inaugural Convention of

the Freedmen of North Carolina.[7] They heeded the strident call of a *Wilmington Herald* notice, announcing the arrival of "the times foretold by the Prophets" for "[f]our millions of chattels, branded mercantile commodity, [to] shake off the bands, drop the chains, and rise up in the dignity of men." The notice outlined their purpose: "to secure those rights of Freemen that have been so long withheld from us[, to] learn how to honorably and usefully fill our new position, and to discharge our debt of gratitude and our new obligations."[8] The delegates entrusted Harris with the pursuit of those withheld rights, tasking him and four other ex-slaves, now delegates, with the preparation of an address defining "the wishes of this convention on the subject of equal rights."[9] The draft presented on October 2 represented a different tact, as did the final response of the address' white recipients.

The Freedmen's Convention had opened on September 29, 1865, with spirited words and lofty aspirations, countering aspersions as "a high festival of ebony" and warnings against "insolent or unreasonable demands" from the state's predominantly white press.[10] The convention's president, the Reverend James W. Hood of Craven County, announced high expectations for the proceedings: "We have met here to deliberate on the best interests of our people. We come from the hills, from the mountains and from the deserts. We come together as one man, and our watchword is 'equal rights before the law.'" Hood, the presiding elder of North Carolina's African Methodist Episcopal Zion church, acknowledged the uncertainty of immediate or complete success, despite "hav[ing] waited long enough for our rights." In his view, however, "[t]he best way is to give the colored men rights at once, and then they will practice them and the sooner know how to use them." Hood defined the convention's objectives as three

fundamental rights: the right to testify in court, as protection of the freedpeople's rights and property; the right to jury service, so that the former slave might be tried before a jury of his or her peers; and the right to vote. "These are the things that we want," proclaimed Hood, "that we will contend for–and that, by the help of God, we will have, God being our defender." Tempered only moderately by Hood's call for respectful conduct, that message set a pitched tone for the equal rights directive given to Harris' drafting committee.[11]

Two letters presented to the delegation, seemingly in response to Hood's call for racial equality, represented the divergent objectives and temperaments of the attendees. The first letter, from state legislator and Cabarrus County Solicitor William W. Coleman, urged relentless advocacy for black suffrage and trial participation. Otherwise, wrote Coleman, "woe to you will be the day when a former slave State shall be admitted to full equality in the Union and your equality before the law not recognized."[12] The second letter came from abolitionist and *New York Tribune* editor Horace Greeley, whose efforts on behalf of blacks had already been "hail[ed] with satisfaction" by the convention's delegates. Seeking to manage expectations, Greeley cautioned the delegates against confrontation and ultimatums in favor of the gracious adoption of a litany of virtues: hope, patience, nonviolence, diligence, self-respect, and forbearance from emigration. Reform would not be immediate, he reminded the delegates, and equality was not assured. "Slavery the tree, whereof negro-hate and white prejudice of color are branches, has been cut down. There is still vitality in the roots, but the branches are bound to wither and decay."[13] The shifting agendas present at the Freedmen's Convention, as represented

by Hood, Coleman, and Greeley, left Harris and his committee a narrow path between demands and deference.

Seeking middle ground, the proposed address substituted equity for equality. Harris' committee members made no demands and invoked no rights in the address. Indeed, the document remained silent as to racial equality and Hood's aspirational trinity of the rights of testimony, jury service, and voting. Harris and his fellow committee members instead requested help in a petition "respectfully and humbly" offered to apprise the constitutional convention "of our situation and our wants as a people." Cast in a formal, almost reverential tone, the document deferred to stereotypes of black inferiority in a calculated effort to secure assistance by placating white attitudes of superiority and paternalism. References to the freedpeople's "consequent degradation" from centuries of enslavement and willingness to "bury in oblivion the wrongs of the past" underscored a plaintive concession: "we must depend wholly upon moral appeal to the hearts and consciences of the people of our State." The freedpeople's faith – in the benevolence of their white neighbors, and in the "justice, wisdom and patriotism" of the white constitutional delegates "to guard the interests . . . of that class which, being more helpless, will most need your just and kind consideration" – reverberated throughout the address. The report bolstered those pronouncements of faith with invocations of morality, religious salvation, fairness, the freedpeople's steadfast obedience and passivity throughout the war, and the shared bond of a southern homeland.[14] The freedpeople had clearly mastered the art of sycophancy after generations of navigating tenuous relations with white North Carolinians.

Shorn of its prolific flattery, the address *requested*, rather than demanded, "wise and humane legislation" to protect the freedpeople from victimization and to help all black North Carolinians help themselves with statutorily-recognized opportunities for self-improvement and social utility. The committee requested legislative relief on five specific matters: (1) employment safeguards, ensuring adequate wages and reasonable work hours; (2) appropriate mechanisms for laborers' protection and redress against unscrupulous employers; (3) education for black children "that they may be made useful in all the relations of life"; (4) repeal of racially discriminatory legislation; and (5) assistance for those orphaned, injured, or separated from families by slavery. To avoid antagonizing lawmakers, the authors disavowed charity. The address instead acknowledged the personal responsibility of the freedpeople to "merit [such legislative relief] by our industry, sobriety and respectful demeanor." Declaring the freedpeople's continued affection for and allegiance to North Carolina, the committee members "commit[ted] our cause into your hands, invoking heavens [*sic*] choicest blessings upon your deliberations and upon the State."[15] The delegates unanimously adopted the proposed address, described by *Chicago Tribune* southern correspondent Sidney Andrews as "one of the most remarkable documents that the time has brought forth." The delegation appointed Harris and delegates John R. Good and Abraham Galloway to deliver the address to the constitutional convention.[16]

Effusive with praise for that first political act by North Carolina's freedmen, Andrews marveled, "I do not see how they could have presented their claims with more dignity, with a more just appreciation of the state of affairs, or in a manner which should appeal more forcibly either to the reason or the sentiment of those whom they address."[17]

The state's press offered a more measured assessment. Coverage in Raleigh's *Daily Standard* reported that the address "in general, is in good taste, and exhibits ability and scholarship," deserving of "a just and considerate hearing." The editors of the capital city's *Daily Progress* found "nothing to object to in the address of the Freedmen, but, on the contrary, much to commend," likely because the address was "in all respects respectful to the white or superior race." The *Daily Progress* editors offered little hope for the address, however, suggesting instead that time would "harmonize all things as to render the blacks and the whites entirely satisfied with the present condition of things." Having foreseen "no good but evil, and nothing but evil to come" of a freedmen's convention, the *Daily Sentinel* editors recognized the address as "admirable in temper, felicitous in its style and modest in the tone of its demands." Meanwhile, the freedmen delegates had allegedly disguised the actual tenor of their proceedings: "[R]umor connects with their public speeches and private conversations, inflammatory and exciting remarks, which only tend to excite counter irritation and to close the ears of the whites against all appeals." Such lukewarm praise, including accusations of alienating white North Carolinians and inspiring "anything but good" among black North Carolinians, portended an inauspicious reception for the address from the constitutional convention.[18]

The Constitutional Convention of 1865

The address in fact evoked little reaction from the constitutional convention beyond avoidance and delay. According to a *New York Times* correspondent, the opening days of North Carolina's constitutional convention had been funereal in nature, appropriate given that "many of the members were really burying a dear friend."[19] Four days passed before the official record of the constitutional convention made any reference

to the Freedmen's Convention, its address, or the freedpeople in general. Finally, on October 5, 1865, Holden forwarded the "memorial from the colored convention" to the constitutional convention without further comment. After a reading of the address, the delegates relegated the matter to the hastily-assembled five-member Pool committee for study and response.[20]

The journal of the constitutional convention's proceedings included no further discussion of the address or its requests for legislative relief until the October 11 delivery of the Pool committee's report. Despite the bravado of its report, the Pool committee evaded affirmative action, instead proposing deferral to the legislature for any further action. The committee did recommend providing the General Assembly with the assistance of a three-member freedmen commission to be appointed by the provisional governor. The Pool committee's proposed ordinance charged that commission to "prepare and report to the Legislature at its next session, a system of laws upon the subject of freedmen," and to identify all existing state laws to be repealed in order to "conform" with the abolition of slavery.[21] The philosophical flaw with a separate statutory code predicated upon race did not escape Andrews' notice: "The injustice of the action lies in the fact that neither the [constitutional] Convention as a body, nor any delegate as an individual, was wise enough to see that there must be no laws for white men, no laws for black men, but only laws for all men alike."[22] Inaction continued, as an immediate motion for further consideration of the Pool committee report delayed ratification of the ordinance until October 18.[23]

With the delegation's most significant action concerning the freedpeople finally completed, Reade closed the two-week-old convention on October 19, 1865, announcing

"there remains nothing to be done" to secure reunification. Yet the request of the Freedmen's Convention for "wise and humane legislation" remained unanswered. Despite the deft avoidance of the freedmen's petition, Reade praised his fellow delegates' passive, almost lifeless, acquiescence to the inevitability of slavery's abolition for restoring racial harmony in the Old North State:

> The element of slavery, which has so distracted and divided the sections, has, by a unanimous vote, been abolished. Every man in the State is free. The reluctance which for a while was felt to the sudden and radical change in our domestic relation—a reluctance which was made oppressive to us by our kind feelings for the slave, and by apprehensions of the evils which were to follow him, has yielded to the determination to be to him, as we always have been, his best friend ; to advise, protect, to educate and elevate him ; to seek his confidence and to give him ours ; and each occupying appropriate positions towards the other, to cherish for the past and cultivate for the future, those strong and mutual attachments which have been hallowed at the hearthstone, in the church, in the sick room, and at the grave.[24]

Records of the delegates' deliberations reflected no such determination of friendship, and no assumption of the role of protector or confidante. In the view of at least one unidentified state politician, reunification remained unlikely because of the breadth of

work left unfinished by the delegates. He feared the convention's results had not been "sufficiently radical" to warrant federal approval, and would likely require a repeat of reconstruction efforts.[25]

What Reade touted as resolution, black North Carolinians interpreted as rejection. In an October 21, 1865, letter to the editor of *Journal of Freedom*, Raleigh's short-lived black weekly newspaper, "A Colored Man of Raleigh" lamented the inconclusiveness of the Pool committee's report. "[T]hat committee has refused to take any responsibility and have [*sic*] not taken the matter in hand at all," the author wrote. "Thus it seems apparent that we, the colored people, are to be left alone as we are now. It seems that this committee have left us in an almost despairing condition. We appealed to them, stating our situation, and asking conventional provision whereby our race could live, but they have done nothing for us."[26] The *Journal*'s editor agreed. Following the convention's adjournment, the *Journal of Freedom* reported that a strong wind during the delegates' deliberations had snapped a flagpole atop the capitol building, causing the national flag to fall. Finding an allegory to the state's predicament, the editor asked: "Will the efforts of the Convention to practically place the State under the old flag prove futile? We don't believe in signs and portents, but we do think that such will be the result, and we shall rejoice over it as a victory over injustice and tyranny. If the Convention had not, coward like, dodged the matter set forth in the Freedmen's petition, the State would have been better off [and] its efforts, like the flag, would not have fallen to the ground."[27] Just three weeks after a call to the freedpeople to "rise up in the dignity of men" prompted a statewide gathering, their bold and unprecedented initiative had stalled. The freedpeople's eloquent address, hand-delivered to the state's constitutional convention,

had been delegated to three unnamed white men for resolution. For white North Carolinians otherwise occupied with reunification, the Freedmen Convention and its address had been little more than a political inconvenience.

The Freedmen Commission

Holden likely paid little attention to his newly-granted authority to appoint a freedmen commission. After all, he had issued his own proclamation that day, one calculated to further his political aspirations by converting his provisional governorship into an officially elected governorship. In accordance with the constitutional convention's prior instructions, Holden's October 18 proclamation designated November 9, 1865, as the date for statewide elections and the referenda on the convention's secession and slavery ordinances.[28] Other distractions already existed for Holden, including the recently-surfaced gubernatorial election challenge from his own state treasurer appointee, Jonathan Worth.[29] Meanwhile, reunification depended in part upon North Carolinians' permanent renunciation of slavery, and the convention's October 9 slavery ordinance had only partially resolved that matter.[30] The more pressing question concerning the freedpeople centered on whether white North Carolinians would accept that final eradication of slavery, not which three people should be named to ponder over any rights that ex-slaves might request. In all likelihood, as a former slaveowner, Holden gave little thought to any prospective rights of the newly emancipated, focusing more intently on his own personal interests and political aspirations.[31]

Holden made his views as to the inferiority of the black race well known long before a rambling paternalistic lecture to the freedpeople dominated his June 1865 proclamation scheduling the state's constitution convention. In an 1859 article arguing

against the overly indulgent management of domestic slaves ("whip well, if whipping be needed"), Holden reminded his readers that "[t]he true condition of the African race is that of dependence on the white man, or, in other words, slavery."[32] Similarly, in a May 1865 speech to a Raleigh audience, Holden espoused the belief that, without the sympathy, aid, and support of the white race, "the emancipated race . . . would be extinct."[33] The very day he received authorization to appoint the freedmen commission, Holden's *Standard* published its unsolicited advice for an appropriate freedmen's code: "Now, we do believe that the majority of the negroes will never voluntarily settle down to hard labor, unless the laws of the country bring them to it. These laws must be simple in order to meet their limited comprehension, just in order to secure satisfactory and friendly relations, and *immediate*, because the war left us on the verge of suffering, and another year of anarchy will plunge us into actual misery."[34] As provisional governor, Holden continued to profess the view of most white North Carolinians: emancipation did not constitute entitlement, but rather the opportunity for the freedpeople to earn any rights they received.[35]

At some unknown point before the end of October 1865, despite his disregard for the freedpeople, Holden took a token step in support of their cause by naming his commission appointees. A brief October 30, 1865, notice in the *Standard* identified the three commissioners: attorneys and constitutional convention delegates Bartholomew F. Moore and Richard S. Donnell, and North Carolina district attorney William S. Mason. Appropriately, in a separate untitled piece appearing just below that announcement, the *Standard* reminded its readers of Holden's firm opposition to black suffrage and testimonial rights.[36]

It remains unclear how long Moore, Donnell, and Mason actually labored on their proposed Code, given the uncertainty as to the exact date(s) of their appointments to the freedmen commission. Moore, himself an ultimately unsuccessful candidate in the November 9, 1865, elections for a House of Commons seat, immediately signaled an intention to begin work promptly. A series of published notices started October 30, 1865, advising Moore's Wake County constituents of the impact his appointment would have on campaign activities, stating the work "will so occupy my time as to forbid my mingling much, if any, with the people."[37] Meanwhile, Holden did not formally notify the General Assembly of the appointments until November 30, 1865, three weeks after his November 9 gubernatorial defeat.[38] Presumably, having been established for at least one month, the freedmen commission had already made significant progress in its work.

The existence and ongoing work of the commission seemingly escaped the notice of Worth and his supporters. Only after the General Assembly convened on November 27, 1865, and received Holden's November 30 notice of the commission appointments, did Worth's supporters apparently appreciate the situation.[39] Three Holden loyalists held sole drafting authority for the freedmen's code – the one politically-sensitive matter most likely to determine the timing and conditions for the state's reunification with the Union – without any involvement or input from the incoming Worth administration.[40] Any newly-elected southern governor of that era would have wanted some representation in deliberations on a matter as potentially explosive as the rights of freedpeople. For Worth, a fierce critic of the freedpeople and their abilities, exclusion from those conversations would have been unforgiveable: "I know from observation of history that the African left to its own self-control, is so indolent and improvident, that he will not–indeed I think he

cannot be made a good citizen. . . . They are rapidly sinking into their natural position and by an irresistible law of nature, will soon perish out in contact with a superior race– and in the mean time will be the curse of our country. They retarded our prosperity as slaves. As free negroes they will be the curse of our Country–particularly of the South." Ironically, having written a friend just two months earlier that, in the wake of emancipation, "it would be better for you and for every body else who is a white man to leave North Carolina," Worth now found himself governor of a state embroiled in the quandary of dealing with that "curse."[41] His supporters needed to scramble to gain some semblance of control over the placement of the newly emancipated within the state's post-war society.

That belated realization of the lack of oversight into the commission's deliberations likely prompted the December 4, 1865, resolution by Worth supporter senator Dennis D. Ferebee. He proposed an eight-member "joint select committee . . . to confer with the [commission]." Comprised of three senators and five members of the House of Commons, the committee would "ascertain what progress has been made by the [commission], and when a report may be expected." The two Houses named at least five Worth supporters to that joint freedmen committee.[42]

There is but one mention in the legislative record of any conference between that joint freedmen committee and the freedmen commission. One week after the committee's formation, Ferebee reported to the Senate that the "many and complicated subjects" resulting from the "sudden change in the condition of the negro from slavery to freedom" made difficult the drafting of legislation "best suited to protect [the freedpeople's] interests and promote their welfare. Time and thought are necessary to this end." Ferebee

also referenced the possible benefit of the "experience and action also of our sister States," which could soon become available to "shed much light upon the subject, to guide and support us." Given the impending close of the General Assembly's session, Ferebee's committee proposed that "the subject can, with more convenience and wisdom, be considered and matured" when the General Assembly reconvened in February 1866. Both Houses of the legislature agreed to postpone further consideration of the commission's work to that next session,[43] much to the chagrin of the *New York Times* correspondent reporting on the proceedings:

> It was unworthy of them as men, and particularly so as politicians, to dodge this vital issue. . . . [S]o preponderant has been [the vote against candidates favorable to governmental reconstruction policies] that it is now a question if the Administration will not summarily set [that vote] aside and continue indefinitely the existing military rule. . . . Certainly the statesmen (if such still exist) of North Carolina cannot expect by lofty disdain to brush from their soil a quarter of million of freedmen [*sic*], nor can they hope by this ostentatious ignoring of the very question the General Government deems most important, to gain consideration in quarters where consideration must ultimately be gained, in order to bring about that reunion for which all good and loyal men are so ardently hoping and striving.[44]

Contrary to Reade's claim at the adjournment of the constitutional convention, there remained much to be done before the Tar Heel State would be welcomed back into the Union.

* * *

Bartholomew Moore, a respected constitutional lawyer considered by many to be the "Father of the North Carolina Bar," served as chair of the freedmen commission. Credited with primary authorship of the commission's work, much like his primary role in drafting the state's 1854 *Revised Code*, Moore brought extensive experience to the task at hand. Moore, a former North Carolina attorney general and state legislator, enjoyed wide regard as "one of the profoundest lawyers in the State, and with scarcely a superior in the United States."[45] In all likelihood – as illness and lengthy absences from Raleigh significantly curtailed Donnell's participation in commission deliberations, and Mason lacked the breadth of Moore's experience and credentials – the Black Code primarily reflected Moore's formidable influence.[46] As a staunch Unionist, Moore had bitterly opposed the "unnecessary, wicked and accursed war," for which he pronounced the damning epitaph: "'The South separated from the Union to secure negro slavery; in the struggle she freed the negro and enslaved herself!'"[47] His own complicated relationships with black persons, ranging from slaveowner to legal counsel, made Moore a unique force on the freedmen commission.[48]

Moore's discordant views as to the black race reverberated throughout his most widely recognized case, the capital murder appeal of *State v. Will* (1834). In that case, Moore convinced the North Carolina Supreme Court of a wounded slave's right to self-defense against the overly-abusive overseer who had shot the slave. Four years before

articulating his own views of the citizenship of free blacks in *Manuel*, justice Gaston adopted Moore's arguments that the white man's authority, while absolute, was not without some reasonable bounds. "Unconditional submission is the general duty of the slave; unlimited power is, in general, the legal right of the master," concluded Gaston. "Unquestionably there are exceptions to this rule." While arguing that slaves had the right to defend against lethal force, Moore maintained his belief in the "inexorable necessity of keeping our slaves in a state of dependence and subservience to their masters." But neither dependence nor subservience mandated irrevocable surrender.

Moore emphasized the "history of a gradual progression in the improvement of the condition of the slave, in the protection of his person, his comforts, and those rights not necessary to be surrendered to his master." A master's power over a slave extended no further than the coercion of service from the slave; "power over the life is not necessary to effectuate that end." "Uncontrolled authority over the body, is uncontrolled authority over the life; and authority, to be uncontrolled, can be subject to no question. Absolute power is irresponsible power, circumscribed by no limits save its own imbecility, and . . . is exempt from legal inquiry, and is absolved from all accountability for the extent or mode of its exercise."[49] In short, neither ownership nor racial superiority necessitated or even permitted such absolute power over the slave.

The inherent right of self-preservation through self-defense, according to Moore, represented the next logical and benevolent step in "one continued, persevering and unbroken series of law, raising the slave higher and higher in the scale of moral being." As part of a ninety-year progression, acknowledgement of the human instinct for self-preservation, and thereby a fundamental right of humanity, even for a slave, represented

"a gradual revolution in favor of the slave" that could "not [be] adverse to the best interests of the master, or of the security of the public."[50] Thirty years later, with the abolition of slavery, Moore's chairmanship of the freedmen commission left him with a new task. He and his fellow commissioners needed to determine, for purposes of the continuation of that unbroken series of law, what other fundamental rights of humanity comprised the status of a race so suddenly elevated from involuntary servitude to emancipation.

Despite his lofty arguments in *Will*, Moore maintained significant doubts as to the capacity of the freedpeople to be free people. His writings suggest little faith or patience with either the former slaves or the legislators grappling with the consequences of emancipation. In an undated postbellum charge to a Gates County grand jury, Moore betrayed his views on the depraved state of the former slaves in his definitions of the crimes of larceny and adultery:

> The laxity of morals developed by the removal of legal restraints during the war, as well as the extreme poverty and thriftless laziness of the negroes lately called to the new task of providing for their own necessities have made this crime [of larceny] frightfully common and it seems still to increase. . . . The little restraint imposed by owners of slaves upon their natural tendency to promiscuous gratification of lust unhappily makes them new careless culprits under the stern measures of the law and their

> condition as free men and members of society calls for great vigilance from you.[51]

In Moore's view, lack of racial control created much of the state's problems. Those same themes of moral laxity, and the need to reestablish racial control to eliminate the adverse repercussions of such laxity, reverberated throughout the Freedman Commission Report's rationales for the Black Code.

Although an advocate for express legislation defining the legal status of the freedpeople, Moore entertained no thoughts of racial equality or black suffrage: "I know no fundamental policy in the government of a Republic, which would be so certainly destructive to the prosperity of the State, and the morals and character of both races, as would be the boon of suffrage to the colored race. . . . It is obvious from experience that the two races cannot harmonize, socially or politically, upon a basis of equality. . . . The prosperity, happiness and peace of each will be retarded and disturbed."[52] In a December 4, 1865, letter to his daughter, Moore declared, "I would gladly quit this for a land where the black race may not be found."[53] In that same letter, describing the anxieties caused by agents of the Freedmen's Bureau in their exercise of exclusive control over the freedpeople, Moore expressed his frustration in that "[t]his nuisance might be removed if the whites would consent to hear [the freedpeople's] evidence in our courts: but prejudice excludes it – We shall be forced to admit it; and the sooner the better."[54] Moore's conflicted views did not bode well for favorable legislation for the freedpeople.

It remains unclear whether the freedmen commission or the joint freedmen committee maintained any records of their joint or respective deliberations. North Carolina's archival collections of legislative materials from that era include no such

records. It is likely, however, that in their roles as commissioners, Moore, Mason, and Donnell came to understand all too well the quandary Moore had presented for the state's supreme court with his arguments in *Will*: "The Court must pass through Scylla and Charybdis; and they may be assured that the peril of shipwreck is not avoided, by shunning with distant steerage the whirlpool of Northern fanaticism. That of the South is equally fatal. It may not be so visibly seen; but it is as deep, as wide, and as dangerous."[55] Given its chairman's conflicted views of the capabilities of the freedpeople, the commission's postbellum navigation of a similar course for the freedpeople would prove equally as treacherous.

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Called into special session by newly-inaugurated governor Worth, the General Assembly reconvened on January 18, 1866. In a lengthy January 19 message to lawmakers covering a range of topics, Worth raised the unresolved status of the freedpeople. His primary concern centered on the "anomalous and inconsistent" jurisdiction of military tribunals in all cases involving black North Carolinians, creating "confusion, idleness, vice, crime and jealousy, and irritation between the two races." Referencing the Freedmen's Bureau commitment to avoid interference with criminal cases against blacks after legislators adopted race-neutral punishments, Worth requested prompt reformation of state laws concerning the freedpeople to secure full restoration of state court jurisdiction.[56] His request conspicuously omitted the reformation he sought, black testimonial rights, the very matter on which he had solicited the advice of former governor William Graham just one week earlier. In a letter fraught with indecision on the brewing controversy over such testimonial rights, Worth did not anticipate how that

politically sensitive "negro question" would ultimately jeopardize passage of North Carolina's Black Code. He ultimately decided not to decide, evasively "pass[ing] over this whole negro matter, putting it on the ground that an able commission having it in charge, by order of the Genl A and Convention, it would be obtrusive for me to present my views."[57]

Avoiding the controversy, Worth focused instead on motivating affirmative legislative action with a reminder to lawmakers of the rights "neither meagre nor unimportant" that had previously belonged to the state's freed blacks, rights that "were ever most scrupulously observed and maintained." Those rights, including property ownership and equal court access for civil and criminal complaints "with all the modes of relief to property or persons that were allowable to white men . . . became the rights of the freedman by the mere fact of emancipation." By drawing implicitly from justice Gaston's discussion in *Manuel* of the common law rights of freedpeople, Worth appeared to offer assurances to lawmakers that new comparable legislation could be substantiated with valid legal precedent. Worth praised the ongoing "enlightened labors" of the freedmen commission "[t]o secure [the freedman] still further in his privileges, as well as to protect society in the sudden and violent change effected by [emancipation]." Although unaware of the status of the commission's work, Worth disclaimed any "disposition to deny to [the freedpeople] any of the essential rights of civil or religious freedom in this State." In no event, he emphasized, should social equality or suffrage be expected. Worth also reminded lawmakers of the need for control mechanisms: "restraining measures are necessary to prevent pauperism, vagrancy, idleness, and their consequent crimes in the new phase which our social system presents." Despite the

absence of any express reference to black testimonial rights, Worth did reiterate the need to purge the state of the Bureau, offering a coded affirmance of the "importan[ce] to the safety, peace and welfare of society, that the conflicts of law and administration,–the one for the white and the other for the colored man– . . . shall cease among us." Having staked out his position on the freedpeople's status, Worth urged prompt attention to the freedmen commission's recommendations upon delivery.[58]

The Report of the Freedmen Commission

Those recommendations finally arrived on January 23, 1866, nearly four months after the constitutional convention had received the freedmen's address. Taking literally its charge to "prepare and report to the Legislature," the freedmen commission paired its recommendations for a freedmen's code and statutory repeals with a twenty-one-page explanatory report (the "Freedmen Commission Report" or "Report") expressly addressed to the General Assembly. Commissioner Donnell, having just taken his seat as a Beaufort County delegate in the House of Commons, delivered those items to the Speaker of the House with a cover note from the three commissioners expressly requesting "through you, [the report] may be laid before the General Assembly."[59] Despite that request and the Report's identification of the General Assembly as its intended recipient, Samuel F. Phillips, the Speaker of the House of Commons, instead referred the materials to the joint freedmen committee.[60]

That referral seems curiously redundant. Upon senator Ferebee's motion, and the concurrence of the Senate and House of Commons, the joint freedmen committee had been formed specifically to consult with the commission on the draft Code. Presumably, since its formation in early December, the committee had been involved with the Code's

preparations prior to its presentation to the General Assembly. The familiarity with the Code that would have resulted from such collaborative work should have obviated a referral to the committee. In the absence of any records indicating consultation between the committee and freedmen commission, and Worth's professed unfamiliarity with the commission's work, however, that referral to the joint freedmen committee suggests that the commission may have actually developed the Code and accompanying Report in isolation.

That apparent disconnect between the freedmen commission and the joint freedmen committee may explain the breadth of the Freedmen Commission Report which, according to North Carolina historian J.G. de Roulhac Hamilton, was authored solely by Moore.[61] In the Report's opening passage, the commissioners referenced a perceived need to "explain the course they have pursued; and to some extent, the reasons by which they have been governed."[62] As a result of emancipation and "the very great changes which have so suddenly taken place," the commissioners had unilaterally assumed a broader "duty" than their mandate from the constitutional convention. In addition to a freedmen's code, the commissioners proposed eight other bills "equally applicable to both populations," but "differing, somewhat in character, from" the proposed "Bill Concerning Negroes, Indians and Persons of Color, or of Mixed Blood."[63] Under ordinary circumstances, Donnell's dual roles – as both a commissioner and a member of the House of Commons – should have uniquely positioned him to defend the commission's expanded activities. His limited involvement in the commission's work, however, may have compromised Donnell's familiarity with the philosophical underpinnings of the proposals, prompting concerns as to the effectiveness of his

advocacy. In any event, the gravity of the commissioners' recommendations evidently prompted the extensive Report as a proactive apologia that methodically anticipated and attempted to defuse potential objections. In that context, the commissioners' express requests to have their work product placed directly before the General Assembly suggest some concern as to possible objections or interference from a joint freedmen committee dominated by Worth loyalists.

As the official explanation of the commission's recommendations, the Report lacked any express coherent logic for either the proposed Code or the commission's approach to the freedpeople. More of a rambling diatribe than a cogent memorandum, the Report lurched from one point to the next, with little effort to tie proposed revisions to any readily quantifiable legislative intent. Interspersed among its numeric progressions of statutory summaries, the Report offered random explication alternating between the sparse ("*Sections twelve and thirteen* require no comment") and the verbose (ten of the Report's twenty-one pages adamantly defend the proposed black testimony statute).[64] Despite its meanderings through arcane legal theory, statutory and caselaw precedent, and popular misconceptions, genetic musings, and paternalistic sentiment concerning the former slaves, the Report nevertheless exhibited the tripartite legislative strategy of stratification, accommodation, and control discussed in Chapter One above.

Following the opening acknowledgment of the distinction between the race-specific Bill Concerning Negroes and the race-neutral applicability of the eight other legislative proposals, the Report launched into a reaffirmation of the state's tradition of class stratification. Long before emancipation, North Carolinians comprised "three classes of population, besides Indians" – whites, slaves, and free blacks – each with its

own applicable laws.[65] The combination of that stratification precedent with the traditional legislative prerogative to treat different groups differently, firmly rooted in the judicial precedents of *State v. Manuel* and *State v. Newsom*, provided the bedrock for the proposed Code. Much like governor Worth's message to the General Assembly, the commissioners implicitly referenced justice Gaston's *Manuel* ruling as the justification for the relative status of each of those three classes, signaling to knowledgeable readers the absence of social equality or excessively charitable privileges within the proposed Code. "Many years since it was solemnly decided by the highest Court of the State, and indeed, it has been so regarded, that the term 'freemen,' (than which none used in the declaration of rights and the Constitution of the State, to describe a citizen, is of higher dignity,) included in its fullest extent, a free negro, whether free in 1776, when the Constitution was framed, or become so since by emancipation. He was, at the beginning of the late unhappy conflict of arms, and is now, included in the term 'freeman,' as used in that instrument."[66] As an initial starting point, the state's common law bestowed equality on all freemen, regardless of race.

The commissioners substantiated that initial precept of equality with an illustrative list of the shared common law entitlements of white and free black North Carolinians. In addition to the rights previously identified by governor Worth, the commissioners cited mutual legal rights (namely property ownership, and the right to form and enforce contracts), criminal procedural rights (grand jury presentments and jury trials), and the protection and regulation of relationships (families, servant/master, and apprentice/master). Those common law rights remained "equally the rights of the one race and the other, without distinction," at least until the state legislature exercised its

prerogative to make distinctions. Again, without expressly citing *Manuel* or *Newsom*, the commissioners promptly qualified the ideal of common law racial equality: "In a word, the common law is the law of the State in all matters where it has not been superseded by statute; where it exists, colored and white persons are equally protected under its shield, and exposed to its punishments; and where it is changed by statute, the change operates on all."[67] That description of statutory change remains deceptively ambiguous. Statutory change does not *apply* to all. Nor does it have the same *effect* on all. It merely *operates* on all.

That choice of "operates" stands in stark contrast to the commissioners' explanation of their statutory drafting methodology. According to the commissioners, emancipation eliminated slaves as one of the three population classes, making all laws previously applicable to that class moot. By default, those ex-slaves "fell under the laws respecting free negroes," creating a new status quo of whites and blacks as the two remaining population classes: "the political and civil condition of all the colored population became that which had already been established for the free negro." Given that presumptively inevitable consequence of emancipation, the commissioners considered it their "duty . . . to look through the entire body of the laws of the State, for the purpose of ascertaining what part of them *governed* the free negro, as distinguished from the white man."[68] Therein lies a subtle but important distinction. While statutory changes to common law, including those altering the balance of racial equality, may *operate* on all people, such changes do not *govern* all people. With that distinction, the commissioners intended to delineate a race-based dichotomy between those existing

statutes that both operated on *and* governed free blacks and those statutes that operated on, but did not govern, whites.

That subtle distinction between "operate" and "govern" evidently rested upon the degree of impact. All statutory changes have some general influence or effect, and thereby operate, on persons identified within the statute. A statutory change that mandates a specific impact – one that both dictates permissible or impermissible conduct and ensures compliance by threat of some punitive measure – actually *governs* the identified persons. For example, the antebellum statute criminalizing assault of a white female by a slave or free black with the intent to commit rape generally effected whites, free blacks, and slaves, and thereby operated on all three classes, albeit differently.[69] The statute operated on white North Carolinians to the extent that it offered protection (for white females) and less onerous punishment (for white men who might assault a white woman with the same intent). Otherwise, the statute neither dictated nor punished any conduct by white people. That statute did, however, operate on *and* govern black persons, regardless of enslavement, in that it prohibited specific conduct and imposed specific punishment (death) for noncompliance. That operate/govern dichotomy rested upon what justice Gaston described as the legislature's "great powers . . . for the suppression and punishment of crime [to] . . . . punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend."[70] The operate/govern dichotomy thereby facilitated the racial inferiority recommended by the commissioners for codification within the proposed Code.

To their chagrin, however, the commissioners discovered that the "species of special legislation" separately governing the two racially-distinct population classes "was

scattered throughout the [state's] civil and criminal laws." To avoid that complication of their assumed duty to distinguish among such statutes, the commissioners proposed a clean slate as "the more advisable course": repeal "all laws that specially affected the colored race," reenact those laws that "in their opinion, ought to exist," and recommend "other and original legislation, when it was deemed expedient."[71] In their crafting of the Bill Concerning Negroes, however, the commissioners ignored that "more advisable course." Incomplete statutory repeals left intact several antebellum laws governing blacks. Subjective determinations both as to repealed laws that "ought to exist" and new "expedient" laws simply facilitated the subjugation of all black North Carolinians through the perpetuation of the inferior pre-emancipation status of free blacks. The Bill Concerning Negroes thus did little more than re-introduce antebellum exceptions to the common law equality of freemen as a means for controlling all blacks through institutionalized class stratification within North Carolina's postbellum legal system.

In accordance with their proposed method of statutory revision, the commissioners started with the repeal of existing race-specific laws. Section 17 of the Bill Concerning Negroes identified for repeal one hundred and nine sections of the 1854 *Revised Code*, including all seventy-nine sections of its "Slaves and Free Negroes" chapter, and nine acts adopted since the enactment of the *Revised Code*.[72] Despite their apparent thoroughness, those repeal recommendations omitted, for example, the existing apprenticeship laws. Perhaps the oversight stemmed from the applicability of those laws to both races. The Bill Concerning Negroes instead proposed to amend the apprenticeship laws to require that any master of black apprentices "discharge the same duties to them as to white apprentices."[73] The commissioners claimed that amendment placed "the colored

apprentice on the same footing with a white one; and leaves the law declaring in what cases they should be bound, as it now exists in the Revised Code."[74] By leaving the rest of the apprenticeship laws untouched, however, the commissioners allowed racially discriminatory distinctions to remain in effect, to the detriment of the freedpeople.

The apprenticeship laws still required that courts bind as apprentices "the children of free negroes, where the parents with whom such children may live do not habitually employ their time in some honest, industrious occupation; and all free base born children of color." No such requirements applied to similarly situated white children. Race-based age limitations for female apprentices remained different. White females could not be bound as apprentices after age eighteen, while black females could continue to be bound until age twenty-one. The laws continued to limit the movement of black apprentices, prohibiting their removal from the county where they were bound, and requiring a one-thousand-dollar bond per black apprentice from their masters to prevent removal. No such restrictions applied to white apprentices or their masters. Even the commissioners' one proposed statutory revision, imposing on masters the same duties for all apprentices regardless of race, failed to amend the remainder of that statute. As a result, the judicial authority to punish noncompliant masters by removing their apprentices only permitted the removal of white apprentices. The statute provided no recourse as to the recalcitrant masters of black apprentices.[75] Whether inadvertent or intentional, the commissioners' failure to repeal "all laws that specially affected the colored race" left black and white apprentices on different footing.

Perhaps inadvertent oversight did allow those racial distinctions in the apprenticeship laws to survive section 17's extensive list of statutes for repeal. If so, that

oversight validated the commissioners' concern as to the difficulty of distinguishing statutes that separately governed the two races. That possibility of oversights also explains section 18 of the Bill Concerning Negroes, a catch-all repeal provision intended to close any gaps in section 17's encyclopedic repeal list with a default automatic repeal provision. As written, however, section 18 did not repeal all remaining laws that "specially affected the colored race." Nor did section 18 eliminate those existing state laws that, in the words of the constitutional convention's ordinance creating the freedmen commission, "should be repealed in order to conform the statutes of the State to the ordinance of the Convention abolishing the institution of slavery."[76] Instead, section 18 only voided prior legislation, "besides those enumerated in the foregoing section [17], the subjects whereof are revised and reenacted in this act, or which are repugnant to the provisions herein contained."[77] That limited scope immunized a range of antebellum laws from the purview of section 18's automatic repeal.

As proposed, aside from the repeal list of section 17, section 18 repealed only those laws "repugnant" to the Bill Concerning Negroes. That Bill recommended codification of racial distinctions that relegated all black North Carolinians to an inferior population class possessing fewer rights and saddled with more restrictions than their white neighbors. Such a racially-discriminatory bill arguably contradicted the abolition of slavery – the repeal threshold set by the constitutional convention's ordinance – but emancipation neither meant nor required racial equality.[78] In their sole explanation of sections 17 and 18, the commissioners rationalized those two statutes, including section 18's altered repeal threshold, as "appropriated to" the constitutional convention's repeal threshold and "the new condition of things arising out of" slavery's abolition.[79] Section

18's revised criterion, focusing solely on repugnancy to the proposed Bill, constricted the scope for automatic statutory repeal, eliminating only those prior laws that contradicted the commissioners' recommendations of race-based stratification and inequality. That shift insulated the Bill Concerning Negroes, and its statutory embrace of the tiered citizenship espoused by *Manuel* and *Newsom*, from repeal.

The answer may be self-evident, but the question must nonetheless be asked. Could *any* antebellum statute that singled out black North Carolinians for race-based disparate treatment, whether as fewer rights or more onerous restrictions and penalties than white North Carolinians, be so repugnant to the race-based stratification of the Bill Concerning Negroes as to warrant automatic repeal? The surviving statutory distinctions between white and black apprentices that eluded section 17's repeal list actually reinforced race-based stratification, thereby immunizing them from section 18's automatic repeal. Section 17's repeal list also omitted at least seventeen other antebellum statutes that impacted black persons, most of which focused solely on slaves. Although not expressly identified by section 17 for repeal, those slave-specific statutes became moot as a result of the constitutional convention's renunciation of slavery.[80] Accordingly, statutes concerning the title, sale, gift, bequest, and murder of slaves, ownership of slaves by wards under guardianship, taxation on the sale of slaves, prohibited service of alcohol to slaves, and formation of county patrols to track and punish runaway or truant slaves had no further practical effect following emancipation.[81]

As with the apprenticeship laws, however, other surviving statutes governed free blacks. The antebellum prohibition against interracial marriages involving a free black to the *third* generation survived, but the commissioners' proposed miscegenation statute

(that, given the revised definition of "person of color," included the *fourth* generation) likely superseded the earlier law.[82] Other surviving laws prohibited whites and blacks from playing cards or other games of "hazard, chance, or skill" together, excluded black children from public schools, barred blacks from militia service (except as musicians), and required more black men to assist with building and maintaining public roads.[83] The *Revised Code*'s surviving "Militia" chapter even empowered any seven justices of the peace to mobilize the state militia to combat any "insurrection among . . . free persons of color either in any county of this State, or in an adjoining State," with dismissal of troops appropriate only when those justices of the peace "think the danger is over."[84] While those remaining statutes may have arguably conflicted with slavery's abolition, such race-based distinctions could hardly be repugnant to the racial stratification of the Bill Concerning Negroes. Immune from section 18's automatic repeal, those surviving statutes may well be considered as a "shadow" Black Code that evaded even the attention of the commissioners charged with crafting the Code.[85]

After addressing the repeal of the existing statutes, the commissioners identified for reenactment those repealed antebellum laws that "ought to exist." As might be expected, given that commissioner chairman Moore had also co-authored the 1854 *Revised Code*, several repealed provisions of the *Revised Code* found their way back into the Bill Concerning Negroes. Those reenacted provisions included the "persons of color" definition, testimonial rights against other persons of color, the special judicial admonition for persons of color to testify truthfully, and the crime of assault of a white female by a person of color with intent to commit rape.[86] The pivotal section of the Bill, section 3's definition of the post-emancipation status of all black North Carolinians,

actually represented an amalgamation of repealed antebellum laws and judicial precedent.[87] Prior to emancipation, there had been no fixed definition of the status of free blacks. Instead, the common law rights otherwise available to all freemen gradually eroded through a series of random race-specific statutory exceptions into a general status of inferiority.[88] Most of those antebellum statutory exceptions had been identified for repeal in the Bill's section 17. But section 18 salvaged the race-based stratification implicit within those proposed repeals, offering the express confirmation that "the subjects" of the repealed statutes "are revised and reenacted in this act." In other words, the commissioners had preserved within the Bill Concerning Negroes those race-related subjects they believed "ought to exist," thereby counteracting section 17's wholesale repeal of antebellum legislation.

Through that convoluted construct, section 3 of the Bill incorporated the subject of racial status and thereby reenacted the pre-emancipation inferiority of free blacks. As proposed, section 3 provided that "all persons of color, who are now inhabitants of this State, shall be deemed to be citizens thereof, and shall be entitled to the same privileges, and subject to the same burthens and disabilities as by the laws of the State were conferred on or were attached to free persons of color, prior to the ordinance of emancipation, except as the same may be changed by law."[89] Acknowledgment of state citizenship for "all persons of color who are now inhabitants of this State" codified the rulings in *Manuel* (1838) and *Newsom* (1844), including their express authorization of tiered citizenship. Legislative relegation of black people to an inferior citizenship status did not violate the federal or state constitution, as neither guaranteed racial equality. Section 3 simply followed the course of action expressly approved in *Newsom*: "the free

people of color . . . occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them; so that they do not violate those great principles of justice, which ought to lie at the foundation of all laws."[90] By preserving antebellum subject matter, section 18 facilitated the resurrection and codification of black inferiority within section 3. Antebellum limitations on free blacks thereby became the postbellum legal status of all black North Carolinians, even as the proposed Bill repealed the slave-era statutes that had originally defined and enabled those limitations.

A single sentence in the Freedmen Commission Report explained that legislative sleight-of-hand: "*The third* [section] declares persons of color to be citizens of the State." The Report made no mention of the *Manuel* and *Newsom* decisions, or of the resurrected race-based citizenship limitations enabled by those decisions.[91] When combined with an express grant of citizenship and the commission's professed methodology of repealing "all laws that specifically affected the colored race," however, the dramatic breadth of section 17's statutory repeals, seemingly supplemented by the automatic repeals of section 18, fabricated a conciliatory tone likely to appease northerners. In truth, the commissioners had crafted a calculated diversionary tactic, concealing a codification of the *gist* of race-based stratification that had once been the explicit substance of a *de jure* legal structure. Adopting the coded terms of a judicially-enabled hierarchical citizenship, the commissioners successfully constructed a post-emancipation legal code that surreptitiously continued what they apparently determined "ought to exist," namely the continued subjugation of persons of color.

The commissioners also likely favored that statutory fusion of judicial precedent with repealed legislation for its expediency, the final consideration of their statutory drafting methodology, as a means to formalize a statutory caste system. North Carolinians unfamiliar with Supreme Court caselaw may not have recognized the silent hand of justice Gaston's views on the limited citizenship status of free blacks when implicitly incorporated within Section 3's reference to the citizenship of persons of color. Yet the *Manuel* decision enabled codification of the deceptively palatable veneer of black citizenship without surrendering race-based differentiation, diverting attention from the Bill's minimal rights and burdensome restrictions. A statutory Trojan horse, the combined effect of sections 3 and 18 cloaked race-based stratification and control measures in the pleasing guise of citizenship, avoiding the provocative racially-explicit measures that had triggered vehement opposition to other states' black codes.

Indeed, with no small sense of pride, the commissioners touted the disingenuity of their proposed approach. "[I]n some of the late slaveholding States, much legislation is employed to confer on persons of color the civil rights which belong to white men. In this State very little is necessary; indeed, none beyond a repeal of the laws, which, from time to time, have been introduced, making distinctions between whites and colored persons." Other states' black codes centered around narrow grants of specifically-enumerated rights for freedpeople, equated in effect to similar rights enjoyed by each state's white populace, followed by extensive qualifications, restrictions, and limitations. For example, Alabama's freedpeople gained the right to sue and be sued "to the same extent that white persons now have by law." Mississippi also allowed its persons of color to sue and be sued, and to acquire and dispose of personal property, "in the same manner and to the

extent that white persons may." Under the South Carolina Black Code, the civil and criminal rights and liabilities "which apply to white persons, are extended to persons of color, subject to the modifications by this act, and the other acts hereinbefore mentioned." Even in North Carolina, the proposed Bill Concerning Negroes granted persons of color "all the privileges of white persons" in presenting their civil claims in court.[92] Unlike the other states' codes, however, only the Bill Concerning Negroes spoke in terms of citizenship.

North Carolina's unique judicial definition of citizenship bolstered the distinctive statutory drafting methodology touted by the commissioners. Without *Manuel* and *Newsom*, the proposed Bill's elevation of the freedpeople to the antebellum status of free blacks, combined with the statutory repeals of sections 17 and 18, would have left all black North Carolinians and all white freemen as common law equals.[93] Both races would have been entitled to the full breadth of common law rights enumerated in the Report, including unlimited property ownership, full court access, and extensive rights to make and enforce contracts. White North Carolinians did not want that equality.

To avoid that result, and secure the stratification and racial controls of interest to the state's white citizenry, lawmakers would have needed to legislate emancipated blacks into an inferior class. The legislative escapades in Mississippi, South Carolina, and other southern states struggling with black codes demonstrated the problem with that approach. Extensive racially-explicit statutes required that rights be scaled back with multiple exceptions, provisos, and other drafting tricks likely to draw the attention and ire of northern observers.[94] The inferior citizenship class authorized for North Carolina free blacks by *Manuel* and *Newsom* effectively functioned as statutory shorthand, a coded

definition of racial inferiority allowing lawmakers to subjugate the freedpeople legislatively without lengthy race-specific verbiage. As the commissioners boasted, with *Manuel* and *Newsom*, "very little is necessary," leaving only minor legislative adjustments to finalize the desired subjugation.[95]

Many North Carolinians, single-mindedly focused on the preservation of white supremacy, seemingly missed the statutory subtlety of granting antebellum free black citizenship to the newly emancipated freedpeople. As evidenced by a *Daily Sentinel* article published on the opening day of the 1865 constitutional convention, the prior status of free blacks and the ensuing impact of emancipation already baffled the state's white citizenry:

> But what *rights* have [the freedpeople] acquired by the war? What *rights* belong to them either natural, political or moral, by the change in their condition? . . . The freedom of the slaves is an *accident*–a result over and above that for which it was undertaken and prosecuted. And do men acquire rights, especially political rights by accident? – Certainly not. The freedom of the Southern slaves forced by the sword and then ratified by amendments to the Constitution, does not, cannot make the freedmen either American citizens, or citizens of North Carolina. . . . If it can be shown clearly that they are free from slavery, by the interposition and purpose of God, that would we grant establish their *right* to freedom from involuntary servitude,

> but that would by no means establish their right to citizenship. That is a purely *political right* and depends entirely upon the sovereign power of the State. That sovereign power lies wholly with the white people, the citizenship of the State. . . . They are still *aliens*, not *citizens*. If they ever become *citizens*, it must be by the grace, the mere favor of the sovereign power of the State. . . . The State Convention which meets to-day . . . will not confer upon them *all* the rights of citizenship or declare them to be citizens at all.[96]

The questions posed in the *Daily Sentinel* had been answered nearly thirty years earlier by justice Gaston. Once freed, black slaves born in North Carolina became citizens of North Carolina. That freedom and citizenship automatically endowed such freedpeople with the rights of freemen, without the need for legislative action. But those rights remained subject to the whims of the state's white lawmakers.[97]

The existence and full import of the *Manuel* and *Newsom* decisions evaded many white North Carolinians. During debates on the Bill Concerning Negroes, House of Commons delegate William A. Jenkins of Warren County "characterized as erroneous the intimation thrown out in the report of the Commission, that the Supreme Court of this State had decided that free negroes are citizens. He undertook to say that no such decision had ever been made."[98] Jenkins soon received a reminder of justice Gaston's opinion, courtesy of the editors of the *Standard*, who described *Manuel* as "one of the ablest and most elaborate that ever proceeded from the pen of that distinguished Judge." Citing

Jenkins' prior service as North Carolina Attorney General, the editors feigned surprise as to his ignorance of state Supreme Court precedent, including *Manuel*, that "leaves no room for doubt upon the subject" of free black citizenship.[99] In two impassioned letters to the *Daily Sentinel* editors, a reader identified only as "Senex" lectured on the unconstitutionality of any legislative grant of state citizenship to the freedpeople. Senex curiously substantiated his constitutional challenge to that North Carolina statute with Chinese law, French law, the state codes of Connecticut, Ohio, Indiana, Michigan, and New York, and random court decisions from New York, Connecticut, Virginia, and Tennessee.[100] Senex apparently lacked access to the North Carolina Constitution and the rulings of the state's Supreme Court.

Such confusion within North Carolina about the citizenship of the state's antebellum free blacks would suggest the likelihood of even greater ignorance of the state's tiered citizenship outside of North Carolina. The commissioners' exploitation of the unfamiliar philosophical underpinnings of North Carolina's antebellum judicial precedent concealed the draft Code's strategic accommodation of the freedpeople with limited civil rights in lieu of equality. That deceptively pleasing guise of citizenship has likely accounted for many of the sweeping generalizations of liberality, moderation, and progressivism attributed retroactively to North Carolina's Black Code.

Other "expedient" proposals included within the Bill Concerning Negroes furthered that strategic accommodation.[101] Some merely opportune proposals, like the marriage and contracting rights for blacks, gave the outward appearance of significant legislative concessions, while remaining constrained by *Revised Code*-inspired restrictions. For example, the marriage statutes' penalty for those cohabiting black

couples that failed to register their statutorily-recognized marriages tracked the language of the state's existing adultery and fornication criminal statute. Strict contractual formalities modeled on arcane statute of frauds requirements, which remained inapplicable to comparable contracts between whites, constrained the new contractual rights for blacks.[102] Such restrictions rendered those grants relatively innocuous for white North Carolinians, as those constrained grants did not impinge upon the rights of the state's white citizenry.

For more controversial proposals, like black testimonial rights against white persons or race-neutral applicability of criminal punishments, the perceived expediency stemmed not from fairness or justice for black North Carolinians, but rather from the self-serving agenda of white North Carolinians. The desire to rid the state of the Freedmen's Bureau and its military tribunals, and thereby regain exclusive legal jurisdiction over the freedpeople, weighed heavily but not conclusively against whites' limited appetite for expanded testimonial rights and more equitable punitive measures against blacks.[103] Mitigation of those more provocative rights with ostensibly-innocuous but functionally significant restrictions – whether by procedural constraints on the admissibility of trial testimony, or the grant of unchecked punitive discretion to local authorities responsible for policing the freedpeople – eased the distaste of white North Carolinians for such grants. As with the recognition of black citizenship, the grant of such surreptitiously constrained rights to the black populace offered a smokescreen to divert congressional attention away from the racial stratification and control mechanisms at the core of the Bill Concerning Negroes.

Following the extensive discussion of their statutory drafting methodology, the commissioners curiously dismissed portions of the Bill Concerning Negroes as "strictly unnecessary; because persons of color were entitled to them without any new enactment." Without identifying those provisions warranting such redundancy of codification, the commissioners noted only that "it was deemed better, at this time, to solemnly declare [those rights] in a bill drawn to define their civil status."[104] What existing rights needed that solemn declaration, and why? That obscure comment might explain the Bill's express declaration of black citizenship and status in section 3, given the widespread unfamiliarity of the *Manuel* decision. Aside from those declarations, and the ensuing common law civil rights and privileges of freemen, the Report identified no existing entitlements for persons of color.

The Bill did include legislation addressing the master/apprentice relationship, the power to make and enforce contracts, and the right to pursue civil claims at law and at equity, all common law rights of freemen enumerated in the Report. Perhaps the commissioners also considered those rights "better" for redundant codification, whether "expedient" or otherwise "ought to exist." Codification certainly placed all citizens on notice of the existence and extent of those rights. Why would it not have been "better" under the circumstances to articulate clearly *all* of the common law rights enumerated in the Report, especially in the context of "a bill drawn to define their civil status"? The Bill conspicuously omitted property ownership, procedural protections in criminal prosecutions (grand jury presentment, trial by jury in the same tribunals for like offenses, and juror challenges), and regulation of the duties of the marital, parental, and master/servant relationships. Without express identification and definition in the Bill,

those omitted common law rights defaulted to the control of section 3, limiting their respective scopes to the same restricted privileges and disabilities as endured by antebellum free blacks. Such legislation by omission furthered the Bill's control mechanisms without the need for extensive explicit legislation likely to provoke congressional ire.

* * *

The Freedmen Commission Report included few details validating the commissioners' perceived duty to exceed the constitutional convention's mandate by proposing eight additional proposed bills. "[I]n view of the very great changes that have so suddenly taken place," the commissioners felt themselves compelled "to recommend the passage of certain laws equally applicable to both populations." The minimal clarification offered by the Report – "the great and radical changes occasioned by emancipation, in the fixed habits and customs of the people" – failed to identify those "very great changes" or "the people" impacted by those changes.[105]

The predominately punitive nature of those bills, identifying specific activities for criminal and civil punishments and restrictions, suggests some aspects of the social disarray that followed emancipation. The bills focused on increased misconduct (primarily theft) and reduced and strained labor resources (due primarily to payment issues and unwanted outside interference with contracted laborers), as well as new or re-imagined means for dealing with those circumstances. In operation, the bills provided control mechanisms to address perceived changes in the habitual conduct of "the people."[106] The race-neutral language of the bills admittedly extended applicability of those controls to the increasingly disruptive conduct of impoverished and propertyless

white North Carolinians, whom governor Worth derisively labeled the "white negro" in an 1867 letter to a state legislator.[107] But any habitual conduct dramatically impacted by emancipation's elimination of societal constraints would have belonged to "the people" subjected to those constraints, the ex-slaves. The adaptation of those eight bills from race-based antebellum statutes, and the Report's repeated references to a single group of offenders, confirm the state's freedpeople as the primary target for those controls. The universal applicability of those bills simply provided token coverage for the implementation of control mechanisms within the racially proscriptive measures of the proposed Black Code.

Race-based restrictions would have unequivocally signaled the underlying racial intent of the commissioners' proposals. Without universal applicability, the reenacted control measures jeopardized the concealment of the covert stratification strategy for the Bill Concerning Negroes.[108] The original draft of the anti-sedition bill indicates the commissioners' awareness of that risk. The original handwritten document criminalized the incitement of insurrection or rebellion "in any person of color," a phrase struck and replaced with "any person whatever" before the bill was presented to the General Assembly.[109] By extending the refurbished pre-emancipation racial controls to all North Carolinians, the eight other bills eliminated objectionable discriminatory language without sacrificing the unspoken opportunity for racially disparate application by local law enforcement officials. The presumption that continued racial animus among white North Carolinians would drive the application of race-neutral legislation sustained those tried-and-true antebellum racial controls that, despite their inherently discriminatory nature, "ought to exist" to maintain statutory stratification.[110]

The commissioners blamed "demoralization," stemming from the purported diminished industry of both races, as the impetus for the eight additional bills. "We conceive it to be among the first of the legislative duties to check this demoralization and direct the energies of the entire population in appropriate channels of honest labor." According to the commissioners, the freedpeople's "relaxed and demoralized" industry had manifested in very specific indolent behavior. They had assumed "an unsettled and roving disposition," avoided steady work, and adopted a suspicious "disposition to pick up a precarious existence by pretended hunting of wild game," despite the scarcity of such quarry. The Report returned repeatedly to those themes of transiency and idleness – ills the commissioners ascribed only to the freedpeople, and not to destitute white persons – as justifications for the additional bills. Conversely, the industry of the state's white citizenry, also "greatly unnerved and demoralized," exhibited only unspecified negative effects: "like evil consequences are ready to follow. Indeed, they already exist."[111] The Report offered no further mention or example of misconduct by white North Carolinians to warrant expansion of the proposed bills' control mechanisms to both races.

Despite the bills' professed applicability to both populations, the remainder of the report explained and rationalized the bills with sole reference to the freedpeople. The commissioners first pointed to the encouragement of "honest labor" as one of the primary purposes of the bill. "[P]rotection of every man's property against unauthorized intrusions, trespasses and thefts of the idle and vicious" offered "one of the most efficient means of accomplishing" such honest labor. The Report frequently repeated that identification of the perpetrators of property crimes as "idle and vicious," with occasional variations (including "roving robber" and "lawless idler and insolvent trespasser"), in

connection with the freedpeople and their allegedly depraved post-emancipation conduct.[112] Predicting increased property offenses due to impoverished post-war conditions, the commissioners lamented the dearth of relevant criminal penalties, such as the absence of common law criminal offenses for willful trespass, and recommended new legislation to address those shortcomings. Of course, new laws protecting the most at-risk property – livestock, crops, and land – afforded little benefit for the newly emancipated, few of whom owned such property after decades of slavery. Modeling the new legislation on antebellum racial control measures, including the statutes criminalizing willful trespass and injury to livestock by slaves, the commissioners uniformly categorized those offenses as larcenies for purposes of punishment, thereby facilitating the use of corporal punishment traditionally imposed on slave offenders.[113]

The most blatant expression of the racial bias embodied within the additional bills arose with regard to the bill authorizing imprisonment for defaults on court-ordered child support and criminal fines, as the commissioners' explanation quickly devolved into a pointed rebuke of the Freedmen's Bureau. In an effort to relieve county treasuries of the financial responsibilities for illegitimate children and burgeoning criminal courts, the bill imposed punitive measures on the "demoralized population" unable to pay court-imposed system costs.[114] "No one, if able to work, ought to be allowed to cast his spurious progeny on the charity of the industrious poor." Nor should those whose "turbulence and violence" necessitated criminal courts be allowed, "when brought to justice, to evade by an idle life, the payment of the costs of suppressing their own disorders." The commissioners faulted the Freedmen's Bureau for both problems: "As yet, no steps have been taken by that authority, which claims exclusive jurisdiction, both civilly and

criminally, over all matters that concern the freedmen." The Bureau, with its claim of exclusive jurisdiction over freedpeople, failed to stop the allegedly rampant cohabitation by unmarried freedpeople, resulting in more illegitimate children for which the state bore financial responsibility. Meanwhile, comparable behavior among whites constituted an "indictable" offense under state law.

Given the impossibility of "elevat[ing] the race by any legislative means" as a result of the Bureau's continued inaction and the freedpeople's further demoralization, the commissioners positioned the bill targeting financially delinquent fathers and convicts as a means of salvation for the black race: "No race of mankind can be expected to become exalted in the scale of humanity, whose sexes, without any binding obligation, cohabit promiciously [*sic*] together. Among such a people, chastity can have no name or place; and the performance of the parental duties, no encouragement or sanction."[115] With no mention of financially delinquent white fathers or convicts, the Report's proselytizing commentary against black promiscuity and Bureau incompetence signaled the true targets for the bill's control mechanisms.

That bill was one of three proposed bills that contemplated compelled labor as punishment, all of which harkened back to antebellum punishment for black offenders. The financially delinquent convict or father of an illegitimate child could elect to be bound as an apprentice in lieu of imprisonment, subject to judicially-sanctioned terms. Another bill authorized counties to establish segregated workhouses as alternative means for punishing convicted offenders. The third bill granted judges discretion to sentence convicted vagrants to a workhouse "for such time as the court may think fit."[116] The commissioners explained that "[t]he dread of involuntary labor is much more effectual to

suppress misdemeanors and idleness than a few days of imprisonment, with a discharge of fines and costs under the insolvent debtor's law."[117] The state's 1854 *Revised Code* had long demonstrated the validity of that claim, allowing courts to hire out free black vagrants and indigent convicts for periods of up to five years in a statutorily-prescribed bidding process reminiscent of slave auctions. No such compelled labor punishment applied to white convicts.[118] In advocating for workhouses, the commissioners insisted that, without compelled labor punishments, "this State may become, in the process of time, the land of immigration from all parts of the Union, of the demoralized freedman and the dissolute white man."[119] To maintain the compelled labor penalties successfully imposed upon antebellum black convicts, the commissioners chose the lesser evil of extending that punitive option to white offenders, thereby avoiding the race-specific language likely to stir the ire of northern observers.

Even the proposed civil measures sought control over the freedpeople. The Report described the bills providing statutory lien protection for laborers' crop share wages and prohibiting enticement of contract laborers as "just companion[s]." The former protected payment due laborers upon completion of their contractual obligations, while the latter held laborers to their contractual obligations. In effect, both bills bound laborers more securely to their employers. The anti-enticement bill tracked an antebellum statute criminalizing interference with the master/slave relationship, whether by enticing slaves to escape or harboring runaway slaves.[120] According to the commissioners, fairness required similar protection of the employer/contract laborer relationship, "especially when his employer surrenders to him, in the outset, the use of valuable lands which may prove to be worthless to the owner, if the laborer be not held to his contract."[121] Prior to

emancipation, that same fairness argument would have applied equally to white contract laborers, but no antebellum statute prevented interference with white labor contracts, leaving the enforcement of any such matters to breach of contract claims. Violation of the anti-enticement bill imposed stiff financial penalties on both the enticer and, in a punitive innovation reminiscent of the master's prerogative to punish the errant slave, the contract laborer. Statutory lien protection for crop shares wages, also unavailable prior to the war, mimicked antebellum statutory lien protection for rents payable to landlords in kind from crops grown on leased land.[122] In a cash-strapped post-war North Carolina, a bill facilitating crop share wages primarily benefitted the mostly white landowners. Such employers could retain their often-meager cash reserves, while implicitly compelling contract laborers to remain hard at work through the harvest to preserve (and perhaps increase) their share of the crop.

In concluding their defense of the eight additional bills, the commissioners reiterated the still-undefined "great and radical changes occasioned by emancipation," noting that the impact of those changes "cannot be truly estimated at once." Because of that continued uncertainty, the commissioners refused to "speculate by legislative anticipation, for such changes as may even probably become necessary in the course of time." Subsequent problems not addressed by the bills could be resolved by the common law's "flexible rules for human conduct," allowing the commissioners to avoid "rigid, and perhaps misconceived legislation."[123] The proposals instead represented "the more prudent course," offering such new laws "only so far as the way seems clear." In other words, the subject matter of the eight bills – criminal activity and labor problems – targeted only those "great and radical changes occasioned by emancipation, in the fixed

habits and custom of the people," in existence as of early 1866. The freedmen commission had focused only on "the people" most directly and profoundly impacted by emancipation, and thereby the people most likely exhibiting changes in habits and custom, from the beginning of their inquiry. The Bill Concerning Negroes had already constrained the common law's flexibility as to the freedpeople with the imposition of the antebellum free black status. The cumulative effect of that Bill and the eight other proposed bills, along with the fail-safe flexibility afforded by *Manuel* and *Newsom* for the legislative manipulation of the common law, provided the legislative blueprint for what would become a segregated North Carolina.

The remainder of the Report addressed a loose collection of random questions pertaining to freedpeople and the proposed legislation, most of which received only scant consideration. A brief discussion distinguishing between celebrated and consensual antebellum slave marriages – the former voidable by law, the latter void as a matter of law – concluded with the commissioners' stated intention to validate both such unions.[124] Increased thefts of livestock, as well as the need "to protect the colored person from imposition by cunning, and the white man from the effects of corrupt evidence," provided justification for the extensive contractual requirements for business transactions with freedpeople,[125] The Report omitted any explanation as to why such considerations did not also warrant comparable requirements for business transactions between white people. The commissioners discussed the elimination of involuntary hiring and public whippings of black convicts as punishments, except where such punishments could be applied to both races. That discussion did not reference the increased likelihood of both corporal punishment (under the new bills imposing larceny punishments on more theft offenses)

and voluntary hiring out of convicts as apprentices (as an alternative to debt or imprisonment). The Report instead reiterated the viability of hiring out convicts as a punishment option, citing the judicial affirmation of that practice's constitutionality.[126] The brief discussions of those random matters provided far more substantive consideration than more compelling matters, including the statutory definition of "person of color," citizenship for the freedpeople, and the parameters of vagrancy offenses.

The commissioners concluded that discussion of random matters with a proactive and remarkably progressive rejection of the theories by "some physiologists" that blacks were "naturally destitute of moral principles, in a greater degree than any other persons yet known." Genetics could not be blamed for the prevalence of dishonesty among most ex-slaves, according to the commissioners, since "the mixed blooded slave" had not "elevated in the moral virtues of the white race, as he advanced toward it in color." "If [the black race] owed its depravity to the vicious nature peculiar to the race, we ought to be able, by this time, to trace some steps of improvement in the mixture of its blood with that of other races of men." Instead, "other and more probable causes than any natural depravity peculiar to the negro race" accounted for their "natural obliguity" [*sic*], such that "the race is not beyond the reach of a proper moral training" of "proper civil institutions."[127] That bold digression into theoretical genetics and paternalistic optimism stands in marked contrast to the first dozen pages of the Report's narrative. As a subtle transition to the remainder of the Report, in which most of the proposed legislation was simply ignored, the discussion of genetic traits introduced what the commissioners apparently believed to be the pivotal race-related matter to be resolved by lawmakers. Offered as a proactive argument to silence recurrent stereotypes of blacks' native

inferiority, that passage became the overture for the commissioners' vociferous defense of the admissibility of black testimony against white North Carolinians.

No subject addressed in the sweeping range of the Freedmen Commission Report received more attention or ink from the commissioners than the testimonial rights of the freedpeople. Longstanding perceptions of the duplicity of blacks had become so entrenched as to have evolved into an accepted attribute of the race, as suggested by the commissioners' preemptive attack on the alleged genetic dishonesty of blacks. As of 1746, North Carolina law expressly prohibited black trial testimony against whites.[128] Meanwhile, however, black North Carolinians had been permitted to testify against other since 1741, subject only to ostensibly curative admonitions as to the importance of truthful testimony.[129] Either white North Carolinians had little concern for the administration of justice among blacks, or the truthfulness of blacks in cases against each other universally gave way to racial bias when called upon to testify against whites. Otherwise, the commissioners advised state legislators, "[i]f it be true that either the negro race, or the negro in our midst, . . . be so mendacious that he cannot be safely heard in our courts of justice, it seems to us that it is one of your highest duties to exclude them as witnesses in all cases whatsoever, as well those in which they are the sole parties."[130] Concerns had arisen among the white populace during the fall of 1865 that repudiation of white immunity from black testimony, yet another tenet of white supremacy, would be a federal prerequisite for removal of the hated military tribunals, return of state jurisdiction over the freedpeople, and perhaps even reunification.[131] For many white North Carolinians, such evidence constituted the first fatal step of a progressive decline that would eventually include black jurors, black officeholders, black suffrage, and racial

equality.[132] Anticipating vehement opposition from legislators (on behalf of their white constituents) to black testimonial rights, and the threat to reunification that rejection of those rights would pose, the commissioners unleashed the full measure of their advocacy skills in a preemptive defensive campaign.

Chairman Moore and his fellow commission members grounded their defense of black testimonial rights in propriety and pragmatism. No longer "cared for and protected as property" in the wake of emancipation, the former slaves' "condition of personal security is greatly changed." Testimonial rights thereby became critical for the freedperson's self-protection in any challenge to or controversy involving his or her person, property, or rights.[133] Even the professed "*general falsity*" of blacks – which, according to the commissioners, "[n]o one pretends . . . is *universally false*" – should not automatically disqualify blacks as witnesses. "[I]f the most veracious persons only were competent witnesses, there would be many cases of the highest interest to the public without a single witness."[134] English common law, the foundation for much of the American legal system, had long qualified all persons over the age of seven as competent witnesses, subject to limited and generally-applicable evidentiary requirements. Indeed, "[b]y the laws of all civilized Europe, . . . none are excluded by reason of character, race, color, or religion."[135] According to the commissioners, the original exclusion of black testimony, a rule applied to slaves and later extended to free blacks, had no basis in racial perceptions of dishonesty. Instead, disqualification had been based upon the slave's lack of separate identity apart from his or her master, preventing the slave from testify as a disinterested witness. Traditional exclusion of blacks from the witness stand also stemmed from "the settled policy . . . to humble the slave and extinguish in him the pride

of independence . . . [but i]f it ever was, it is certainly not now, our policy to degrade them." Echoing their opening optimism as to the race's potential for salvation, the commissioners expressed confidence that education and moral training would alleviate any concerns as to the veracity of the freedpeople.[136]

In wise anticipation that arguments of propriety could not uproot entrenched biases against black testimony, the commissioners also appealed to the pragmatic self-interest of white North Carolinians. "[W]ithout the capacity to bear evidence, [the freedman] stands in numerous cases utterly defenceless [*sic*], except by opposing force to force against every species of outrage offered to himself or to his family."[137] Adapting Moore's successful self-defense arguments from *Will*, the commissioners substituted the silenced freedman for the wounded slave defending himself against the lethal assault of his overseer. The right to testify against his transgressors served as a deterrent against violent revenge or vigilante justice by the wronged freedman. That manipulation of the ever-present atmosphere of white fear reminded lawmakers that "by protecting the person of the negro, we shall most certainly protect the person of the white." Because trial testimony enabled the black worker to protect his or her personal gains from unlawful taking, testimonial rights even advanced labor interests by encouraging "habits of industry and a desire for honest acquisition" among the freedpeople. If "unable to bring the robbers to justice because the witnesses are colored, can the race feel any ardent disposition to labor for themselves? On the contrary, will they not feel doubly tempted by such want of security for their own property, to become depredators themselves especially, when they reflect that it is the white man's policy, which thus exposes them to licentious white men?"[138] The negligible grant of testimonial rights, argued the

commissioners, benefitted all, by defending the freedpeople's personal property and incentivizing a valued and necessary labor force.

The Report even challenged the fabled connection between the dishonesty and inherent inferiority of blacks. The "natural offspring of their recent slavery and degradation," the "lamentable prevalence" of duplicity among blacks had no basis in any hereditary flaw. The continued loyalty of slaves during a war fought for their freedom belied pointless apprehension of prejudiced revenge by freedpeople admitted to the witness stand.[139] Untruthfulness remained a risk with any witness, regardless of color. To exclude black testimony on the mere existence of that possibility, argued the commissioners, cast prosecutors and judges as incompetent and jurors as inept in determining credibility. "It is settled by our highest judicial tribunal, that the testimony of a witness who commits a perjury, apparent to the jury in the very case in which he is examined, must, nevertheless be weighed by the jury for what it is worth."[140] As proposed, the bill conditioned admissibility – allowing black testimony only when the person or property of a freedperson came into controversy – thereby limiting the use of such evidence without depriving black litigants of any advantages. Professing a curious concern about their authority to provide broader testimonial rights, the commissioners argued that the bill provided the "most perfect protection that human evidence can afford" while appropriately managing the potential for perjury.[141] It is unclear why the commissioners felt constrained to so limit their proposal, unless to blunt objections. After all, they had already justified proposals of universally applicable legislation on unspecified post-emancipation changes. Nonetheless, the extensive defense of black testimonial rights demonstrated the commissioners' belief in the significance of those

rights to North Carolina's readmission to the Union and underscored their concern about the vociferous challenges such proposals would likely spawn.

The General Assembly and the Committee of the Whole

While the freedmen commission proved prescient as to the pending controversy over the proposed black testimony statute, the commissioners could hardly have foreseen the legislative gyrations that preceded passage of the Black Code. On January 29, 1866, six days after House Speaker Phillips disregarded the commissioners' written requests and forwarded their submissions to the joint freedmen committee, House of Commons delegate Kenneth Rayner effectively dissolved that committee. On Rayner's motion, seemingly without further discussion or vote, the House "relieved [the joint freedmen committee] from the further consideration of the bills prepared by the commission appointed to frame a code for the government of freedmen, and kindred matters referred to them." Newspaper accounts obliquely reported that the bills "had been referred to the House alone," and that Rayner intended "to have these matters considered in Committee of the whole."[142] A special order immediately followed the approval of Rayner's motion, scheduling the House to convene the next day as a committee of the whole to consider the freedmen matters.[143] Neither the journals of the General Assembly nor contemporaneous newspaper accounts make any further reference to the joint freedmen committee.

How did that procedural maneuver occur without objection? The joint freedmen committee had been formed in December 1865 on a resolution proposed in and adopted by the Senate and accepted by the House. Senator Dennis Ferebee chaired the committee, and had reported to the Senate on the commission's progress in December. Contrary to newspaper reports, the commission's materials had been intended for delivery to the

entire General Assembly. The commission's bills had been under the committee's consideration for nearly a week. According to the *Wilmington Journal*, given the "distinguished members of both branches of the General Assembly" serving on the joint freedmen committee, after their "due consideration," the Bill Concerning Negroes would "have great weight with the Assembly."[144] Delegate Rayner had never been a member of the committee. Despite referral of the bills to the committee for further consideration, Rayner's motion to divest the committee of those bills went unchallenged, and received no mention in the journal of the Senate's proceedings.

The editors of Raleigh's *Standard* questioned how the House had unilaterally assumed sole jurisdiction over the commission's proposals, given the anomalies of the delivery and named addressee of the commission's materials. "It is surprising that the Report of the Commissioners . . . should have been taken up in the [House of Commons] and discussed, altered, and amended, without having been referred to a joint committee of the two Houses. . . . It was intended, not for the Commons or for the Senate as separate bodies, but for the *General Assembly*." Apparently forgetting that the two-month-old joint freedmen committee had the proposed legislation under consideration when the recall motion was raised, the editors questioned why the House had deviated from the "usual course on important matters" for measures as "exceedingly important" as the proposed Code. In a dismissive response, the editors of the *Daily Sentinel* theorized "[t]he House we suppose thought the Commission was committee enough.–To have sent it to joint committee would have taken away at least a fortnight of the time to discuss it."[145] On the motion of a single delegate, the House of Commons had assumed exclusive control over materials designated by the state constitutional convention for the entire

General Assembly, unilaterally dissolved a legislative committee jointly created by both houses of the General Assembly to consider those materials, and usurped the authority jointly granted to that committee to finalize the proposed legislation for passage. In the absence of challenge, the abnormal apparently became the normal.

Two other unusual circumstances warrant mention. First, despite the scope of Rayner's motion – which sought to relieve the joint freedmen committee of all bills prepared by the commission and any "kindred matters" referred by the General Assembly to that committee – the Committee of the Whole only deliberated on the Bill Concerning Negroes. The other eight bills proposed by the commissioners proceeded through the House Judiciary Committee and ultimately through the Senate in the same manner as any other ordinary legislative bill. The legislative record offers no explanation of that deviation from Rayner's motion or of that bifurcation of the commissioners' proposals. Lawmakers ultimately adopted all eight of the additional bills without debate, reported commentary, or amendment.[146] Second, when called into session as the Committee of the Whole, none other than Kenneth Rayner chaired the proceedings. It is unclear why Rayner proactively sought to assume such a significant and visible role in the deliberations of freedpeople's rights and the Code. One Rayner biographer described that role as "curious," in light of Rayner's sentiments during that period that "all matters concerning the status of blacks should be avoided for the present."[147] Reticent as to "any sort of peonage or quasi-slavery for the former slaves," and widely known for his preference for removal of the freedpeople from the South and colonization elsewhere, the purpose behind Rayner's prominent role in deliberations on the Bill Concerning Negroes remains a mystery.[148] Indeed, despite inserting himself into the center of the process,

Rayner neither spoke for or against the Bill during the deliberations of the Committee of the Whole, nor voted on the proposed legislation.[149]

Between January 30 and February 9, 1866, the House convened by special order as a Committee of the Whole six times to consider the Bill Concerning Negroes.[150] As anticipated by the freedmen commission, the most exhaustive debates – dominating four of those sessions – centered on black testimonial rights, specifically the admissibility of black testimony against white citizens. For a brief moment during the January 31 session, due to an error in parliamentary procedure, opponents successfully struck the black testimony statute from the Bill.[151] Ultimately, however, the debates swayed the delegates to retain the proposed statute.

House Speaker Phillips, temporarily relieved of that office's neutrality while Rayner presided over the proceedings, spoke frequently and passionately in favor of the testimonial rights statute, often reiterating the arguments presented in the Freedmen Commission Report. In an effort to deflate the brewing controversy, Phillips characterized the statute as a small "boon," little more than the "right to be heard." Indeed, he professed not to have expected debate on the issue, given the close scrutiny being accorded the House's proceedings: "He had not expected the House of Commons, in face of the fact, that the proceedings would be vigilantly scrutinized by those who are hostile to what we conceive to be our own rights and happiness would have proposed to exclude the freedmen from the enjoyment of the rights and safe guards that are dearest to man. How, he asked, can we say, leave the freedman to us, we will do him justice, refusing in the same breath to allow him to tell his tale before a jury of white men and white judges?"[152] Phillips touted the statute's mutual benefit to both races, with particular

emphasis on its deterrent value: "If not allowed access to the ordinary arena for the adjudication of right, the negro would become both judge and executioner" in seeking extrajudicial satisfaction for any wrongs.[153] Suggesting that testimonial rights might well be considered natural rights, Phillips forcefully argued that the rights were "demanded by the natural sense of justice of the enlightened Christian world [which] should induce a prompt and willing concession of a right it were cruel and unjust to deny."[154] Realizing, as did the commissioners, that propriety would likely be ignored, Phillips relied primarily on pragmatism. He emphasized that the state would not be free of the Freemen's Bureau and its hated military tribunals "sitting to the intense disgust, harassment and injury of private citizens" until black North Carolinians could testify. Refusal of testimonial rights would only "retard restoration and result in incalculable injury" to the state.[155] The pragmatic self-interest of white North Carolinians would ultimately carry the day, as reunification and removal of the Bureau outweighed any lofty ideals of justice or fairness for the freedpeople.

Opponents to black testimonial rights took a scattershot approach to barring the freedpeople from the witness stand. William Jenkins, whose numerous objections to the Bill Concerning Negroes included the refusal to acknowledge justice Gaston's free black citizenship ruling in *Manuel*, led the charge in the House against black testimonial rights. As a "white man's government," he argued, North Carolina should not be required to give rights to the freedpeople that "the unfriendly legislation of Indiana and other Northern States" did not grant.[156] Jenkins asserted that the testimonial statute "was the worst that could be devised for the protection of the freedmen, and the more intelligent among them were the least desirous that this franchise be granted them."[157] He cited the

"ignorance and mendacity" of the black race as the reasons for exclusion of their testimony, incapacities not cured by emancipation. In Jenkins' view, appeasement of "the radical majority of the North" did not warrant "the inauguration of any new system of legislation."[158] Testimonial rights marked a decline that would lead to the unaccepted result of racial equality: "If the right to testify be granted the right to suffrage, the right to sit on juries and to fill offices would be successively demanded." Jenkins' most effective argument, the one most frequently repeated by testimony opponents, rebutted pragmatic arguments with the glaring absence of any assurance that testimonial rights would necessarily equate to removal of the Bureau: "[W]hat reason was there to believe that this concession would free us from that tribunal? Florida, Alabama, and other States had yielded [and] no such result had followed."[159] The lack of a firm quid pro quo from the federal government sounded repeatedly throughout the debates on the testimony statute.[160]

Similar debates raged in the state's newspapers as well. Although "repulsive" to white North Carolinians, the editors of the *Daily Sentinel* believed that "nothing short of [black testimonial rights] will satisfy the government."[161] In an effort to mollify opposition, newspapers published a letter from former North Carolina governor William Graham endorsing the Freedman Commission Report and its proposals on black testimonial rights as a valid legislative grant "on the higher ground of right." Graham considered those rights the only "essential attribute of civil or religious liberty, which is denied to [the freedpeople] in this State."[162] The editors of Wilmington's *Daily Dispatch* reported that the majority of white North Carolinians and their elected representatives opposed black testimony, as "a matter of principle." Those who supported the measure

only as a matter of expediency, the *Dispatch* editors argued, unwisely jeopardized the state's best interests: "If this bill is to be passed by the Legislature of North Carolina merely as an offering at the shrine of Northern radicalism, then it were better that it be rejected. It will prove but an insignificant sacrifice towards appeasing the wrath of the offended deities. Give them negro testimony, not as a matter of justice to the poor negro, but to please them; and they will have no hesitation in demanding unrestricted negro suffrage." The *Sentinel* staff responded that, given the erroneous but inevitable abolition of slavery after the war, propriety and justice required black testimonial rights in order to protect the freedom of the former slaves, but "[t]he idea that this admits a negro to equality with the whites, is in our mind, simply preposterous."[163] Opposition to black testimony ran deeper than "mere prejudice of color," posited the *Sentinel* staff. "It grows out of long and thorough acquaintance with the black race, which knowledge is directly at war with all ideas of their early approach, to such a state of morals and civilization, as would safely admit them to the claim of equality." The reluctant realization slowly dawned on white North Carolinians: a choice between accommodation of the freedpeople or a continued military presence had to be made.[164]

The timely circulation of a position statement from the Freedmen's Bureau concerning black testimony hastened that sense of resigned acquiescence. A February 13, 1866, letter, from Colonel Eliphalet Whittlesey, the Bureau's Assistant Commissioner for North Carolina, articulated the Bureau's views of the respective jurisdictions of the federal government's military tribunals and the state's judicial system. Given North Carolina's existing statutes permitting the admissibility of black testimony in criminal cases, state courts would be permitted to try criminal cases against the freedpeople,

following the amendment of North Carolina laws to require "necessarily the same" punishments for the same criminal offenses, regardless of any offender's race. As for civil matters, Whittlesey committed to transfer civil cases to the state courts upon enactment of the pending black testimony legislation, subject to continued compliance with those requirements of the admissibility of black testimony and race-neutral punishment: "The aim of the government is simply to secure justice to all without distinction of race or color." Meanwhile, the military tribunals would continue to exercise exclusive jurisdiction over cases involving the freedpeople. Bureau officials issued a formal circular outlining those same requirements three days later.[165]

Acquiescence gave way to begrudging inevitability. House delegate Neill McKay spoke for many lawmakers when he conceded "[t]hat we had to accept of [*sic*] condition of affairs upon us, and that the admission of negro evidence followed as a necessary consequence of the abolition of slavery. . . . That the issue was upon us, and we must dispose of it as we thought best for the welfare of our State. Georgia, Tennessee and Alabama have already adopted this policy, and we would have to follow their example."[166] To refuse, argued delegate Matthias Manly, would be to invite Congress to take charge of the freedpeople's affairs and have black testimonial rights "forced upon us."[167] State senator Leander Gash, who frequently wrote of legislative intrigues to his wife while the General Assembly was in session, agreed. Just as the "Federal Military" had forbidden enforcement of Virginia's racially discriminatory vagrant law, Gash believed "so they will our entire negro code unless we permit [the freedpeople] to testify where their colour is concerned."[168] Black testimony could not be avoided, argued a February 21, 1866, letter from "Union" to the *Standard* editors; "[r]epulsive as this

measure is to every sentiment of the Southern heart, it is clear we will all have to give up our prejudices." Rejecting concerns of subsequent racial equality as the "creation of our disturbed imaginations," Union positioned the statute as "a long stride towards restoring us to law and order, security and safety," regardless of whether its adoption secured removal of the Bureau.[169] Even ex-provisional governor Holden, having reverted to his pugnacious columns upon his return as editor of the *Daily Standard*, had little appetite for the debate. Complimenting the exhaustive Freedmen Commission Report authored by his appointees, Holden dismissed the testimony debate as a foregone conclusion, with admissibility "probably indispensable to the restoration of the State to the Union." "We do not by any means say that this *ought* to be so," wrote Holden, "but only that it *is* so. We see no ground for feeling or excitement on this subject."[170] Most North Carolinians appeared unenthusiastically prepared to concede the testimonial rights in furtherance of reunification.

No other section of the Bill Concerning Negroes engendered as much vitriol during legislative debates as the black testimony statute. Brief conciliatory discussions on statutory language prompted revisions to the "person of color" definition (including the unfortunate insertion of the ambiguous "one ancestor in each succeeding generation" phrase) and the fourth generation inclusive test, removal of Indians as "persons of color" governed by the Bill, and the complete elimination of proposed section 2 (concerning the all-inclusive definition of the "person of color" term in any court pleadings).[171] Minor disagreements over the structure and wording of the black marriage provisions resulted in collaborative revisions to sections 6, 7, and 8, including consolidation of sections 6 and 7 into a single section.[172] A proposed amendment to the apprentice statute, granting former

slaveowners the preferential right to bind their former slaves as apprentices, passed without comment. An amendment to the encyclopedic statutory repeals of section 17 – exempting from the omnibus repeal of the *Revised Code*'s "Slaves and Free Negroes" chapter the antebellum prohibitions against black migration and possession of unlicensed weapons – also passed without comment, as did various minor corrections to statutory citations within that section.[173]

No mention of citizenship for freedpeople appeared in published accounts of the Committee of the Whole proceedings or the Senate's subsequent deliberations, other than Jenkins' misguided statements about the nonexistence of any North Carolina Supreme Court decision recognizing the citizenship of free blacks. At some point, however, before the Bill passed to the Senate for consideration, the commissioners' proposed statutory recognition of the citizenship of all black North Carolinians mysteriously disappeared from the Bill, without a motion, objection, or discussion. Although that omission of citizenship did nothing to repudiate the continued applicability of the *Manuel* and *Newsom* rulings, it did rob the Bill Concerning Negroes of the empty gesture concocted by the commissioners to placate northern critics.

Opponents to black testimonial rights had one final ploy. Realizing the unlikelihood of a firm federal commitment for removal of military tribunals in exchange for black testimonial rights, House delegates amended the proposed testimonial statute, rendering it conditional upon an acceptable triggering event. After various iterations, the proposed amendment – "*Provided*, That this section shall not go into effect until jurisdiction in matters relating to freedmen shall be fully committed to the courts of this State" – rendered the statute inoperable unless and until the military tribunals

relinquished all jurisdictional claims over the state's freedpeople. From his vantage point in the state Senate, Leander Gash described such tactics as "flankmovements [*sic*] by amendments that seemed plausable [*sic*] within themselves, but after they got them incorporated in the bill find they are wrong. The majority for the bill is so small that the minority keep [*sic*] them fought off by a skirmish fight, so that it looks like they will hardly ever get it passed."[174] Concern over the potential adverse impact of that proviso contributed to the opposition against the overall Bill Concerning Negroes as even Commissioner Donnell, reportedly "impressed . . . with the inefficiency of the whole scheme," voted against the Bill.[175] Based on her review of legislative voting patterns on the constituent provisions of the Code, however, historian Roberta Sue Alexander concluded that most lawmakers opposing the Bill focused on its perceived excessive leniency towards the freedpeople, with little concern as to the discriminatory impact of any amendments to the Bill.[176] Despite those objections, including claims that the testimonial proviso "emasculated the bill," the amended testimony statute passed on a sixty-three to forty vote on February 21, and the House adopted the final version of the Bill Concerning Negroes on February 26 by a one-vote margin.[177]

On February 28, 1866, having already passed most of the freedmen commission's proposed bills to their final readings without comment or amendment, the state Senate finally took up the Bill Concerning Negroes.[178] Initially optimistic of the Bill's passage "as our house has great respect for bills reported by the commission appointed by the convention," Gash sounded a more cautionary tone later that same day: "My opinion is that the majority is now against it. But so was the House at first but it gained strength by discussion."[179] The only significant Senate challenges to the Bill focused on the House's

amendments to the black testimony and apprenticeship statutes.[180] On March 2, after unsuccessful efforts to delete both the testimonial proviso and the entire black testimony statute, the Senate surprisingly rejected the entire Bill Concerning Negroes on its second reading. A second vote on the Bill the next day reversed that determination, allowing the Bill to proceed to its third and final reading.[181]

The Senate scheduled the final vote for the Bill, which senator Lash described as "the all absorbing question of the Session," for March 9. Lash had grave concerns over the "very objectional feature" added to the testimony statute by the House: "That, in the face of the Presidents [*sic*] declaration that the Bureau will not be withdrawn until the negro is protected in all his personal rights is a sort of defiant threat (to say nothing of the foolishness of it) that may lead to much trouble. . . . All know that we got [*sic*] to meet it in its present form or have it forced on us in a far worse one."[182] Sharing Gash's concern that the House's conditional grant of testimonial rights would prove objectionable to the federal government, governor Worth directly solicited President Johnson's opinion, at the behest of the editor of the *Daily Sentinel*. On March 4, 1866, stating his belief that the President's disapproval would prompt the General Assembly to abandon the testimony proviso, Worth wrote Johnson to ask, "Will you express your approval or disapproval, with permission to me to show your answer, to the individual members of the General Assembly, but not for the press?" Johnson's curt response arrived by "private" telegram two days later, "Policy at this time would suggest the passage of the bill without the proviso."[183] Despite Worth's pledge of confidentiality, news of his exchange with Johnson spread rapidly, as did the self-righteous condemnations from Holden for how Worth and House Speaker Phillips had "put their foot in it," both with respect to the

conditional grant of black testimonial rights and the ex-slaveowners' preferential apprenticeship rights. "The Freedmen's Code, as adopted *under the auspices of Governor Worth*," clucked Holden, "will rather retard than advance the return of the State to the Union."[184] Despite Johnson's response, and several last minute efforts to remove the testimony and apprenticeship amendments, the Bill Concerning Negroes, as amended by the House of Commons, passed the Senate on March 9, 1866, by a vote of twenty-two to nineteen.[185]

The Freedmen's Convention long-unanswered call for "wise and humane legislation" had finally elicited a reply. Having "pray[ed] for such encouragement to our industry as the proper regulation of the hours of industry and the providing of the means of protection against rapacious and cruel employees [*sic*], and for the collection of just claims," North Carolina's freedpeople now had "An Act Concerning Negroes."[186] With the freedmen commission's other bills already adopted, white North Carolinians had their own Black Code.

The Constitutional Convention of 1866

Passage of the Black Code vexed governor Worth. Despite the President's stated preference for unconditioned black testimonial rights, lawmakers had leveraged those rights as a means for securing removal of the hated Freedmen's Bureau and restoration of the state's exclusive jurisdiction over its freedpeople. Worth lamented the situation in a March 16, 1866, letter to former governor David Swain: "I am at a loss to know what is to be the effect of the first proviso to the 9th section." Claiming to have "used every legislative means to have the proviso stricken from the bill," Worth blamed its enactment on legislators' ill-advised pledges to vote against black testimony. "[N]ow convinced that

both justice and policy required the opposite vote, [those lawmakers] thought this proviso a necessary shield between them & their constituents," Worth explained. "But for those pledges the bill would have passed almost unanimously without the proviso." Desperate for a solution, Worth asked Swain to consult with former governor Graham "as to the expediency of asking the Prest to make the 9th sec. operative, by requiring the chief of the Freedmen's Bureau to make an order to his subordinates in this State (communicating the same to me to be communicated to the Judiciary) that 'Jurisdiction in matters relating to freedmen is fully committed to the courts of this State.'" Worth also welcomed any alternative solution that the former governors might propose for neutralizing the proviso's effect on the testimony statute.[187]

In an effort to assist Worth, Swain conferred with Freedmen's Bureau Commissioner General O.O. Howard, providing him with a copy of the Act Concerning Negroes. In a subsequent letter to Colonel Whittlesey, the Bureau's Assistant Commissioner for North Carolina, Howard offered his view of the new legislation. "[B]y the terms of the law," according to Howard, in order to make the testimony statute's proviso operational, "it will require you freely to commit jurisdiction" over the freedpeople to the state courts. In light of the statute's continued "distinctions on account of race or color," as well as "other parts of the act, which hinge upon old laws of the statute book of N.C. which laws I would prefer to have examined prior to issuing any formal order of transfer," Howard believed such voluntary jurisdictional transfer would be premature. Noting that the civil rights bill then pending before the President (which would soon thereafter become the Civil Rights Act of 1866, over Johnson's veto) would prohibit such distinctions, Howard preferred no immediate action on Swain's petition.

Howard instead requested that Whittlesey pursue further study of the overall legislation and consultation with Worth and other state officials.[188]

Meanwhile, questions concerning black testimony plagued the state's legal system. On March 22, 1866, racial tensions in Wilmington nearly turned violent as a crowd of freedmen threatened to free five black men convicted for larceny during the local sheriff's preparations to impose sentences of thirty lashes on each convicted prisoner. The Bureau dispatched soldiers to intervene, upon receipt of information that black testimony favorable to the accused had been excluded and that similar punishment had not been imposed upon whites also convicted of larceny. Despite rumors of arrests court officials, the situation soon dissipated after court officials convinced the Bureau of the error of their information.[189] In a similar incident, Bureau agent Captain R. A. Seely intervened in the April 1866 Craven County prosecution of a black woman for unlicensed liquor sales, citing the inadmissibility of black testimony in criminal matters involving freedpeople as defendants. Upon receipt of a demand by Seely to relinquish the matter to the Bureau, the Craven County sheriff contacted the county attorney, who wrote to Worth, who in turn advised Colonel Whittlesey of the matter, prompting an investigation and response by Whittlesey that Seely had in fact acted in error.[190] Such confusion over the admissibility of black testimony and the resulting inefficiency of bureaucratic coordination between coexisting judicial authorities only aggravated the already tense relations between state and federal officials.[191]

The opportunity to address objectionable provisions in the Black Code finally presented itself on May 24, 1866, as the constitutional convention resumed its deliberations. Invited by the delegates to provide information of developments since their

last session, Worth used that platform to request limited amendments to the Code. Noting that "Congress has been sitting some five months, without prescribing any terms on which it is proposed to recognize our admission," Worth professed "no information which warrants me in making any suggestions to you as to any further action which you may properly take, tending to produce the desired harmony." The conduct of Bureau officials and representatives of the federal executive branch, however, had convinced Worth of their "readiness to co-operate with me in every thing tending to restore cordial reconciliation between the lately belligerent sections of our country." According to Worth, Brvt. Maj. Gen. Ruger, then-military commander of North Carolina, wanted to transfer all jurisdiction over the freedman to the state courts, but felt "embarrassed" to do so because of objectionable features in the Act Concerning Negroes. Worth reported that Ruger's "difficulties are understood to grow out of the 9th and 11th sections of the act. As it is very desirable that the civil Courts shall mete out uniform justice to all, white and black, according to law, and that all cause of dissatisfaction as to conflict of jurisdiction shall be avoided, I recommend the subject to your consideration." Worth did not explain the revisions sought by Ruger, apparently presuming that the delegates knew what needed to be done to appease the federal government.[192]

It is unclear what authority, if any, the constitutional convention had to amend legislation adopted by the state's separately elected legislative branch. As none other than constitutional authority Bartholomew F. Moore, resuming his role as a convention delegate, answered Worth's call to action, no one questioned the convention's authority. Moore proposed two ordinances, the first repealing both provisos to the black testimony statute, and the second repealing the assault to commit rape statute in its entirety.[193]

Moore's first proposed ordinance also repealed the five statutes prohibiting black migration and possession of unlicensed weapons, provisions resurrected by the General Assembly from the 1854 *Revised Code*'s "Slaves and Free Negroes" chapter by the Code, even though no objection to those statutes had been voiced.[194] A complete overhaul of Moore's second ordinance preserved the offense of assault with intent to commit rape, but made the crime race-neutral as to both victim and offender, and replaced the automatic death penalty with a discretionary range of punishment that included a fine, imprisonment of up to two years, commitment to the pillory for an hour, and one or more public whippings (each not exceeding thirty-nine lashes), or any combination of those penalties.[195] The Black Code otherwise remained intact.

Armed with those limited revisions to the Code, Worth wrote to the Bureau's then-Assistant Commissioner for North Carolina Brvt. Maj. Gen. John Robinson with the news that "there now exists, under the laws of this State, no discrimination in the distribution of justice to the prejudice of free persons of color." On the strength of Worth's sweeping representation, jurisdiction over the freedpeople finally returned to North Carolina's courts.[196]

The Freedmen's Convention of 1866

On Tuesday, October 2, 1866, at approximately 10 A.M., all eyes in Raleigh's Methodist African Church again turned to James H. Harris. One year earlier in that same sanctuary, Harris had presented the written address that would be delivered to the North Carolina constitutional convention on behalf of the delegates of the Freedmen's Convention. That petition for "wise and humane legislation" to protect the freedpeople and to help all black North Carolinians help themselves remained largely unanswered.

The legislative response instead came in the form of the North Carolina Black Code. As the president of the year-old North Carolina State Equal Rights League, Harris called to order a very different second Freedmen's Convention.[197]

The League had been formed on the final day of the 1865 Freedmen's Convention by the convention delegates "to secure, by political and moral means, the repeal of all laws and parts of laws, State and National, that make distinctions on account of color." That day, in its constitution, the League set an annual meeting on the first Tuesday of each subsequent October.[198] An unusual notice published in Raleigh's *Tri-Weekly Standard* (the descendent of Holden's *Daily North Carolina Standard*) on July 10, 1866, seemingly attempted to usurp the League's first annual meeting. In "A Call to the Colored People In North-Carolina," Albert B. Williams (listed as the chairman of some unidentified committee), eight other named "colored citizens of North-Carolina," "and many others" called for a meeting of black North Carolinians on that same first Tuesday of October 1866 in Raleigh "for the purpose of forming, if deemed expedient, a *State Educational Association* of colored people, whose object shall be to provide for the establishment and support of free schools for our own people on the broadest scale possible, and to devise and employ means to secure for such schools the greatest possible efficiency and success."[199] A subsequent series of conflicting published letters revealed that the call for a State Educational Association organization meeting had been published without the participation or knowledge of several of the individuals named in the notice.[200]

In an apparent effort to dispel any confusion caused by Williams' activities, the formal notice of the State Equal Rights League's October 2, 1866, meeting expressly

identified the "State League [as] the only recognized organization we, as a colored people, have." Although referencing its efforts in education and support for the poor, the League emphasized its advocacy for "the interests of the Colored People of the State," particularly as the freedpeople continued to learn self-reliance and while "the world is looking to us for a demonstration of our capacity to perform the part of useful, intelligent citizens."[201] Despite that effort to clarify the broader purpose of the League and its 1866 convention, white North Carolinians continued to view the convention solely as the education forum espoused by Williams, and later criticized the delegates for exceeding the misconceived limited purpose of the meeting.[202] For its own part, the League introduced further confusion into the intended proceedings, as its convention notice also stated: "The State Legislature has been memorialized in behalf of the colored people, and our petition was treated with respectful consideration."[203] As the sole response to the Freedmen Convention's prior petition had been the General Assembly's Black Code, the suggestion that the freedpeople had received anything resembling respectful consideration sounded a discordant tone on the eve of the 1866 Freedmen's Convention. An apparent remnant from the prior year's convention, that deferential posture would not be repeated in the second convention.

The 1866 delegation, approximately the same size as the 1865 delegation but far more geographically diverse, seemed intent upon announcing their expectations.[204] Admittedly, the delegates reiterated that enigmatic sense of gratitude to the General Assembly in a resolution "to return their grateful and heartfelt thanks for the cordial acceptation and kind treatment of the petition presented to your honorable body at your last assembly. We also feel it to be our bounded duty to return our thanks for what you

have done in removing the disabilities under which we have labored, and which are contrary to the genius of a republican government, to liberty and humanity. The Convention continues to pray your honorable body to give us protection in the future, as we have shown ourselves loyal and peaceable citizens in the past."[205] The delegates patiently sat through patronizing speeches and letters of almost formulaic uniformity from white dignitaries, including governor Worth and ex-provisional governor Holden, who professed friendship with the freedpeople, espoused the importance of education and morality, and advocated a "work hard and wait" philosophy for freedpeople eager for rights and opportunities.[206] According to the *Daily Sentinel*, the delegates "received with applause and with evident tokens of pleasure and gratification" Worth's condescending remarks: "Let me advise you not to meddle in governmental affairs. You know how few of your race are now capable of understanding matters of this sort, and you see the strifes and troubles in which party politics have involved the whites. Avoid politics. Practice industry, virtue, and cultivate the kind feelings which now exists between the races, and you will thus acquire competence and elevate your condition."[207] Echoing Worth's warning against political involvement – "a 'weariness to the flesh' among the white people" – Holden cautioned the delegates that, because no one proposed or advocated for social equality between the races, the best hope for the freedpeople rested in the cultivation of the friendship of white North Carolinians.[208] The delegates listened, recognizing a conciliatory tone reminiscent of their own 1865 address to the constitutional convention, and then proceeded otherwise.

Evidently realizing the error of their past reliance upon the General Assembly for legislative assistance, the delegates resorted to self-help. They approved a constitution to

govern the Freedmen's Educational Association of North Carolina, a newly-formed organization to establish schools open to all, regardless of race or financial condition. They also adopted a host of resolutions, including provisions for the formation of local auxiliary leagues to track and report outrages against freedpeople, and for the encouragement of black-owned businesses. They denounced taxation without representation and the unscrupulous binding of black children as apprentices without parental consent, endorsed such congressional measures as the 1866 Freedmen's Bureau Act and the Fourteenth Amendment, and extended votes of thanks to such renowned abolitionists as Charles Sumner, Thaddeus Stevens, and Horace Greeley. They hosted a lecture on phrenology and ethnology by Dr. H. J. Brown, refuting any myths of innate racial inferiority through proof of the physical and intellectual similarities between whites and blacks. In an abrupt departure from the previous year's convention, Brown unabashedly blamed any developmental delays on slavery, which he denounced as "the white man's shame." The assembly even opened the floor for individual delegates to report incidents of mistreatment and abuse of the freedpeople at the hands of the state's white citizenry.[209]

Most significantly, however, rather than repeat the prior year's mistake of petitioning the General Assembly for assistance, the delegates went directly to their "fellow-citizens" of North Carolina, both white and black. Among "our grievances, our sufferings and the outrages heaped upon us, because of our helpless and disqualified position for self-defense," and resulting from "our long and unjust political disenfranchisement," the delegates called attention to their victimization through taxation without representation, violent attacks, and theft. Disclaiming any "reproach or

denunciation" in their appeal, the freedpeople's representatives also denied any suggestion of selfishness in their request "for equal rights without regard to complexional differences." The delegates declared themselves prepared to "honor and credit" the state for joining "the rapid strides which this great Nation has been taking in the direction of universal emancipation and equality before the law." But they also sought protection from "the murderous hand." Appealing to the "religion and humanity" of white North Carolinians, the delegates "beg[ged] you as white men in authority to shield our defenceless [*sic*] heads, and guard our little homes." [210] Having previously failed in their direct appeal to lawmakers, the convention attendees now hoped to muster the sympathies of their white neighbors in order to mobilize public sentiment, and thereby legislative responsiveness.

Those concerns and pleas but prefaced the boldest request of all, the one request the freedpeople's delegates had so scrupulously avoided in the prior year's petition to the General Assembly. The delegates targeted the citizens of North Carolina for an unadorned request for suffrage: "We claim by merit the right of suffrage, and ask it at your hands. We believe the day has come, when black men have rights which white men are bound to respect. , , , Will you, oh! will [*sic*] you treat us as human beings, with all our rights? It is all we ask."[211] All indeed. That knowingly radical request marked a monumental departure for the same delegation who had just expressed gratitude for the General Assembly's purportedly respectful treatment of the freedmen's earlier petition for legislative support. The delegates surely knew such an unflinching request for suffrage would be flatly rejected, particularly after their more innocuous petition from the prior year had prompted North Carolina's Black Code.[212] But the stalwart confidence

with which that request had been presented could not be ignored. Nor could it be forgotten by the architects of a legislative scheme designed to further subjugation of the petitioning freedpeople.

End Notes

[1] *Journal of the Convention of the State of North-Carolina at its Session of 1865* (Raleigh, NC: Cannon & Holden, 1865), 2-6.

[2] "A Proclamation, by William W. Holden Provisional Governor to the People of North Carolina," August 8, 1865, *The Papers of William Woods Holden*, 2 vols., ed. Horace W. Raper (Raleigh, NC: Division of Archives and History, North Carolina Department of Cultural Resources, 2000), 1:228.

[3] *Journal of the 1865 Convention*, 6-7 (italics in original).

[4] David S. Cecelski, *The Fire of Freedom: Abraham Galloway and the Slaves' Civil War* (Chapel Hill, NC: University of North Carolina Press, 2012), 184; *Official Proceedings of the Convention of the Freedmen of North Carolina, September 29-October 3, 1865* (Raleigh, NC: 1865), 2-3. Three additional delegates joined the second day of proceedings. *Official Proceedings, 1865 Freedmen Convention*, 6. Other contemporaneous sources offered differing attendance estimates. Sidney Andrews, *The South Since the War as Shown by Fourteen Weeks of Travel and Observation in Georgia and the Carolinas* (1866; Boston: Houghton Mifflin, 1971), 121 (noting 117 delegates from 42 counties); "From North Carolina.: Freedmen Convention–The State Convention–Letters of Advice," *New York Times*, October 7, 1865, 1 (estimating 120 delegates); "The South and the Negroes. North Carolina. The Colored Convention," *National Anti-Slavery Standard* (New York/Philadelphia), October 14, 1865, 3 ("probably" 150 delegates).

[5] Andrews, *The South Since the War*, 119.

[6] John H. Haley, *Charles N. Hunter and Race Relations in North Carolina* (Chapel Hill, NC: University of North Carolina Press, 1987), 10.

[7] According to the official minutes of the 1865 Freedmen's Convention, the 106 delegates recognized on the first day of the Convention represented thirty-two North Carolina counties and two black enclaves in James City and Roanoke Island. Only eight counties west of Raleigh were represented, the westernmost being Rutherford and Mecklenburg counties. *Official Proceedings, 1865 Freedmen Convention*, 2-3; John Richard Dennett, *The South As It Is: 1865-1866*, ed. Henry M. Christman (New York: Viking Press, 1965), 148 (many freedpeople in central and western North Carolina thought the Freedmen's Convention premature, preferring it be held after the constitutional convention "in the event of the convention's leaving the colored population unnoticed . . . [particularly] when as yet they had suffered no injustice by any State action").

[8] "Freedmen of North Carolina, Arouse!!," *Wilmington* (NC) *Herald*, September 8, 1865, 2. For an account of the organizational efforts leading up to the Freedmen Convention, see Cecelski, *The Fire of Freedom*, 177-83.

[9] *Official Proceedings, 1865 Freedmen Convention*, 6-7.

[10] "The Negro Convention," *Daily Union Banner* (Salisbury, NC), October 3, 1865, 2; "Convention of Colored Men," *Daily Progress* (Raleigh, NC), 2; "The City," *Daily Progress*, September 29, 1865, 1 ("Whatever their object may be, it would be well for them to be cautious, to avoid extremes, in every particular, not to dictate to the approaching State Convention, or make any unnecessary insinuations as to their *future* position, political or social.") (italics in original).

[11] *Official Proceedings, 1865 Freedmen Convention*, 4-5 (italics in original).

[12] Ibid., 7-9.

[13] Ibid., 9-11.

[14] Ibid., 12-13.

[15] Ibid., 13-14. In its most confrontational statement, the Report articulated the delegation's call for repeal of racially discriminatory legislation: "We most earnestly desire to have the disabilities under which we formerly labored removed, and to have all the oppressive laws which make unjust discriminations on account of race or color wiped from the statutes of the State." Ibid., 14.

[16] Andrews, *The South Since the War*, 127, 130; Dennett, *The South As It Is*, 153-54 (the address "breathes nothing but moderation and conciliation . . . . a wonderfully conservative document, undisfigured by the marks of levelling radicalism"). Historian David Cecelski has noted the ironic juxtaposition of the humble, conciliatory tone of the address and the renown of the three men chosen to deliver it: the black militant Harris, the esteemed Good who had once met personally with President Lincoln, and Galloway, "by then perhaps the most notorious black leader in the South . . . famed for the revolver at his hip and for his unremitting fierceness." Cecelski, *The Fire of Freedom*, 187.

[17] Andrews, *The South Since the War*, 131.

[18] "The Freedmen's Convention," *Daily Standard* (Raleigh, NC), October 4, 1865, 3; "Address of the Freedmen," *Daily Progress*, October 4, 1865, 2; "The Colored Convention," *Daily Sentinel*, October 2, 1865, 2; "Freedmen's Convention," *Daily Sentinel*, October 4, 1865, 2; "City and State Items," *Daily Sentinel*, October 5, 1865, 3.

[19] "The Colored Convention–The State Convention Repealing the Secession Ordinance," *New York Times*, October 9, 1865, 1.

[20] *Journal of the 1865 Convention*, 19; William C. Harris, *William Woods Holden: Firebrand of North Carolina Politics* (Baton Rouge, LA: Louisiana State University Press, 1987), 187.

[21] "North Carolina State Convention," *Daily North Carolina Standard* (Raleigh, NC), October 12, 1865, 2; "Report on Freedmen's Address," *Daily North Carolina Standard*, October 13, 1865, 2. According to the *Standard*, General O.O. Howard, Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands (also known as the Freedmen's Bureau), concurred with the Pool committee's recommendations. "Gen. Howard's Address Last Night!," *Daily North Carolina Standard*, October 13, 1865, 3.

[22] Andrews, *The South Since the War*, 162.

[23] *Journal of the 1865 Convention*, 44-45, 81, 94; *Executive Documents. Convention, Session 1865. Constitution of North-Carolina, with Amendments, and Ordinances and Resolutions Passed by the Convention, Session, 1865*, "A Resolution to Constitute a Commission to Prepare and Report to the Legislature, a Code of Laws on the Subject of the Freedmen," October 18, 1865 (Raleigh, NC: Cannon & Holden, 1865), 73. Neither the constitutional convention's journal nor the North Carolina press covering the proceedings reported any further action on or consideration of the Pool committee report during that October 11 to 18, 1865, interlude.

[24] *Journal of 1865 North Carolina Convention*, 93-94.

[25] "Washington News, Reconstruction in North Carolina," *New York Times*, November 9, 1865, 5.

[26] "Voices of the Colored Men–The Freedmen's Address, &c.," *Journal of Freedom* (Raleigh, NC), October 21, 1865, 2.

[27] "Portentous," *Journal of Freedom*, October 28, 1865, 2.

[28] *Executive Documents. Convention, Session 1865*, "An Ordinance Providing for the Election of the Members of the General Assembly to be Convened on the Fourth Monday of November, 1865, and for the Electing Representatives in Congress, and Governor of the State," "An Ordinance Submitting to the Qualified Voters of the State, the Ratification or Rejection of Certain Ordinances," 42, 46; "Proclamation, by William W. Holden, Provisional Governor, to the People of North Carolina," *Daily North Carolina Standard*, October 19, 1865, 3.

[29] The editors of Holden's rival newspaper, *The Daily Sentinel*, reported Worth's intended candidacy for governor on October 17. "Jonathan Worth, Esq.," *Daily Sentinel*, October 17, 1865, 2. It is ironic, given the confluence of related events on October 18, 1865, that Worth tendered his resignation as treasurer to Holden on that same day. Holden did not accept Worth's resignation until November 15, nearly a week after Worth defeated Holden for the governorship. Jonathan Worth to W. W. Holden, October 18, 1865, Joseph S. Cannon to Jonathan Worth, November 15, 1865, in Raper, *Papers of William Woods Holden*, 1:254, 1:261.

[30] *Executive Documents. Convention, Session 1865*, "An Ordinance Prohibiting Slavery in the State of North Carolina," 40.

[31] Harris, *William Woods Holden*, 213. According to one source, as of March 1850, Holden owned at least one hundred ninety slaves. "How Deep," *North Carolina Standard* (Raleigh, NC), March 27, 1850, 2.

[32] "Proclamation by William W. Holden, Provisional Governor, to the People of North Carolina," June 12, 1865, in Raper, *Papers of William Woods Holden*, 1:189-90; "Slaves and Free Persons of Color," *Weekly Standard* (Raleigh, NC), December 7, 1859, 1.

[33] W. W. Holden, *Memoirs of W. W. Holden*, ed. William Kenneth Boyd (Durham, NC: Seeman Printery, 1911), 52.

[34] "The Freedmen," *Daily North Carolina Standard*, October 18, 1865, 2 (italics in original).

[35] Harris, *William Woods Holden*, 169-70.

[36] "Commissioners on the Subject of Freedmen," *Daily North Carolina Standard*, October 30, 1865, 2. At least one North Carolina newspaper promptly reprinted the notice of those appointments. "Commissioners on the Subject of Freedmen," *New Berne Daily Times*, November 1, 1865, 4.

[37] "To the Voters of Wake County," *Daily North Carolina Standard*, October 30, 1865, 2, October 31, 1865, 2; "To the Voters of Wake County," *Daily Sentinel*, October 31, 1865, 2.

[38] "Governor's Message," November 30, 1865, in Raper, *Papers of William Woods Holden*, 1:267.

[39] The editors of the *Daily Sentinel*, vocal supporters of Worth's gubernatorial campaign, failed to report the commission appointments until November 8. *Daily Sentinel*, November 8, 1865, 2.

[40] Harris, *William Woods Holden*, 188 (identifying Moore, Donnell, and Mason as part of Holden's "faction"); "Party Organizations," *Wilmington Herald*, February 19, 1866, 2 (naming Holden, Moore, Mason, and Donnell as party affiliates supportive of the

Johnson administration); Holden, *Memoirs of W. W. Holden*, 43 (Holden described Moore as "one of my confidential friends and advisors"). Reports in the *Standard* alleged that, before Worth announced his gubernatorial candidacy, unnamed secessionists had attempted to recruit several other people to run for governor against Holden, including Moore and Donnell. Both Moore and Donnell declined. "How the friends of Andrew Johnson and of the Union acted," *Daily North Carolina Standard*, October 24, 1865, 2. According to North Carolina historian J.G. de Roulhac Hamilton, although not an ardent Holden supporter, Moore opposed a gubernatorial election given the likelihood of exacerbating tensions between Unionists and Secessionists. J.G. de Roulhac Hamilton, "Bartholomew Figures Moore," *Biographical History of North Carolina*, 8 vols., ed. Samuel A. Ashe (Greensboro, NC: Charles L. Van Noppen, 1906), 5:282. Mason owed his appointment as North Carolina's District Attorney to Holden, who had recommended Mason to President Johnson. William Holden to Andrew Johnson, May 26, 1895, "Letters from North Carolina to Andrew Johnson," ed. Elizabeth Gregory McPherson, *North Carolina Historical Review* 27, no. 3 (July 1950): 344; Holden, *Memoirs of W. W. Holden*, 48, n.1.

[41] Jonathan Worth to William Clark, December 28, 1867, in *The Correspondence of Jonathan Worth*, 2 vols., ed. J.G. de Roulhac Hamilton (Raleigh: Edwards & Broughton, 1909), 2:1095-96; Jonathan Worth to B.G. Worth, September 11, 1865, Hamilton, *Correspondence of Jonathan Worth*, 1:417. Worth's views did not improve during his administration: "the normal condition of the African is that of a savage–and that Providence, for inscrutable reasons, has made him incapable of permanent civilization

and useful citizenship." Jonathan Worth to William Clark, February 16, 1868, Hamilton, *Correspondence of Jonathan Worth*, 2:1155.

[42] *Journal of the Senate of the General Assembly of the State of North Carolina at its Session of 1865-'66* (Raleigh, NC: Wm. E. Pell, 1865), 47; House Speaker Samuel Phillips to Senate Speaker Thomas Settle, December 4, 1865, North Carolina General Assembly Session Records, November-December 1865, House message folder, box 1, State Archives of North Carolina, Raleigh, NC. The joint freedmen committee consisted of senators Ferebee (named chairman of the committee), James M. Leach, and D. A. Covington, and House members Lewis Thompson, Rufus McAden, Robert H. Cowen, John F. Hoke, and John Holderby. *Senate Journal, 1865-'66*, 60; *Journal of the House of Commons of the General Assembly of the State of North Carolina at its Session of 1865-'66* (Raleigh, NC: Wm. E. Pell, 1865), 63. According to historian Roberta Sue Alexander, the Worth contingency consisted of Ferebee, Covington, McAden, Cowen, and Hoke, while Leach and Thompson remained loyal to Holden. Alexander did not determine Holderby's affiliation. Roberta Sue Alexander, "North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-1867" (PhD diss., University of Chicago, 1974), 688-709.

[43] *Senate Journal, 1865-'66*, 108-09; *House of Commons Journal, 1865-'66*, 116; Senate Speaker Thomas Settle to House Speaker Samuel Phillips, December 10, 1865, North Carolina General Assembly Session Records, November-December 1865, Senate message folder, box 1, State Archives of North Carolina, Raleigh, NC; House Speaker Samuel Phillips to Senate Speaker Thomas Settle, December 13, 1865, North Carolina

General Assembly Session Records, November-December 1865, House message folder, box 1, State Archives of North Carolina, Raleigh, NC.

[44] "North Carolina—Unworthy Evasion," *New York Times*, December 19, 1865, 4.

[45] "North Carolina State Convention; Bartholomew F. Moore," *Daily Sentinel*, November 11, 1865, 3; *Tribute to the Memory of Bartholomew Figures Moore* (Raleigh, NC: Edwards, Broughton & Co., 1879), 8-11; Hamilton, "Bartholomew Figures Moore," 5:282; Memory F. Mitchell, "Moore, Bartholomew Figures," *Dictionary of North Carolina Biography*, 6 vols., ed. William S. Powell (Chapel Hill, NC: University of North Carolina Press, 1986), 4:294-95; "Mr. Moore Played Part in City History," *Raleigh Times*, July 1, 1961, B1. Observers within and outside of North Carolina openly discussed Moore as a worthy candidate for the United States Supreme Court. "U. S. Supreme Court--B. F. Moore, Esq.," *Daily Sentinel*, November 17, 1865, 2 (quoting the Petersburg, VA *Index*). According to one lawmaker, however, Moore "is one of North Carolina's Political and Judicial Jewels if she has any such if he would only stay sober." Leander S. Gash to Margaret Adeline Gash, February 4, 1866, Leander S. Gash Papers, 1866-1867, State Archives of North Carolina, Raleigh, NC.

[46] Hamilton, "Bartholomew Figures Moore," 5:277-78, 5:282-83; "The Freedmen's Code," *Weekly Sentinel* (Raleigh, NC), February 3, 1866, 2. Donnell apparently suffered from severe gout and kidney ailments. Richard S. Donnell to David M. Carter, September 9, 1866, David Miller Carter Papers, 1713-1916, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill (Donnell recounted his eight weeks of convalescence in Healing Springs). At the time of the 1865 freedmen commission appointments, Mason had been licensed to

practice law in North Carolina for only twelve years, whereas Moore had already been in practice for forty-two years. "Supreme Court," *North Carolina Standard*, January 3, 1852, 2; Hamilton, "Bartholomew Figures Moore," 5:275.

[47] "Letter from Hon. B. F. Moore," *Raleigh Register*, October 24, 1860, 4 (professing his "habitual reverence of the Union," Moore "regard[ed] its preservation as the greatest of political blessings, because in it are contained, in my judgment, the only hope of a well regulated liberty, and the best protection of our rights."); Will of Bartholomew F. Moore, August 15, 1863, Moore, Blount, and Cowper Family Papers, 1789-1990, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill (Moore blamed the Civil War on "a few ambitious and supremely wicked men to whose mad counsels millions born and unborn will lay the great crime of their doom for all time to come to the curses by turns of anarchy and profound despotism. No man will ever see the South as it was !!").

[48] Moore's personal papers evidence the family's sizable slave ownership. Record book of slave births, circa 1828-1846, and October 17, 1853, deed between Edwin L. Moore and B. F. Moore (for the purchase of slaves Harry and Sam), Moore, Blount, and Cowper Family Papers, 1789-1990, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill. According to his daughter Lucy Catherine Capehart, however, Moore also exhibited genuine affinity for his individual slaves. L. C. Capehart, *Reminiscences of Isaac and Sukey, Slaves of B. F. Moore, of Raleigh, N.C.* (Raleigh, NC: Edwards and Broughton Printing Co., 1907). In his final will, Moore granted a one-hundred-dollar bequest for each of his former slaves still residing in North Carolina at the time of his death. Hamilton, "Bartholomew Figures

Moore," 5:286; "Will of Bartholomew F. Moore," August 12, 1878, Bartholomew F. Moore Papers, Wake County Wills, Estate Papers, and Tax Lists, State Archives of North Carolina, Raleigh, NC.

[49] *State v. Will*, 18 N.C. 121, 165, 145, 142, 131, 127 (1834).

[50] *Will*, 18 N.C. at 142.

[51] Undated Bartholomew F. Moore charge to Gates County grand jury charge, Moore and Gatling Law Firm Papers, 1788-1921, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill.

[52] "Letter from Hon. B. F. Moore," *Daily Standard*, August 29, 1865, 2. One week prior to the opening of the 1865 state constitutional convention, Moore wrote to former state Supreme Court chief justice Thomas Ruffin to complain that "[t]he struggles for negro political equality are to be prominent and harassing – and the attempted checks on the free legislation of the State in regard to the blacks are to be ever before us, backed by a parcel of low bred fanatics abroad and among us." Describing a recent theft of nine horses and mules – "[d]oubtless the thieves were freedmen" – Moore wished for "the civil law restored completely to our hands, and an efficient police, and firm courts," as the Bureau's "mock punishment . . . but encourages the rogue to higher deeds." Bartholomew F. Moore to Thomas Ruffin, September 22, 1865 (emphasis in original), Thomas Ruffin Papers, 1753-1898, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill.

[53] Bartholomew F. Moore to Lucy Catherine Capehart, December 4, 1865, Moore, Blount, and Cowper Family Papers, Southern Historical Collection. As suggested by that comment, Moore openly advocated for the separate colonization of the freedpeople:

"Enlightened humanity demands it. The negro race can now be removed, as the Indians were." "Letter from Hon. B. F. Moore," *Daily Standard*, August 29, 1865, 2.

[54] Bartholomew F. Moore to Lucy Catherine Capehart, December 4, 1865, Moore, Blount, and Cowper Family Papers, Southern Historical Collection. Moore's fellow commissioner William Mason also saw black testimonial rights as a means for removal of both the Bureau and the issue of black suffrage: "I fear we will ultimately have suffrage of the negroes forced upon us, which I am persuaded could be avoided if we would do justice to that class in giving full protection. If punishment were the same and the right to testify was given I believe the Bureau would be withdrawn. If it is not done Congress will take all questions from the state courts and give them to the [federal] district courts when negroes are affected in person or property." William Mason to David M. Carter, March 6, 1866, David Miller Carter Papers, Southern Historical Collection.

[55] *Will*, 18 N.C. at 145.

[56] *Journal of the House of Commons, at its Special Session of 1866* (Raleigh, NC: Wm. E. Pell, 1866), 18-22.

[57] Jonathan Worth to William A. Graham, January 12, 1866, William A. Graham Papers, 1750-1940, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill. Worth's letter – opening with the understated concession "I am greatly at a loss" – vacillated wildly on the testimonial issue: "I think–per se–that the testimony of negroes ought to be heard in a case where a negro is a party"; "I am not sure, but incline to think" that such testimony would be beneficial; "I think <u>policy</u> affirmatively requires" such evidence "where a negro is affected"; "I fear" continued military rule if the statutes are discriminatory; and "I have

not the enough constitutional learning to write . . . what ought to be said and ask your aid." Ibid. (emphasis in original). It remains unclear whether Graham responded to Worth's request for help. The only contemporaneous letter from Graham to Worth makes no mention of testimonial rights, offering little but a noncommittal statement of Graham's belief that the state would be burdened with the Bureau for some while longer. William A. Graham to Jonathan Worth, January 26, 1866, in Hamilton, *Correspondence of Jonathan Worth*, 1:482.

[58] *House of Commons Journal, Special Session, 1866*, 18-22.

[59] Ibid., 2, 34-35; "General Assembly; House of Commons," *Daily Sentinel*, January 24, 1866, 2; *Executive and Legislative Documents Laid Before the General Assembly of North Carolina, Session of 1865-66*, "Report of Committee," Document No. 9 (Raleigh, NC: Wm. E. Pell, 1866), 6 (the "Freedmen Commission Report").

[60] *House of Commons Journal, Special Session, 1866*, 35; "General Assembly; House of Commons," 2.

[61] Hamilton, "Bartholomew Figures Moore," 5:282.

[62] Freedmen Commission Report, 2.

[63] Ibid., 6, 2.

[64] Freedmen Commission Report, 4 (italics in original), 12-21. Numeric statutory citations in the Report to the originally proposed "Bill Concerning Negroes, Indians and persons of color, or of mixed blood" do not coincide with the sections of the final "Act Concerning Negroes and Persons of Color or of Mixed Blood." As proposed, the Bill consisted of twenty-one sections. The final Act reduced the number of sections to nineteen, rejecting the commission's proposed section 2, combining proposed sections 6

and 7 into a new section 5, and otherwise renumbering the remaining sections of the Bill. "A Bill Concerning Negroes, Indians and persons of color, or of mixed blood," House Bill no. 82, North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, State Archives of North Carolina, Raleigh, NC; "A Bill Concerning Negroes, Indians and persons of color, or of mixed blood," *Daily North Carolina Standard*, January 31, 1866, 2; *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866*, ch. 40 (Raleigh, NC: Wm. E. Pell 1866).

[65] Freedmen Commission Report, 2. The exclusion of Indians from North Carolina's pre-emancipation population classes is odd, given the commissioners' intention that the proposed Code, by virtue of including Indians within the defined term "persons of color," would govern both freedpeople and Indians. "A Bill Concerning Negroes," House Bill no. 82, § 1; *Public Laws of North Carolina, 1866*, ch. 40, § 1. The Report included no other reference to the Bill's applicability to Indians. Indians were later removed from the Bill by the House of Delegates, leaving the Black Code to apply solely to black North Carolinians. *Public Laws of North Carolina, 1866*, ch. 40, § 1.

[66] Freedmen Commission Report, 5.

[67] Ibid., 6. The commissioners' discussion of the common law equality of all freemen is somewhat complicated by the noted exception that free blacks' property rights did not include the right to own slaves. That exception, nonexistent in common law, stemmed from an 1861 statute prohibiting any free black from hiring, controlling, or owning slaves and from having slaves bound as apprentices. *Public Laws of the State of North Carolina, Passed by the General Assembly, at its Session of 1860-'61*, ch. 36 (Raleigh, NC: John

Spelman, 1861). The inclusion of a statutory exception of then-recent vintage within a list of illustrative time-honored race-neutral common law rights would suggest an even broader legislative power than authorized by *Manuel*, allowing for the introduction of racial disparity within the common law concept of "freeman" equality.

[68] Ibid., 2 (italics added).

[69] *Revised Code of North Carolina, Enacted by the General Assembly at the Session of 1854*, ch. 107, § 44 (Boston: Little, Brown & Company, 1855).

[70] *State v. Manuel*, 20 N.C. 144, 163-64 (1838).

[71] Freedmen Commission Report, 5.

[72] "A Bill Concerning Negroes," House Bill no. 82, § 17; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[73] Ibid., § 5.

[74] Freedmen Commission Report, 3.

[75] *Revised Code of North Carolina, 1854*, ch. 5, §§ 1-3, 5.

[76] *Executive Documents. Convention, Session 1865*, 73.

[77] "A Bill Concerning Negroes," House Bill no. 82, § 18; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[78] Garrett Epps, "The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment," *Temple Political & Civil Rights Law Review* 13, no. 2 (Spring 2004): 422-23.

[79] Freedmen Commission Report, 6.

[80] *Executive Documents. Convention, Session 1865*, "An Ordinance Prohibiting Slavery in the State of North Carolina," 40; Freedmen Commission Report, 2 (upon

emancipation, "laws specially respecting" the slave population class "ceased to have any force").

[81] *Revised Code of North Carolina, 1854*, ch. 34, § 9, ch. 50, §§ 12, 13, ch. 54, §§ 24, 25, ch. 65, § 20, ch. 79, § 5, ch. 83, § 3, ch. 99, § 22, ch. 119, § 27.

[82] Ibid., ch. 68, §§ 7, 8; "A Bill Concerning Negroes," House Bill no. 82, §§ 10, 1; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[83] *Revised Code of North Carolina, 1854*, ch. 34, § 116, ch. 66, § 33, ch. 70, § 5, ch. 101, §§ 9, 12. The public roads statute required that men of both races work on public roads without pay, but the age range of affected men differed by race. The statute applied only to white men aged eighteen to forty-five, and black men aged sixteen to fifty. Only black men were statutorily required to provide their own tools. Ibid., ch. 101, § 9.

[84] Ibid., ch. 70, § 80. Lawmakers expanded the scope of another statute under that chapter – an antebellum section that allowed any three justices of the peace to mobilize the militia against "outlawed or runaway negroes, committing depredations, or in any way alarming the citizen [*sic*] of any county" – to allow for such mobilization against any "outlawed persons" engaged in such acts. Ibid., ch. 70, § 83; *Public Laws of North Carolina, 1866*, ch. 23, § 1.

[85] For example, surviving antebellum statutes, such as the exclusion of blacks from public schools and the militia, soon provided the basis for express codification of segregation. *Laws & Resolutions Passed by the General Assembly of the State of North Carolina, at the Special Session, begun and held in the City of Raleigh on the First of July, 1868*, ch. 22, § 7 (Raleigh, NC: N. Paige, 1868) ("The white and colored men in the militia shall be enrolled in separate and distinct companies and shall never be compelled to serve in the

same companies."); *Public Laws of the State of North Carolina, Passed by the General Assembly at its Session 1868-'69, Begun and Held in the City of Raleigh on the Sixteenth of November, 1868*, ch. 184, § 50 (Raleigh, NC: M. S. Littlefield, 1869) (requiring each township to "establish a separate school or separate schools for the instruction of children youth of each race resident therein").

[86] Appendix 2; "A Bill Concerning Negroes," House Bill no. 82, §§ 1, 9, 12-13; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[87] Ibid., § 3.

[88] For a description of that statutory erosion, see notes 76-81 and accompanying text in Chapter One above. What state law did not take from the antebellum free blacks, they lost through "the growing body of extra-legal restrictions imposed on [them] by the larger community." John Hope Franklin, "The Enslavement of Free Negroes in North Carolina," *Journal of Negro History* 24, no. 4 (October 1944): 404.

[89] "A Bill Concerning Negroes," House Bill no. 82, § 3.

[90] *State v. Newsom*, 27 N.C. 250, 252, 254-55 (1844).

[91] Freedmen Commission Report, 3 (italics in original). Whether tactical or inadvertent, the omission of references to *Manuel* and *Newsom* proved prescient, as the final version of the Bill inexplicably removed any reference to citizenship. *Public Laws of North Carolina, 1866*, ch. 40, § 2. Even without that express grant of citizenship, the rulings authorizing such legislative distinctions remained valid, except as subsequently limited by such measures as the Fourteenth Amendment. Indeed, elements of both *Manuel* and *Newsom* have continued to be cited favorably by North Carolina courts as valid precedent well into the twenty-first century. *Tully v. City of Wilmington*, 370 N.C. 527, 533 (2018)

(citing favorably *Manuel*'s ruling as to the civil rights granted citizens by the state's Declaration of Rights); *Long v. Rockingham*, 187 N.C. 199, 203 (1924) (citing favorably *Newsom*'s ruling on eminent domain).

[92] *Session of 1865-6, of the House of Representatives of the State of Alabama, held in the City of Montgomery, Commencing on the Third Monday in November, 1865*, "An Act to Protect Freedmen in their Rights of Person and Property in this State," § 1 (Montgomery, AL: Reid & Screws, 1866); *Laws of the State of Mississippi, Passed at a Regular Session of the Mississippi Legislature, Held in the City of Jackson, October, November and December, 1865*, "An Act to Confer Civil Rights on Freedmen, and for Other Purposes," ch. 4 (Jackson, MS: J. J. Shannon & Co., 1866); *Acts of the General Assembly of the State of South Carolina, Passed at the Sessions of 1864-65*, "An Act Preliminary to the Legislation Induced by the Emancipation of Slaves," No. 4730, § 5 (Columbia, SC: Julian A. Selby, 1866); "A Bill Concerning Negroes," House Bill no. 82, § 4; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2.

[93] Freedmen Commission Report, 5-6.

[94] For examples of the journalistic fury generated by the extensive racially-explicit provisions of Mississippi's Black Code, see Ben C. Truman, "Affairs in the South: Action of the Legislature of Mississippi," *New York Times*, February 4, 1866, 1; "Northern Opinion and Southern Action," *The Liberator* (Boston), November 17, 1865, 2; *Memphis Bulletin*, December 14, 1865; "Black Code of Mississippi," *Chicago Tribune*, December 1, 1865, 2.

[95] Freedmen Commission Report, 5.

[96] "Rights of the Freedmen," *Daily Sentinel*, October 2, 1865, 2 (italics in original).

[97] *State v. Manuel*, 20 N.C. 144, 151-52, 161-64 (1838).

[98] "General Assembly; House of Commons," *Daily Sentinel*, February 2, 1866, 2.

[99] "Free Negroes Citizens of the State," *Daily North Carolina Standard*, February 3, 1866, 2.

[100] "Negro Testimony," *Daily Sentinel*, February 12, 1866, 3; "Freedman's Code," *Daily Sentinel*, February 16, 1866, 1.

[101] See notes 100-09 and accompanying text in Chapter One above. Freedmen Commission Report

[102] "A Bill Concerning Negroes," House Bill no. 82, §§ 8, 9; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2; *Revised Code of North Carolina, 1854*, ch. 34, § 45, ch. 50, §§ 11, 16; Chapter One, notes 116-21 and accompanying text. Moore viewed marriage as an additional means of social control over the freedpeople, forcing them to assume the responsibilities for themselves and their families previously shouldered by their masters, and granting the state supervisory rights within the family units created by those unions. Laura F. Edwards, "'The Marriage Covenant is at the Foundation of all Our Rights': The Politics of Slaves Marriages in North Carolina after Emancipation," *Law & History Review* 14, no. 1 (Spring 1996): 94, 96.

[103] Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67* (Durham, NC: Duke University Press, 1985), 42-43.

[104] Freedmen Commission Report, 5.

[105] Ibid., 6, 2, 11.

[106] "[C]riminal and labor laws were used to reduce the economic opportunities available, reinforce black poverty, and enrich white elites." Brian Sawers, "Race and Property After the Civil War: Creating the Right to Exclude," *Mississippi Law Journal* 87, no. 5 (2018): 707.

[107] Laura F. Edwards, "The Problem of Dependency: African Americans, Labor Relations, and the Law in the Nineteenth-Century South," *Agricultural History* 72, no. 2 (Spring 1998): 332-33. In a July 11, 1867, letter to P. T. Henry, a House of Commons delegate from Bertie County, Worth complained of what he saw as the "manifest design of the Congress": "I fear the black and white negro will become the controlling power of the State, under re-construction acts of Congress." Jonathan Worth to P. T. Henry, July, 11, 1867, in Hamilton, *The Correspondence of Jonathan Worth*, 2:1004.

[108] "A Bill Concerning Negroes," House Bill no. 82, § 14; "A Bill Concerning Negroes," *Daily North Carolina Standard*, January 31, 1866, 2 (requiring that white and black convicts "be punished in like manner," with the sole exception of the crime of assault of a white woman by a person of color with intent to commit rape).

[109] "A Bill to punish seditious language, insurrections and rebellions in the State," North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, House Bill no. 86, State Archives of North Carolina, Raleigh, NC.

[110] "[M]ost criminal statutes have been facially race-neutral for generations. Racial disparities have not been caused by discriminatory statutes; instead, such results have been achieved through the racialized exercise of discretion, including selective enforcement by police departments, selective prosecution, and selective sentencing by

judges." Paul Butler, "The People: One Hundred Years of Race and Crime," *Journal of Criminal Law and Criminology* 100, no. 3 (Summer 2010): 1055-56.

[111] Freedmen Commission Report, 6-7.

[112] Ibid.

[113] Ibid., 7; *Revised Code of North Carolina, 1854*, ch. 107, §§ 31, 32 (willful trespass by a slave punishable by up to thirty-nine lashes), ch. 34, §§ 104, 105, ch. 48, §§ 3, 4 (only two of the livestock offenses – malicious killing of livestock, and injury to trespassing livestock by slaves – constituted larceny subject to corporal punishment), ch. 34, § 21 (theft of crops punished as larceny offense). The commissioners consolidated those antebellum offenses into two bills authorizing corporal punishment even in instances where such punishment had not previously been applicable. "A Bill to punish persons pursuing and injuring horses and other live stock, with intent to steal them," "A Bill to prevent willful trespasses on lands, and stealing any kind of property therefrom," North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, House Bill nos. 83, 84, State Archives of North Carolina, Raleigh, NC; Chapter One, notes 137-40 and accompanying text.

[114] "A Bill more effectually to secure the maintenance of bastard children, and the payment of fines and costs on conviction in criminal cases," North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, House Bill no. 89, State Archives of North Carolina, Raleigh, NC. The bill proposed that, upon default of their court-ordered financial commitments, convicts or fathers of bastard children could be imprisoned for up to twelve months or, at the option of the offender, bound out as apprentices "for such time and at such price, as the court may direct." Ibid.,

§ 1; Freedmen Commission Report, 8-9; Chapter One, notes 134-35 and accompanying text.

[115] Freedmen Commission Report, 9-10; Edwards, "'The Marriage Covenant is at the Foundation of all Our Rights,'" 93 ("The underlying assumption, however, was that irresponsibility, indolence, and sexual promiscuity now characterized the freedpeople's lives. If marriage would not completely resolve these problems, it was the only way to contain them. And containment was crucial for society as a whole.").

[116] "A Bill more effectually to secure the maintenance of bastard children," "A Bill to establish work houses or houses of correction in the several counties of the State," "A Bill to punish vagrancy," North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, House Bill nos. 89, 90, 85, State Archives of North Carolina, Raleigh, NC. As originally drafted, in addition to the workhouse, the vagrancy bill also allowed hiring out convicted vagrants, which had once been the mandatory punishment for indigent free blacks under the antebellum vagrancy statute. "A Bill to punish vagrancy," House Bill no. 85; *Revised Code of North Carolina, 1854*, ch. 107, § 60. That passage was struck from the proposed vagrancy bill, apparently before delivery to the legislature. Ibid.

[117] Freedmen Commission Report, 10.

[118] *Revised Code of North Carolina, 1854*, ch. 107, §§ 60, 75-77 (governing only free blacks). The separate race-neutral vagrancy statute, which applied to whites accused of vagrancy, carried an alternative maximum penalty of twenty days imprisonment. Ibid., ch. 34, § 43; Chapter One, notes 130-33 and accompanying text. That penalty substantially altered the previously-applicable punishment under the race-neutral

vagrancy statute in the 1837 *Revised Statutes*, which provided for a jury trial and allowed convicted vagrants to be hired out for up to six months (or, if incapable of being hired out because of the offender's "ill fame," thirty-nine lashes). Free blacks accused of vagrancy under the *Revised Statutes* received no jury trial. Upon a judicial determination of vagrancy, a free black unable to pay court costs or a court-mandated fine or security could be hired out for up to three years. *The Revised Statutes of the State of North Carolina, Passed by the General Assembly at the Session of 1836-37,* ch. 34, § 44, ch. 111, § 69 (Raleigh, NC: Turner and Hughes, 1837).

[119] Freedmen Commission Report, 11.

[120] *Revised Code of North Carolina, 1854*, ch. 34, § 81.

[121] Ibid., 8; "A Bill to prevent enticing servants from fulfilling their contracts or harboring them," "A Bill to secure to agricultural laborers their pay in kind," North Carolina General Assembly Session Records, January-March 1866, House Bills 1-235 Public, House Bill nos. 87, 88, State Archives of North Carolina, Raleigh, NC.

[122] *Revised Code of North Carolina, 1854*, ch. 63, § 1.

[123] Freedmen Commission Report, 11.

[124] Ibid., 3-4. In another effort to conceal the true nature of the proposed legislation, the commissioners characterized as "inducements" to compliance the statutory penalty for black couples' failure to record their marriages, namely criminal prosecution for adultery and fornication. Ibid., 3.

[125] Ibid., 4.

[126] Ibid., 11-12.

[127] Ibid., 12.

[128] *The Colonial and State Records of North Carolina. Published Under the Supervision of the Trustees of the Public Libraries, by Order of the General Assembly*, 26 vols., ed. William L. Saunders, Walter Clark, and Stephen B. Weeks (1886-1907; Wilmington, NC: Broadfoot Publishing Company, 1994), 23:262 (*Laws of North Carolina, 1746*, ch. 2, § 50).

[129] Ibid., 23:202-03 (*Acts of the North Carolina General Assembly, 1741*, ch. 24, §§ 48, 51).

[130] Freedmen Commission Report, 18.

[131] *House of Commons Journal, Special Session, 1866*, 18-22; "Code for the Freedmen," *Daily Sentinel*, January 9, 1866, 2.

[132] "Negro Testimony," *Daily Dispatch* (Wilmington, NC), February 11, 1866, 2. The perceived inevitability of black equality following any grant of black testimonial rights surfaced in several period interviews of white North Carolinians by *The Nation* correspondent John Richard Dennett. Dennett, *The South As It Is*, 116 (Guilford County resident discussing state constitutional convention candidates: "We want men that'll keep the niggers in their place. If we let a nigger git [*sic*] equal with us, the next thing we know he'll be ahead of us."); 132 (Cabarrus County resident discussing black testimonial rights: "I don't think the Southern people are prepared to admit nigger testimony against a white man. What would be the good of putting niggers in the witness-box? You must have niggers in the jury-box, too, or nigger evidence will not be believed.").

[133] Freedmen Commission Report, 12-13, 16.

[134] Ibid., 16 (italics in original).

[135] Ibid., 17, 19.

[136] Ibid., 17-18. Many opponents wanted proof of that salvation before granting black testimonial rights. Dennett, *The South As It Is*, 168 (Harnett County resident discussing black testimonial rights: "a white man can't live in this country if a nigger can get to testify. I want to wait till they have more of an idea of the nature of an oath before I let one of them give evidence against me. Why, our lives wouldn't be safe. They must be educated and elevated first. It won't hurt 'em to wait a little.").

[137] Freedmen Commission Report, 14. A black Fayetteville barber interviewed by John Richard Dennett in October 1865 underscored the prevention of violence through testimonial rights: "But who could think it strange if a Negro, ignorant and without friends, when he felt that he had no place to go for justice, should take the law into his own hands? Then white men would do the same, they wouldn't wait either, and there would be nothing but bloodshed and burning." Dennett, *The South As It Is*, 176.

[138] Freedmen Commission Report, 14-15. Commissioner Mason reiterated that point in a letter to his law partner, state senator David Carter, during the Senate's deliberations on the Bill Concerning Negroes. Mason argued that the freedpeople "cannot be made to provide the necessary labor to revise the prostrate condition of the condition of the South with effect, unless they are fully invested in person and property by the laws honestly administered in the courts. And though that should fail, it is certainly our duty to try the experiment." William Mason to David M. Carter, March 6, 1866, David Miller Carter Papers, Southern Historical Collection.

[139] Freedmen Commission Report, 16, 18-19.

[140] Ibid., 19.

[141] Ibid., 13, 20.

[142] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, January 30, 1866, 2; "General Assembly; House of Commons," *Daily Sentinel*, January 30, 1866, 2; *House of Commons Journal, Special Session, 1866*, 60 ("bills, etc. reported from the Commission . . . be taken from the hands of the Committee, to whom they had been referred, and considered hereafter as in Committee of the Whole.").

[143] *House of Commons Journal, Special Session, 1866*, 60.

[144] "Our Raleigh Correspondence; The Week's Legislation," *Tarborough Southerner*, February 3, 1866, 2 (quoting *Wilmington Journal*, January 27, 1866).

[145] *Daily North Carolina Standard*, February 1, 1866, 2 (italics in original); "The Code," *Daily Sentinel*, February 2, 1866, 2.

[146] *House of Commons Journal, Special Session, 1866*, 102, 106-07, 124, 126-27, 130, 133-34; *Journal of the Senate, at its Special Session of 1866* (Raleigh, NC: Wm. E. Pell, 1866), 122-23, 151-52, 162-63.

[147] Gregg Cantrell, *Kenneth and John B. Rayner and the Limits of Southern Dissent* (Urbana, IL: University of Illinois Press, 1993), 312 n.17.

[148] Ibid., 151-52; "Wake County," *Daily North Carolina Standard*, October 30, 1865, 2; *Journal of Freedom*, October 21, 1865, 3 ("[Rayner] declares that if this separation does not take place the Southern States will in ten years relapse into barbarism. . . . In North Carolina, he adds, public opinion is unanimous in favor of the separation of the white and black races.").

[149] Cantrell, *Kenneth and John B. Rayner*, 312 n.17; "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 22, 1866, 3, February 27, 1866, 2 (italics in original).

[150] Legislative records do not indicate the duration of those sessions. Typically beginning at 11 AM or 12 PM, the sessions – which occurred on January 30 and 31, and February 1, 2, 8, and 9 – concluded each day in time for the House to undertake several other matters. *House of Commons Journal, Special Session, 1866*, 63-64, 67, 70, 73, 96, 98-99.

[151] "General Assembly; House of Commons," *Daily Sentinel*, February 1, 1866, 2.

[152] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 1, 1866, 3. Philips "had hoped that without any public deliberation, there would be a silent and universal vote in favor of the section." "General Assembly; House of Commons," *Daily Sentinel*, February 1, 1866, 2.

[153] "General Assembly; House of Commons," *Daily Sentinel*, February 1, 1866, 2; "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 1, 1866, 3.

[154] "General Assembly; House of Commons," *Daily Sentinel*, February 2, 1866, 2; "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 2 1866, 2.

[155] "General Assembly; House of Commons," *Daily Sentinel*, February 1, 1866, 2; "General Assembly; House of Commons," *Daily Sentinel*, February 2, 1866, 2.

[156] "General Assembly; House of Commons," *Daily Sentinel*, February 2, 1866, 2; "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 2, 1866, 2. In response, Phillips reminded Jenkins that, of

the twenty-three free states, only Indiana had refused testimonial rights for black witnesses. Ibid.

[157] Ibid. John Richard Dennett's interview with the black Fayetteville barber also refuted this claim of the freedpeople's purported indifference to testimonial rights, which the barber described as "absolutely necessary, ... he hoped that Congress, to prevent the troubles of this year or two, would declare that no State had a republican form of government if every free man in it was not equal before the law, equal so far as the witness-box was concerned." As for suffrage, the barber described himself and his people as "quite indifferent," although he believed it should be a "necessary consequence of Negro emancipation, if emancipation was made complete. If a black man could testify in court, and in all respects enjoy equality before the law, he would soon begin to educate himself and acquire property, and otherwise make himself respectable, and so prepare the way for his admission to the polls." Dennett, *The South As It Is*, 175-76.

[158] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 3, 1866, 2.

[159] "General Assembly; House of Commons," *Daily Sentinel*, February 2, 1866, 2.

[160] "General Assembly; House of Commons," *Daily Sentinel*, February 3, 1866, 2 (Samuel C. Barnett, arguing that "the extremists–the radicals" had designated black testimony as "essentially necessary" to both readmission into the Union and removal of the Freedmen's Bureau), February 9, 1866, 2 (Atlas Jones Dargan, claiming "no one had kindlier feelings towards that unfortunate race than he" as he "had owned many, had never punished one," but opposing the grant of black testimonial rights without assurances for the Bureau's removal, given the questionable credibility of a race "to

whom the proffer of a hog-jowl was an irresistible argument"; James H. Everett, arguing that the grant of black testimonial rights had not relieved other states of the Bureau's presence; G. G. Luke, protesting northern duress in requiring the state "with swords at our throats and bayonets at our backs, in the name of justice and humanity, to accord" black testimonial rights).

[161] "Code for the Freedmen," *Daily Sentinel*, January 9, 1866, 2.

[162] "Freedmen's Code," *Daily North Carolina Standard*, February 8, 1866, 2; "Freedmen's Code," *Daily Sentinel*, February 8, 1866, 2. Graham carefully qualified his position, noting that as to political or legal liberties, "the safety and welfare of the community require" that suffrage "be jealously reserved to the white race, upon whose salutary control in the future as in the past, we must rely . . . to fulfill the high destiny of the Anglo-American States." Ibid.

[163] "Negro Testimony," *Daily Dispatch* (Wilmington, NC), February 11, 1866, 2; "Negro Testimony," *Daily Sentinel*, February 19, 1866, 2. In a separate column, espousing many of the evidentiary arguments outlined in the Freedmen Commission Report, the *Daily Sentinel* staff concluded, "Nor do we perceive how the ends of truth and justice can be maintained, without admitting all parties concerned to testify before the Courts." "Rules of Evidence," *Daily Sentinel*, February 16, 1866, 2.

[164] "Negro Testimony–The People," *Daily Sentinel*, March 5, 1866, 2 ("[T]he military arm of the government will be held over us to secure [the freedpeople] their rights until it is done. Those who are blind to this fact, must be wilfully blind."); "Equal and Exact Justice," *Wilmington Herald*, January 30, 1866, 2 ("The negro must be placed upon an

equality before the law with the white man, or we must remain very much in the condition of a military province, as we have been for a year past.").

[165] "Trials of Freedmen," *Daily North Carolina Standard*, February 17, 1866, 3; Circular No 1, February 16, 1866, Bureau of Refugees, Freedmen and Abandoned Lands, North Carolina Assistant Commissioner, Issuances, General Orders and Circulars, vol. 28, July 1, 1865-December 9, 1867, National Archives; "Bureau of Refugees, Freedmen and Abandoned Lands," *New Berne Daily Times*, March 7, 1866, 8.

[166] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 3, 1866, 2; "Remarks of Mr. Phillips, of Orange," *Daily Sentinel*, March 8, 1866, 1 (noting black testimony legislation nearing enactment in Virginia and Tennessee); "General Assembly; House of Commons," *Daily Sentinel*, February 3, 1866, 2 (James Hutchinson, arguing that, while "[t]he idea of social or political equality with negroes, was an abomination," black testimonial rights would not lead to such equality, but would likely "be beneficial alike to the white man and the negro"). Citing both political expediency and political necessity, delegate Rufus Y. McAden best summarized lawmakers' quandary: "We yielded the question [of slavery] on the grounds that 'might makes right.' We have swallowed camel after camel with a gusto; why 'strain at the gnat?'" "Negro Testimony," *Daily Sentinel*, February 28, 1866, 1.

[167] "General Assembly; House of Commons," *Daily Sentinel*, February 9, 1866, 2. The editors of the *Wilmington Herald* noted the same concern; while President Johnson trusted state action to safeguard the freedpeople, "the hint is thrown out to us, that unless

we do more in the matter ourselves the general government will take it out of our hands." "The South on Trial," *Wilmington Herald*, February 26, 1866, 2.

[168] Leander S. Gash to Margaret Adeline Gash, February 4, 1866, Leander S. Gash Papers, State Archives of North Carolina ("My own opinion is that a negro code without [a bill admitting black testimony] would be worse than useless.").

[169] "Negro Testimony," *Daily North Carolina Standard*, February 21, 1866, 1.

[170] *Daily North Carolina Standard*, February 9, 1866, 2.

[171] "General Assembly; House of Commons," *Daily Sentinel*, January 31, 1866, 2.

[172] "General Assembly; House of Commons," *Daily Sentinel*, February 1, 1866, 1; "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 10, 1866, 2.

[173] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 10, 1866, 2. The only other seemingly intentional change to section 17 upon adoption of the Bill corrected an erroneous chapter reference. The commissioners had proposed repeal of sections 19 and 20 of the *Revised Code*'s chapter 87 ("Poor"), but that chapter contained only sixteen sections. Sections 19 and 20 of the *Revised Code*'s chapter 86 ("Prisoners") both referenced slaves, however, justifying the changed reference to chapter 86 made by lawmakers. Other changes by state legislators to this section appear to have been inadvertent errors: the omission of chapter 34, section 88 for repeal (unlawful trading with slaves), and the erroneous reference to chapter 84 as the "Pilots" chapter (the commissioners had recommended repeal of a section from the "Pilots" chapter, or chapter 85 of the *Revised Code*; chapter 84 of the *Revised Code*

instead governed pensions for disabled veterans). *Public Laws of North Carolina, 1866*, ch. 40, § 15.

[174] Leander S. Gash to Margaret Adeline Gash, February 22, 1866, Leander S. Gash Papers, State Archives of North Carolina.

[175] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 27, 1866, 2; "Our Neighbor," *Daily Sentinel*, March 5, 1866, 2. A *Wilmington Herald* article also suggested that Donnell's vote against the Bill Concerning Negroes may have resulted from frustration over extensive amendments "of such a nature as to materially injure the efficiency of the measure, and render it comparatively valueless in accomplishing the results for which it was originally intended by its framers." "The Negro Bill," *Wilmington Herald*, March 6, 1866, 2. That article is otherwise fraught with factual errors. The House (not the Senate) made the objectionable amendments, and Donnell (as a member of the House of Delegates) voted on the measure on February 26 with the House, and not on March 2 and 3 with the Senate. Ibid.

[176] According to Alexander's analysis, including as to legislative votes on the proposed amendments to the black testimony and apprenticeship statutes, as well as the overall Bill Concerning Negroes, no more than eleven of fifty opposing House delegates and only three of nineteen opposing senators voted against the Bill because of perceived discriminatory provisions. The majority of the remaining opponents "were conservatives who felt that the laws did not go far enough." Alexander, "North Carolina Faces the Freedmen," 309, Appendices F and G.

[177] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, February 9, 1866, 2, February 22, 1866, 3, February 27, 1866, 2

(italics in original). Apparently absent from House proceedings on February 22, Donnell did not vote on the black testimony amendment. *House of Commons Journal, Special Session, 1866,* 145-53. Following approval of the amended testimony statute, Jenkins made a final desperate attempt to scrap the entire Bill Concerning Negroes, proposing to replace it with one simplistic statute stating only that "the slaves recently emancipated by the Proclamation of the President of the United States are entitled to all the rights and privileges of free negroes in this State." His motion failed forty to sixty-one. *Daily North Carolina Standard*, February 22, 1866, 3.

[178] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, March 2, 1866, 2.

[179] Leander S. Gash to Margaret Adeline Gash, February 28, 1866, Leander S. Gash Papers, State Archives of North Carolina.

[180] "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, March 3, 1866, 2. Senator Ferebee did make a brief but unsuccessful effort to strike the renumbered section 3, a previously unchallenged statute which gave black North Carolinians equal access to civil courts. "Proceedings of the Legislature. Called Session. House of Commons," *Daily North Carolina Standard*, March 5, 1866, 2.

[181] The motion to delete the black testimony amendment failed on a vote of eighteen to twenty-six, and the motion to strike the entire black testimony statute failed nineteen to twenty. The motion rejecting the entire Bill on its second reading passed by a margin of twenty-two to eighteen. The next day's vote approving the Bill's second reading prevailed by a margin of twenty-five to seventeen. *Senate Journal, Special Session, 1866*, 177-79, 187.

[182] Leander S. Gash to Margaret Adeline Gash, March 4, 1866, Leander S. Gash Papers, State Archives of North Carolina, Raleigh, NC.

[183] W. E. Pell to Jonathan Worth, March 2, 1866 (encouraging Worth to seek Johnson's opinion on the statutory amendment), Jonathan Worth to Andrew Johnson, March 4, 1866, Andrew Johnson to Jonathan Worth, March 6, 1866, Governor's Papers, Jonathan Worth (March 1866), State Archives of North Carolina, Raleigh, NC.

[184] *Tri-Weekly Standard* (Raleigh, NC), March 20, 1866, 2 (italics in original) (reporting rumors of a "private, unofficial telegram" from Johnson concerning black testimony; "It was whispered about the lobbies that a telegram had been received, and the fact was snaked around by the doorkeepers that it might be seen in the Executive office, but there was no official promulgation of it."); "North Carolina Legislature," *Daily Journal* (Wilmington, NC), March 7, 1866, 3 (reporting a March 6, 1866, announcement by Senator Ferebee during Senate deliberations that "a telegram had been received by Governor Worth from President Johnson, saying that the freedmen's code bill ought to pass without the proviso declaring that it shall not go into effect until the bureau is removed"). Holden seemingly enjoyed that opportunity to ridicule the editors of the *Daily Sentinel*, after ignoring their prior sharp attacks on the "manifest indifference, if not positive hostility to the Code" evidenced by the purported refusal of the *Standard* editors "to promote the passage of the Freedmen's Code, prepared by a commission appointed by the editor of the *Standard*, and endorsed by his best friends." "Our Neighbor," *Daily Sentinel*, March 5, 1866, 2.

[185] *Senate Journal, Special Session 1866*, 240-42.

[186] *Official Proceedings, 1865 Freedmen Convention*, 14.

[187] Jonathan Worth to David L. Swain, March 16, 1866, Governor's Papers, Jonathan Worth (March 1866), State Archives of North Carolina, Raleigh, NC.

[188] O.O. Howard to Eliphalet Whittlesey, March 20, 1866 (emphasis in original), Governor's Papers, Jonathan Worth (March 1866), State Archives of North Carolina, Raleigh, NC.

[189] "Conflict of Authority," *Daily Dispatch* (Wilmington, NC), March 19, 1866, 3; "Affairs in the South; North Carolina," *New York Times*, April 2, 1866, 2.

[190] Richard L. Zuber, *Jonathan Worth: A Biography of a Southern Unionist* (Chapel Hill, NC: University of North Carolina Press, 1965), 217; Jonathan Worth to Eliphalet Whittlesey, April 7, 1866, in Hamilton, *The Correspondence of Jonathan Worth*, 1:533; Eliphalet Whittlesey to Jonathan Worth, April 7, 1866, Governor's Papers, Jonathan Worth (April 1866), State Archives of North Carolina, Raleigh, NC.

[191] Zuber, *Jonathan Worth*, 217-19.

[192] *Journal of the Convention of the State of North Carolina, at its Adjourned Session of 1866* (Raleigh, NC: Cannon & Holden, 1866), 4-6.

[193] Ibid., 12; "State Convention; Adjourned Session," *Daily Sentinel*, May 26, 1866, 2. Largely overlooked and provoking no appreciable opposition, the second proviso, which permitted the testimony of parties of record and other interested parties, actually benefitted black litigants without intimating any racial bias. *Public Laws of North Carolina, 1866*, ch. 40, § 9.

[194] *Journal of the 1866 Convention, Adjourned Session*, 64-65; *Ordinances Passed by the North Carolina State Convention, at the Sessions of 1865-'66*, "An Ordinance Repealing the Provisions of Section Nine, of an Act of the General Assembly, Entitled 'An Act

Concerning Negroes And Persons of Color or of Mixed Blood,' and for Other Purposes," ch. 38 (Raleigh, NC: Wm. E. Pell, 1867).

[195] *Journal of the 1866 Convention, Adjourned Session*, 68-69; *Ordinances of the Convention, Sessions of 1865-'66*, "An Ordinance Concerning the Crime of Assault, with Intent to Commit Rape," ch. 21, 39.

[196] *Daily Sentinel*, July 23, 1866, 3; *Tri-Weekly Standard*, July 26, 1866, 3. The Bureau did retain jurisdiction solely as to wage claims arising under labor contracts approved or witnessed by Bureau representatives. Ibid.

[197] *Official Proceedings, 1865 Freedmen Convention*, 16, 22; *Minutes of the Freedmen's Convention, Held Minutes of the Freedmen's Convention, Held in the City of Raleigh, on the 2nd, 3rd, 4th and 5th of October, 1866* (Raleigh, NC: Standard Book & Job Office, 1866), 3.

[198] *Official Proceedings, 1865 Freedmen Convention*, 16-17.

[199] "A Call to the Colored People In North-Carolina," *Tri-Weekly Standard*, July 10, 1866, 2 (italics in original). With one possible exception, none of the identified signatories had been admitted as a delegate to the 1865 Freedmen's Convention. *Official Proceedings, 1865 Freedmen Convention*, 2-3 (the Wake County delegation included a "J. Craven"; the July 1866 notice named John C. Craven as a signatory)

[200] In a July 17 letter to the *Tri-Weekly Standard* editors, three of the named individuals, who claimed unauthorized use of their names in the initial notice without their knowledge and "contrary to our better judgment," repudiated "that pretended call" from a "faction . . . [that] might satisfy the silly ambition of a few, but result in injury to the many." They reiterated the League's previously scheduled meeting which, among other matters, would

"perform the very work" called for in Williams' July 10 notice, and therefore would be the appropriate forum for addressing the freedpeople's education agenda. *Tri-Weekly Standard*, July 17, 1866, 2. In a muddled response, Williams defended what he acknowledged as a unilateral call to black North Carolinians to act where he apparently believed the League had failed: "Leagues nor societies have done nothing in the way spoken of but personal friends. . . . So come all that may come, I am with the right man in the right place, and intend to reside there. If I am not right I will show others how to get right." *Tri-Weekly Standard*, July 21, 1866, 2.

[201] "To the Colored People of North-Carolina!," *Tri-Weekly Standard*, August 11, 1866, 3.

[202] The editors of the *Daily Sentinel*, one of several state newspapers to reference the League's 1866 convention as a "Colored Educational Convention," expected the gathering to be "an important movement in the future well being of the colored race . . . . a Convention called purely to consult upon the best plan of organizing and inaugurating a feasible system of Education for our colored population." "Colored Educational Convention," *Daily Sentinel*, October 1, 1866, 3; "The Colored Educational Convention," *Tri-Weekly Standard*, October 6, 1866, 2; *Daily Dispatch*, October 9, 1866, 1. After providing no coverage of the convention's proceedings, the *Daily Sentinel* editors lambasted the convention for the failure to "confine itself to the avowed commendable object of its convocation, viz: the devising of suitable measures for the improvement of the moral and educational condition of the race." Instead, according to the *Sentinel*, the delegates had promoted that false subject matter as a means for fraudulently securing the support and attendance of several prominent white North Carolinians who would not

have had "anything to do with their meeting, if [those white men] had dreamed that their deliberations were to partake of a political or incendiary character." "The Colored 'Educational' Convention, *Daily Sentinel*, October 6, 1866, 2.

[203] "To the Colored People of North-Carolina!," *Tri-Weekly Standard*, August 11, 1866, 3.

[204] The initial roll call of delegates in the convention's official minutes identified by name one hundred and fifteen delegates representing sixty North Carolina counties, spanning from Hyde County to Haywood County. The named delegates did not include Albert Williams. *Minutes of the 1866 Freedmen's Convention*, 7. The concluding passage of the convention minutes revised that attendance to reflect one hundred and eleven delegates representing eighty-two counties. Ibid., 31.

[205] Ibid., 32.

[206] Ibid., 10 (letter from former governor Graham, advocating an "honest livelihood," primary school education, morality, and frugality), 13 (letter from former governor Thomas Bragg, supporting the convention's object and the freedpeople's improvement). Even Bartholomew Moore, the primary author of the Black Code, respectfully declined an invitation to attend the convention, claiming his friendship with the freedpeople "as a fellow creature of the race of man" and advocating education and industry as "idleness is the parent of all vice is an adage as old as time." Ibid., 11. Brevet Col. A. G. Brady, then-superintendent of the Central District of North Carolina for the Freedmen's Bureau – whose specific responsibilities required familiarity with and advocacy for the needs of the state's freedpeople – declined an invitation to address the convention, claiming "I do not

think I could address you on the account of not knowing the object or purpose of your Convention." Ibid.

[207] "The Colored Educational Convention," *Daily Sentinel*, October 4, 1866, 3.

[208] *Minutes of the 1866 Freedmen's Convention,* 23-25. Consistent with the other white respondents to the delegates, Holden preached education, labor, industry, and morality, as well as the races' mutual dependency and blacks' need to avoid idleness, dissipation, and unnecessary congregation. Ibid.

[209] Ibid., 12, 14-18, 21. The reference to "taxation without representation" alluded to the annual poll tax assessed against all free males, regardless of color, which slaveowners had previously paid on behalf of their slaves. In the same special legislative session in which the Black Code had been adopted, lawmakers imposed a one-dollar poll tax on all North Carolina men, requiring employers and landowners to pay the tax for any employees or tenants and allowing recoupment of such payments from any amounts due those employees or tenants. *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866*, ch. 21, § 2 (Raleigh, NC: Wm. E. Pell, 1866). In an apparent effort to avoid controversy stemming from the reports of white aggression against freedpeople, the convention minutes closed with a disclaimer: "notwithstanding various outrages are being committed on our people, that the mass of the whites are favorable to our elevation." *Minutes of the 1866 Freedmen's Convention,* 31.

[210] Ibid., 26.

[211] Ibid., 26-27. The request for suffrage also appeared in the convention's resolution for the General Assembly, seeking a right "in common with other citizens of the United States, [sought] in consideration of our loyalty, citizenship and merit." Ibid., 32.

[212] The editors of the *Daily Sentinel* warned that the freedpeople "will rue this foolish course bitterly. . . . As to political rights, they will probably get them when ever they deserve them and are prepared for them." "The Colored 'Educational' Convention, *Daily Sentinel*, October 6, 1866, 2 (italics in original).

CHAPTER THREE: BY ANY OTHER NAME: THE LEGACY OF NORTH CAROLINA'S BLACK CODE

> But it was insisted that the act in thus discriminating between the punishment of free persons of color and other free persons is arbitrary, repugnant to the principles of free government, . . . and not of the character properly embraced within the term "law of the land." We do not admit the validity of this objection. Whatever might be thought of a penal Statute which in its enactments makes distinctions between one part of the community and another capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the legislature for the suppression and punishment of crime, they may rightfully so apportion punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend, as to produce in effect that *reasonable and practical equality in the administration of justice which it is the object of all free governments to accomplish*. What would be cruelty if inflicted on a woman or a child, may be moderate punishment to a man. What might not be felt by a man of fortune, would be oppression to a poor man. What would be a slight inconvenience to a free negro, might fall upon a white man as intolerable

> degradation. The legislature must have a discretion over this subject, and that once admitted, this objection must fail . . . .
>
> – *State v. Manuel*, 20 N.C. 144, 163-64 (1838) (italics added)

On May 18, 1896, United States Supreme Court Justice Henry Billings Brown offered his own paraphrased version of the North Carolina Supreme Court's 1838 *Manuel* decision. In *Manuel*, justice William J. Gaston had found no constitutional error in a state statute that required only free persons of color be hired out as laborers when unable to pay criminal fines. Nearly six decades later, the nation's highest court grappled with a similar dilemma. Louisiana legislators had also found cause for the disparate treatment of their state's black residents, requiring separate coaches for Homer Plessy and other railroad passengers simply because of their race.

Justice Brown approached the constitutional challenge to that statute much like Gaston had resolved the *Manuel* challenge, reducing the case to a question of legislative reasonableness. Brown explained that "with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." A law "enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class" necessarily constituted a reasonable exercise of legislative authority. Mandated involuntary servitude of indigent free blacks had survived the same inquiry by North

Carolina's highest court. Finding neither constitutional repugnancy nor excessive cruelty in that exercise of legislative discretion, Gaston instead concluded that the state's legislators had acted reasonably in accordance with the customs and traditions of white North Carolinians. Regardless of that law's race-based trigger, Tar Heel lawmakers had not violated their "power to uphold social order by competent sanctions," but instead preserved the public peace and the comfort of their state's white citizenry.[1] After all, as rationalized by justice Brown, "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences."[2] Yet in both Manuel and Plessy, the North Carolina and U.S. Supreme Courts validated the use of legislative authority to perpetuate by codification the very social conventions – what Brown described as "the established usages, customs and traditions of the people" – that fueled those racial instincts and physically-based distinctions. What legislation could not prohibit, it apparently could protect, encourage, and institutionalize.

Nor, according to Brown's opinion for the seven-to-one *Plessy v. Ferguson* majority, should a statute requiring the "separation of the two races in public conveyances [be considered] unreasonable, or more obnoxious" to the Constitution than, for example, Congress' own legislative segregation of the District of Columbia's schools. Separation constituted inferiority "solely because the colored race chooses to put that construction on it." That exercise of legislative discretion by Louisiana lawmakers, mandating separation of the races with "equal but separate accommodations," had not been unreasonable. Reasonable legislative discretion could not violate the Thirteenth or Fourteenth Amendments. Without a constitutional violation, Plessy suffered no

actionable injury when removed from the white passenger coach of the East Louisiana Railway, and segregation thereby received official Supreme Court approval.[3]

North Carolina lawmakers had not awaited the *Plessy v. Ferguson* decision. They had no need to. Their Supreme Court had already blessed racially classified citizenship as a reasonable exercise of legislative discretion. Even before oral arguments in *Plessy*, in the Old North State's resort to racial separation as a post-emancipation stratification mechanism had ebbed and flowed for nearly thirty years. Physical distancing started early, even before Raleigh's 1869 segregated Independence Day celebration, with reserved seating for whites and gallery seating for blacks.[4] Since 1868, white and black members of the state militia had served in "separate and distinct companies," "never [to] be compelled to serve in the same companies."[5] Separation of the races continued across the state in a variety of manifestations. White children and black children had attended separate schools since at least 1872. Segregated education, as long as "no discrimination [was] made in favor of, or to the prejudice of, either race," had become such an important public interest, at least for white North Carolinians, as to warrant incorporation within the state's constitution in 1875. Assuming that such separation logically extended to educational funding, legislators decided that black schools should only be funded by black taxpayers, while white tax dollars should pour only into the state's white schools.[6] Inmates of different races could not be commingled, whether in state asylums or county jails. Racial separation continued beyond the grave, as one statutory prerequisite for the incorporation and bond issuances of townships mandated segregated cemeteries. Even newspapers separated job listings by race. Finally, in an apparent nod to their Louisiana colleagues' success in *Plessy*, members of North Carolina's General Assembly

empowered the state's Corporation Commission in 1899 to require racially segregated railroad cars.[7] Separate and unequal had long been a favored stratification tool of white North Carolinians and their General Assembly.

Although Jim Crow arrived early in the Old North State, he had been expected. State lawmakers anticipated formal race-based separation in their post-emancipation efforts to fortify white superiority through the Black Code's racial stratification. The state Supreme Court facilitated such legislative racial distancing with its 1844 *Newsom* pronouncement: "as a principle, settled by the highest authority, the organic law of the country, that the free people of color cannot be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them."[8] That spatial discrepancy, a racial stratification once easily sustained through slavery, found new life in the 1866 codification of antebellum social and legal conventions of black subjugation within the Black Code. Yet North Carolina legislators also ratified the Fourteenth and Fifteenth Amendments soon thereafter, allowing the state to rejoin a federal government by professing equal protection of the laws. Those conflicting legislative measures created a quandary inadequately addressed by the scant consideration of black code historiography. How did North Carolina, the professed paragon of racial tolerance that justice Gaston exalted as "foremost in Liberty's story," slide so quickly and comfortably into a partnership with Jim Crow?

A new racially-discriminatory legislative movement must have captivated North Carolina lawmakers. After all, according to several historians, the Black Code era had ended. In his 1906 collection of Reconstruction-era documents, Walter L. Fleming argued

that the black codes of North Carolina and its sister southern states "were never in force in any of the states; the Freedmen's Bureau suspended them until 1868, when the reconstructed governments repealed them." North Carolina historian J.G. de Roulhac Hamilton agreed in principal, but instead marked May 1866 as the demise for North Carolina's Code. At that time, as posited by Hamilton, "upon the recommendation of Governor Worth," the state's constitutional convention "removed all discriminations."[9] In his 1965 study of southern black codes, Theodore Brantner Wilson noted in passing that North Carolina legislators "[o]stensibly" terminated their Black Code with the January 1867 repeal of ex-slaveowners' preferential right to apprentice their former slaves, despite limited remaining vestiges of Code-related legislation.[10]

The black codes' specific dates of expiration did not concern sociologist John Mecklin. He instead lamented the loss of their "essential justice and fitness to the problems" of white southerners. Mecklin confidently announced in 1917 that "the objectionable features in these codes . . . were far outweighed by the ultimate and permanent good that would have resulted both for the freedmen and the community at large had they been given an honest trial." In his view, "[t]he black codes were speedily forgotten in the dismay and despair aroused by the radical Reconstruction legislation of Congress. Through these codes the mind of the South uttered its first and last untrammeled word upon the status of the freedmen."[11] Regardless of the precise date, North Carolina's short-lived Black Code experiment had ended in failure, leaving only a legislative void that remained empty until state lawmakers' flurry of Jim Crow legislation in the late 1890s.

Hardly. The early and active pursuit of racial separation by North Carolina lawmakers suggested that such reports of the Code's demise had been greatly exaggerated. Instead, as argued by historian John David Smith, "legalized segregation was the result of years of experimentation by whites in searching for an effective means of race control." As late as 1930, the publication date for his study of North Carolina's Black Code, historian James Browning noted the continued effect of portions of the state's Code.[12] The Code was not repealed. Nor had it simply vanished, or faded with the vagrancies of memory. Members of the General Assembly instead adapted, allowing the Code to survive as part of their multiyear experimentation with race control. The Code's continued presence constituted a significant phase of North Carolina's participation in the "evolutionary concept of segregation in the South," the ongoing "intensifications of processes . . . at work since at least the end of Reconstruction."[13] The Code ultimately sustained and furthered the racial stratification structure upon which racial separation later thrived, providing a firm foundation for the "separate but equal" regime in the Old North State.

* * *

At the behest of congressional leaders and Freedmen's Bureau officials, and in dogged pursuit of reunification, members of North Carolina's General Assembly begrudgingly excised the most explicit racial distinctions from the state's Black Code. Lawmakers completed those concessions by January 1867. Gone were the provisos conditioning black testimony upon the Bureau's removal from North Carolina, and mandating death for black men suspected of illicit intentions in assaulting white women. Restrictions on black migration and ownership of weapons had been repealed. Even

apprenticeships lost their racially-divisive standards. The legislature's apparent concession to inclusivity did not go unnoticed by the state's Supreme Court. In *State v. Underwood* (1869), an otherwise mundane appeal of a misdemeanor conviction for the mismarking of a sheep, chief justice Richmond Mumford Pearson rebuked the appellant's invocation of antebellum law to contest the admissibility of black testimony:

> According to [the Constitution,] persons of color are entitled to vote and to hold office. The greater includes the less, and the effect is to take away the mark of degradation imposed by the statute under consideration. . . .
>
> The [antebellum] statute must be taken to be repugnant to the spirit, if not the letter, of the Constitution.
>
> We see no occasion to elaborate the question, and, indeed, there is but little room for discussion. The new order of things brought about by emancipation, the XIII Article of the amendments of the Constitution of the United States, the Civil Rights Bill, the military rule to which the State was subject while the government was provisional, and the approval by Congress of the present State Constitution, tend to support our conclusion, and to show, in fact, that it is unavoidable, in order to make the parts of our system harmonize and work together as a consistent whole.[14]

On the surface, it appeared that the Black Code had been mercifully swept from the annals of North Carolina law.

That deceptively conciliatory benevolence of North Carolina's legislature and judiciary, however, only masked the survival of the very racial animus that had prompted the Black Code. As noted in abolitionist Horace Greeley's letter to delegates to North Carolina's 1865 Freedmen's Convention, even though the tree of slavery with its branches of racial hatred and prejudice had been cut down, "[t]here is still vitality in the roots." Those roots, according to Browning, rested in "the preservation of white civilization by refusing to recognize the equal political rights of the blacks, and an understanding from the beginning that the Negro should be made to know his place in the new social and economic order by the hostile legislation which cramped his activities."[15] Those roots had not magically withered with the abolition of slavery. Nor could they be dislodged by the Fourteenth Amendment's investiture of all native-born and naturalized Americans with the privileges, immunities, and equal legal protections of federal and state citizenship. Emancipation had not cured white North Carolinians of their intransigent aspirations for a separate and inferior "place" for the freedpeople.

Less than six months after Pearson's dramatic pronouncement of the state of constitutional affairs in *Underwood*, his colleague justice Edwin Reade declared with equal vigor the white populace's continued disdain for the purported rights of the freedpeople in *State v. Hairston* (1869). The court rejected a claim by the defendants (a black man and white woman) that their marriage barred criminal prosecution for fornication and adultery. Trumpeting the Black Code's reaffirmation of the state's traditional prohibition of miscegenation, Reade emphasized the continued validity of legislative distinctions between the races:

> Late events and the emancipation of the slaves have made no alteration in our policy or in the sentiments of our people. . . [W]e have not only the plain letter of the acts of the Legislature, but the sanction of the Constitution, that the intermarriage of whites and blacks is against public policy and is unlawful. . . . It is no discrimination in favor of one race against the other . . . . The law operates upon both races alike; neither can marry the other; nor is it repugnant to the spirit of the Constitution or subversive of civil rights, but is in consonance with both.
>
> It was insisted that the Civil Rights Bill has declared a different policy and has changed the law. . . . Its object was, and its terms are, to declare equality between all citizens without regard to race or color, in the matters of making business contracts, suing in the courts, giving evidence, acquiring property and in the protection of person and property. And this is nothing more than our own State Constitution has done. But neither the Civil Rights Bill nor our State Constitution was intended to enforce social equality, but only civil and political rights.[16]

State lawmakers reinforced Reade's distinction between political and social equality with an 1877 resolution denouncing "with repugnance the absurd attempts, by means of 'civil rights' bills, to eradicate certain race distinctions, implanted by nature and sustained by

the habits of forty centuries." Both North Carolina's judiciary and legislature thereby foreshadowed the *Plessy* majority's pronouncement of the futility of legislatively mandated social equality. Such communal relationships rested solely with the "natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals," extrajudicial factors beyond legislative mandate or constitutional protection.[17] That dogmatic insistence upon differentiating between social and political equality sustained the distinct space which North Carolina's Black Code had codified for the state's black populace.

The Code's few surviving explicitly discriminatory provisions presumably became moot upon the July 1868 ratification of the Fourteenth Amendment. In the wake of that amendment, for example, it would be pointless to argue that the Code's statutory limitation of black North Carolinians' privileges to the level of antebellum free blacks could be legally enforced.[18] Yet lawmakers amended the state's constitution in 1875 to incorporate the Black Code's prohibition on miscegenation, even borrowing from the Code's legal definition of "persons of color" to delineate the scope of outlawed interracial marriages. That amendment survived until 1967, when finally ruled unconstitutional by the United States Supreme Court.[19] Despite Reade's arguments in *Hairston* that miscegenation mutually afflicted the races, the use of the Code's generational definition of race to delineate a constitutional race-based exclusion entrenched antebellum social conventions. The Code's race-based distinction, adopted in 1866 to facilitate a legislative intent of racial stratification through both social and political rights and restrictions, thereby became North Carolina's constitutional standard for legal racial differentiation. Far from being forgotten, the idiom for the Black Code's

racial caste system actually gained constitutional gravitas in spite of Reconstruction, surviving for nearly a century past the Code's purported demise.

Other Black Code provisions also survived, either as originally enacted or as subsequently amended if and when the need arose. When the Code's authorization of county work houses and houses of correction proved too costly, for example, lawmakers amended the existing statute to allow for the joint operation of such facilities by multiple counties.[20] In 1883, an updated *North Carolina Code* (the first such updated consolidation of North Carolina laws since the 1854 *Revised Code* coauthored by Bartholomew F. Moore) offered testament to the Black Code's continued influence. Eighteen statutes within that 1883 compilation incorporated and cited for precedential value specific statutes from the Black Code.[21] Crafted from repurposed antebellum slave statutes, North Carolina's Code likewise provided ample raw material for subsequent legislation in furtherance of racial stratification.

The tripartite legislative strategy embodied by the Black Code – stratification, accommodation, and control – also supported the state's transition to Jim Crow segregation. Continued legislative and judicial insistence on the distinction between political equality (as mandated by the federal government) and social equality (as defined by each state as part of its continued sovereignty) extended the racial stratification created by slavery and sustained by the Code. That distinction even validated the race-based spatial separation approved in the *Plessy* ruling. "If the civil and political rights of both races be equal," justice Brown explained, "one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them together upon the same plane."[22] North Carolina lawmakers

maintained that racial divide with continued accommodation of the freedpeople, removing only the most explicit racial distinctions from the Code as a last resort when necessary to placate federal expectations of political equality. Actual control – resting in the hands of local authorities endowed with the discretionary implementation and enforcement of those laws and exercised in service of racial stratification – remained beyond the express letter of the law. Minimal statutory revisions did not extinguish the Black Code.

White North Carolinians understood that even impartial laws applied partially could frustrate both political and social equality, thereby preserving stratification. As arenas of racial coexistence teetered on becoming arenas of racial conflict, the continued legal effect of the Code's method of surreptitious control permeated and divided the interactions of the two races, sustaining white supremacy while legislators worked segregation into state law. Three specific arenas – crime and punishment, apprenticeships, and labor contracts – demonstrate the adaptation and evolution of the Black Code as a legislative safeguard, allowing the continued separation and subjugation of the freedpeople as lawmakers prepared to welcome Jim Crow, all well beyond the Code's purported expiration.

Crime and Punishment

The proposed repeal of the 1854 *Revised Code*'s "Slaves and Free Negroes" chapter, one of the more impactful revisions recommended within the freedmen commission's 1866 "Bill Concerning Negroes," suggests the faith that the commissioners had in the effectiveness of that storied legislative control regime. Its seventy-nine racially-explicit statutes consisted primarily of onerous criminal provisions and penalties

applicable solely to the State's black population. Removal of the chapter could demonstrate white North Carolinians' commitment to the statewide referendum ratifying slavery's abolition. Chairman Moore and his two colleagues, however, evidently believed that the state's remaining criminal laws could not offset that loss of racial controls provided by the Slaves and Free Negroes chapter. Otherwise, why would the commissioners have felt compelled to supplement existing criminal law and their own Bill Concerning Negroes with the eight additional bills delivered to the General Assembly? The Freedmen Commission Report characterized those proposals as the commissioners' "duty" to address "the great and radical changes occasioned by emancipation, in the fixed habits and custom of the people."[23] That duty apparently included a perceived need to fix what the commissioners had felt compelled to break in their efforts to satisfy suspicious congressional leaders.

Compensation for that loss of slave-era control mechanisms came in the form of a resurrection and redrafting of race-specific antebellum criminal laws nullified by the abolition of slavery or terminated by the Code's repeal of the existing Slaves and Free Negroes chapter. In targeting the impoverished for behavioral modification, the commissioners simply reenacted certain proscriptive measures – such as the blacks-only criminal liability for trespass, the slave-specific sedition provisions, and the most onerous penalties for blacks for vagrancy and injury or theft of livestock – and extended them to apply to all North Carolinians. One provision, modeling an antebellum statute outlawing the enticement of slaves, found new life as a civil cause of action prohibiting the enticement of any contract laborers and apprentices. Two of the bills – creating work houses and a process for hiring out insolvent convicts and absentee fathers to satisfy their

court-imposed financial obligations – drew inspiration from slave-era criminal punishments of compelled labor to maintain direct control over an unruly populace. In the hands of local officials, with whom enforcement discretion rested, those new facially-innocuous but antebellum-inspired statutory additions to North Carolina's criminal code became racially-charged control mechanisms.

The commissioners described those bills as legislative tools for the direction of "the energies of the entire population in appropriate channels of honest labor" and the protection of "every man's property against unauthorized intrusions, trespasses and thefts of the idle and vicious."[24] That desire to suppress indolence and theft – and thereby alleviate, or at least manage, the social turbulence of a post-emancipation North Carolina – did not dissipate. Lawmakers sought to maintain the inherent controls of the Black Code's stratified social order through continued adaptive uses of the its statutory provisions. An 1867 amendment to the anti-enticement statute added criminal liability to enhance the statute's civil remedies. That statute was amended again in 1881 to extend its enticement prohibitions to include oral contracts. An additional sedition statute supplemented the Code's sedition provision in 1868, prohibiting additional conspiratorial activities and increasing maximum penalties to fifteen years' imprisonment at hard labor and fines of ten thousand dollars. A separate offense criminalizing horse and mule theft, punishable by five to twenty-five years imprisonment with hard labor, supplemented the Black Code's livestock theft provision in 1868 to shield valued farm animals from pilfering. The aggressively entitled "Act to Prevent Tramps Infesting or Depredating on Citizens of this State" of 1879 expanded the vagrancy statute to include up to six months' imprisonment for anyone "going about from place to place begging and asking or

subsisting on charity."[25] Ongoing legislative refinements of the Code's criminal provisions served lawmakers' desires for behavioral modification and racial control, sustaining their experimental racial subjugation in anticipation of wholesale segregation.

Such legislative efforts required caution, however, to avoid stirring the ire of suspicious northerners. Continued concerns that statutory control mechanisms might provoke congressional retribution often prompted indecisiveness within the General Assembly, as evidenced by frequent enigmatic changes within criminal punishment legislation. In an 1868 special session, the assemblymen very nearly eradicated the death penalty, replacing it with extended prison terms ranging from twenty to sixty years with hard labor. Only the crimes of rape of a minor and murder remained punishable by death. In the very next legislative session, however, lawmakers amended that structure, reducing the imprisonment range to five to sixty years with no hard labor. The 1868 special session also eliminated corporal punishment. Alternative sentencing options replaced the whip and the pillory: imprisonment for six months to ten years with hard labor, or a fine ranging from one hundred to ten thousand dollars. Those punishments also dropped during the next legislative session, moving to four months to ten years imprisonment with no hard labor, and eliminating the option of an alternative financial punishment. Legislators even ended the death penalty for the previously race-specific crime of assault with intent to commit rape. As the offense had become applicable to white offenders, lawmakers decided that a prison term of five to fifteen years provided appropriate punitive redress.[26] Regardless of the varying punishment ranges, sentencing decisions remained in the sole province of North Carolina's primarily white judiciary.

Lawmakers also sought increased racial control through adaptation of the Black Code's re-invigoration of the antebellum criminal punishment of free blacks by compelled labor.[27] In their proposal of county workhouses, the members of the freedmen commission had touted both the retributive and deterrent values of involuntary servitude as a control mechanism: "The dread of involuntary labor is much more effectual to suppress misdemeanors and idleness than a few days imprisonment."[28] An aggressive expansion of that punitive servitude began in 1867, as state legislators empowered county courts to commit convicts to chain gangs for compelled labor on county roads, railroads, or other state improvement projects. Subsequent legislation permitted county commissioners to hire out convict labor to any individual or entity engaged in public works, and authorized the chain gang sentencing option for anyone convicted of any crime or liable for any court-imposed financial penalties. With the sentencing judge's approval, a variety of county officials and mayors could hire out convicts for public work "or other labor for individuals or corporations."[29] Such prolific use of convict labor comported with the sweeping state constitutional amendment that allowed the imprisoned to be hired out "where, and in such manner as may be provided by law."[30] State legislators thereby had *carte blanche* over the deployment of this previously underutilized captive labor force, and they took full advantage of the benefit. In 1879 alone, the members of the General Assembly allocated hundreds of convicts to work on twelve state improvement projects (ranging from swamp drainage to grounds maintenance at the state insane asylum) and twenty-one separate railroad lines.[31] Primary exploitation of compelled convict labor remained at the local level, however, where

county commitments of convicts to local labor camps outnumber state prison commitments by a ratio of more than ten to one through the mid-1920s.[32]

Economic interests quickly overshadowed the retributive and deterrent values of involuntary servitude, as suggested by the expanding legislative authorization of compelled convict labor and the growing allocation of inmates to state and local work crews. To sustain a convict labor system, including any labor savings on state and local projects, and potential profits from leasing convict labor to private employers, prison officials required a steady supply of convicts for such overhead expenses as supervision and equipment. Evidence garnered by sociologists Jesse F. Steiner and Roy M. Brown in their 1927 study of North Carolina chain gangs suggested "that the mill of criminal justice grinds more industriously when the convict road force needs new recruits."[33] A readymade solution presented itself during Reconstruction, one uniquely suited to address the concerns of theft and indolence expressed in the Freedmen Commission Report.

As if in response to the commissioners' distress, local officials across North Carolina focused their discretionary enforcement authority on the investigation and prosecution of theft. Starting in 1870, with the opening of the state's first penitentiary (ironically constructed with convict labor), county courts tried and convicted hundreds of defendants for larceny, sentencing them to multiyear sentences in the penitentiary, as shown in table 3 of Appendix 3. Larceny remained the single most common criminal conviction among the penitentiary's prisoner population each year until at least 1900, often by margins of more than twenty to one.[34] Between 1880 and 1885, for example, larceny convictions outdistanced the next most numerically significant criminal conviction by several hundred cases: 319 to 12 (larceny versus forgery, 1881); 370 to 12

(larceny versus manslaughter, 1882); 325 to 14 (larceny versus manslaughter, 1883); 331 to 18 (larceny versus manslaughter, 1884); and 466 to 15 (larceny versus a tie between attempted rape and forgery, 1885). Table 7 of Appendix 3 shows that most prisoners incarcerated in the state penitentiary between 1878 and 1896 labored on external work projects. Although data identifying inmates assigned to work projects by their specific criminal convictions is unavailable, it is safe to assume from the data that larceny convictions remained well-represented among the convicts compelled to work during that period. Indeed, larceny convictions built and filled North Carolina's penitentiary almost singlehandedly.

Despite its potential economic benefit, compelled labor did not lose its primary intended function of racial control. County court records from the late nineteenth century are unfortunately often incomplete and inconsistent. As a result, accurate details about prisoners during that era are notoriously difficult to locate, making unlikely a definitive comprehensive survey identifying the racial composition of North Carolinians convicted for particular crimes and comparing the relative severity of their punishments. One alternative rests with a small collection of spreadsheets held by the North Carolina State Archives, consisting of case summaries complied by county clerks at the conclusion of superior court terms in two counties between 1889 and 1891.[35] That abbreviated view of period criminal proceedings provides some limited context for the overwhelming majority of black convicts in North Carolina's penitentiary and compelled labor force during that period, substantiating the use of criminal law as a significant means for post-emancipation racial control.

The two counties reflected in those spreadsheets, summarized in table 8 of Appendix 3, fortuitously represent two extremes of the state's late nineteenth century population. The sparse population of Henderson County, located in the Blue Ridge Mountains of western North Carolina, consisted primarily of white residents. The more densely populated Craven County, like the state's other eastern coastal counties, tended to be predominantly black. At best, however, because the available information only represents three court terms for each county, the data provides but a suggestion of potential trends. In both counties, for example, more black defendants received larceny indictments, convictions, and prison sentences than white defendants. That is of particular interest for Henderson County, where black residents comprised less than 11% of the county's overall population and less than 30% of the total defendants indicted for any crimes during those three court terms. Each of those Henderson County larceny convicts received one-year prison terms. More black defendants may have reasonably been expected in Craven County, given its nearly two-thirds black population. But of the twenty-seven people indicted for larceny during those court terms, Craven County officials cited only one white person for that offense. In fairness, that one individual was convicted and sentenced to the penitentiary for larceny, but so were twelve black Craven County residents. The sole white larceny convict received a two-year prison term. Sentences for the black larceny convicts ranged from four months to five years, with eight of the twelve black convicts receiving longer prison terms than the sole white convict.

Those numeric distributions, as statistically insignificant as they may be, still cast an interesting light on the penitentiary population that the larceny convicts from

Henderson and Craven counties (two blacks and one white, and twelve blacks and one white, respectively) joined. In the first three decades of the penitentiary's operation, the state's formerly freedpeople dominated the facility's incarcerated population, in concentrations ranging from 77% to nearly 90%. Without data specifically tying prisoners to their individual crimes, one can only assume some not-insignificant level of numeric correlation between the overwhelming majorities of black convicts and larceny convictions within North Carolina's state penitentiary between 1870 and 1900. That same vast racial disparity tainted the penitentiary's convict labor program, such that black convicts comprised 82% to nearly 94% of the convict laborers hired out for external work projects across North Carolina.

The members of the freedmen commission had wanted some solution for "the unauthorized intrusions, trespasses and thefts of the idle and vicious."[36] Larceny and compelled labor seemingly offered a corrective fix for both theft and indolence. That is only the most readily apparent example, using a single criminal offense, of the impact that local discretionary enforcement and punishment of criminal laws had on the state's freedpeople. To some appreciable extent that cannot be definitively quantified, that unchecked discretion – the touchstone of the Old North State's Black Code – satisfied white North Carolinians' desires for behavioral control, social dominance, and a captive labor force. Long after its purported demise, the Code and its legislative progeny managed to return significant numbers of free blacks to involuntary servitude.

Apprenticeships

North Carolina's apprenticeship laws similarly retained their discriminatory impact, in spite of governor Worth's July 1866 assurance to Brvt. Maj. Gen. John

Robinson that "there now exists, under the laws of this State, no discrimination in the distribution of justice to the prejudice of free persons of color."[37] Antebellum requirements mandating apprenticeships for illegitimate children or children born to unemployed parents continued to apply solely to black children.[38] Other race-specific distinctions – including bonding requirements, disproportionately longer apprenticeship periods for black females, and the absence of statutory recourse against masters failing their duties to black apprentices – similarly survived to the detriment of the freedpeople. The Black Code, with its continuation of those race-specific provisions and added preferential right for former slaveowners to bind their former slaves as apprentices, simply exacerbated those statutory racial disparities.[39]

Cognizant of the disparate impact on the freedpeople, officials within the Freedmen's Bureau resisted the aggressive binding of black apprentices by the state's civil courts. In May 1866, on orders from Brvt. Maj. Gen. Thomas Ruger, Col. Eliphalet Whittlesey instructed the Bureau's North Carolina-based agents to ignore all statutory racial distinctions remaining within North Carolina's apprenticeship regime. "[I]n all matters pertaining to the Apprenticeship of 'Freed-Children,'" Whittlesey wrote, "you will be guided by the State Laws in force, in respect, to the apprenticing of <u>white</u> children by the Courts of Record."[40] Although Bureau officials actively repudiated noncompliant indentures binding black children, the absence of a consistent Bureau policy muddled its agents' effectiveness.[41] Whittlesey himself vacillated as to the appropriate administration of apprenticeships, after initially espousing the more proactive and permissive philosophy that "[e]very effort will be made to provide in this way good homes for all minors, now dependent upon the government." Faced with rampant abuses of the system, Whittlesey

soon narrowed his directive, instructing his agents that "none except orphans, or children whose parents give their consent, be bound out as apprentices." The subjective creation and implementation of policies by various officials within the Freedmen's Bureau often resulted in the inconsistent enforcement and results for the freedpeople and their children chronicled by historian Rebecca Scott.[42]

Bureau interference in apprenticeship matters came to Worth's attention three weeks before the start of the 1866-1867 sessions of the General Assembly. Brunswick County resident and former judge Daniel Russell Sr., complained to the governor that Bureau officials had cancelled his indentures from the New Hanover and Roberson county courts for several black apprentices. Writing to Brvt. Maj. Gen. Robinson for explanation, Worth asserted that North Carolina law did not discriminate between the races in the binding of apprenticeships. Rejecting Worth's claim, Robinson responded with a blistering portrayal of Russell, whose actions Robinson described as "a re-establishment of slavery under the mild name of apprenticeship":

> With regard to Daniel L. Russell from the reports I receive & his own letters that I have read, I consider him a designing & unscrupulous man. This is not the first time his name and acts have occupied the attention of myself and subordinates. In the case refered [*sic*] to Mr. Russell seizes with violent hands, children (one of them sixteen year [*sic*] old) living with their parents who support them, carries them off, the court binds them, they are thrown into prison for safe keeping and then carried to his home, he asked

> [*sic*] to restore them, he refuses and threatens the vengeance of the court, the court of which he is a member and which court binds to him these kidnapped children, Is [*sic*] not this a case where discrimination is made and that too, greatly predudicial [*sic*] to the colored people and their children?

In his letter, Robinson claimed a right and duty for the Bureau to review apprenticeship decisions by the state's civil courts for impermissible race-based distinctions. He advised Worth that Bureau agents had been instructed to cancel any such discriminatory indentures, including indentures lacking parental consent that bound any children over the age of fourteen or any children capably supported by parents.[43]

Concerned by Robinson's ultimatums, Worth referenced the dispute in his November 19, 1866, message to the General Assembly. Worth advised lawmakers that Robinson's order "if carried into effect, substantially annuls, as I conceive, the powers of our Courts over minor children of color." Contrary to his prior claims as to the elimination of all discriminatory legislation, Worth conceded continued statutory inequalities within the state's apprenticeship regime: "some distinction still exists as to apprenticeship, inadvertently overlooked I presume. . . . I hope the law will be so altered as to abolish those discriminations, and all others, if any others be found to exist."[44] Lawmakers did not await the possibility that Robinson might revoke his order. On November 22, 1866, they quickly assembled a joint select committee to address those aspects of Worth's message "as related to the African race and Apprenticeships." They

ratified the "Act to Amend the 5th Chapter of the Revised Code, Entitled 'Apprentices'" two months later.

The new law revised or repealed several race-specific apprenticeship provisions, but made no reference to the Black Code or to the preferential right of former slaveowners to bind their former slaves as apprentices. Lawmakers may have assumed that the act's concluding provision – repealing "all other laws and parts of laws discriminating between white and blacks in the apprenticing of children" – automatically nullified that preferential right.[45] Indeed, subsequent iterations of the apprenticeship laws made no reference to that preferential right. Legislators could not resist the urge to incorporate other restrictions into the purportedly equitable statutory regime, however. The 1867 addition of enhanced financial penalties and criminal liability (with up to six months' imprisonment) to the Code's anti-enticement statute bolstered the legal effectiveness of both apprentice indentures and labor contracts.[46] An 1875 law prohibited any white child from being bound to a "colored master or mistress." Lawmakers renewed that prohibition in 1889, adding an additional reservation of rights for white North Carolinians to apprentice black children unless "a competent and suitable colored person can be found in the country."[47] With such continued refinements of antebellum and Black Code apprentice laws, lawmakers solidified racial control with an aggressive apprentice system that indoctrinated the next generation of freedpeople into a system of social subjugation.

Meanwhile, Russell's petition to the governor for assistance did not alleviate his apprenticeship indentures woes. In the face of Bureau officials' interference, Russell refused to surrender custody of the children he had seized, including Harriet and Eliza

Ambrose, the fifteen- and thirteen-year old daughters of freedpeople Wiley Ambrose and Lucy Ross. The Ambrose family had received no notice of Russell's apprenticeship motions or of the county court hearing scheduled to consider those motions, thereby failing to appear to contest those motions. The Ambrose family did not learn about the issuance of the girls' indentures until Russell's agents removed the children from the Ambrose home.[48] A Roberson County judge rejected the Ambrose family's petition for *habeas corpus* for the girls' release, but the state Supreme Court sided with the Ambrose family on appeal. Writing for the court, justice Reade voided the indentures on the basis of the adverse impact caused by that lack of notice to the family about the pending indenture motions. The ensuing loss of the opportunity to be heard in opposition to the potential forfeiture of the children's freedom violated the Ambrose family's constitutional rights to due process, a rare concession of fundamental rights for the newly emancipated.[49]

That confirmation of constitutional due process rights represented a significant turn of events for black North Carolinians. That constitutional issue had been previously ignored by the court in a similar antebellum-era claim challenging the lack of prior notice to an unsuspecting apprentice target.[50] The prior notice required by the *Ambrose* decision gained significance as the number of indenture proceedings increased exponentially across North Carolina. "The proceedings of our county courts have been in a summary way in binding out apprentices," Reade observed, "and although it has been usual to have the person to be bound present, yet we know from observation that it has not been invariably the case. . . . But now a very different state of things exists." That "different state of things," based on pre- and post-war comparative labor studies by historians

Guion Griffis Johnson, Roberta Sue Alexander, and Karin Zipf, included the significant growth of apprenticeships throughout North Carolina communities in places where available labor had become sparse. Apprenticeships represented "cheap labor in exchange for maintenance," giving white North Carolinians additional opportunities to control both the child and the parent. In Sampson County alone, during a five-month span between November 1865 and March 1866, judges bound approximately 1,079 black children as apprentices, many in violation of Bureau apprenticeship standards.[51] The dire conditions described in the *Ambrose* decision – "The war has impoverished the country and made wrecks of the estates of orphans; its casualties have greatly increased their numbers; and one-third of the whole population are indigent colored persons" – suggested the unlikelihood of substantial improvements in the treatment of black apprentices. Questionable conditions for apprentices and escalating numbers of binding proceedings placed great significance on prior notice and other due process procedural requirements. Emboldened by a proactively expansive Bureau interpretation of the procedural requirements mandated by *Ambrose,* Bureau agents promptly mobilized to set aside any indentures issued without parental consent.[52]

That procedural gain failed to negate the continued reliance upon North Carolina's apprenticeship regime as a key social control measure of the state's black citizenry. The use and abuse of apprenticeship laws to exercise dominion over black children and parents continued until the state's 1919 adoption of the Child Welfare Act.[53] Apprenticeships also provided the structure for gaining control over financially delinquent convicts and fathers of illegitimate children who, in lieu of imprisonment, could bind themselves as apprentices, subject to the terms unilaterally set by county

courts.[54] The inherent inequality within the apprenticeship system rested in the nature of the very relationship itself, in that it compromised the apprentice's liberty while conspicuously ignoring his or her views or wishes. The actual or potential disregard of the apprentice's interests in the master/apprentice relationship replicated the absence of choice in the antebellum master/slave relationship, without the purchase price of the slave. Like the slave, robbed of free will because of the purported intellectual immaturity of the black population, the fate of an apprentice rested outside of his or her control. Whether apprenticed as a minor or as an insolvent convict or father seeking to avoid imprisonment, the individual's lack of volition perpetuated the control mechanisms set in motion by the Code.

That insignificance of the apprentice's position within the actual apprenticeship relationship prompted the result in another state Supreme Court decision, also authored by Reade during the same month as his *Ambrose* decision. In *Beard v. Hudson* (1867), a Rowan County apprentice "wantonly left the master's service, and was living in 'an idle and disreputable manner.'" On the erroneous belief that he lacked authority to enforce a validly-issued indenture, a superior court judge rejected the master's petition to have the local sheriff return the youth.[55] In reversing that superior court decision, Reade offered a meticulous description of the rights and duties required of the master, apprentice, and county court by the apprenticeship laws.

According to Reade, an apprentice indenture bound the apprentice to render service, the master to feed, house, train, and clothe the apprentice, and the court "to exercise general superintending powers over both master and apprentice, in all matters pertaining to that particular relation." Yet "the contract of binding, the indentures, is not

between the master and the apprentice, but *between the master and the court*."[56] As consideration for the master's agreement to perform his duties, "the court contracts with the master that the apprentice shall serve him faithfully. . . . [I]t would be bad faith if the court should fail to comply with its part of the contract; *i.e.*, that the apprentice should serve the master." As long as the master/apprentice relationship functioned consistent with the terms of the indenture and relevant statutes, "the court ought not to interfere. It is then a domestic relation, subject to ordinary domestic regulations; but when the relation is wantonly broken, or grossly abused, it becomes the duty of the court to interfere."[57] The apprenticeship indenture, whether the result of statutory proceedings or voluntary negotiations between a prospective master and a child's parents, mandated the child's performance without making the child a party to that underlying agreement. Much like antebellum contracts for the sale of slaves, the absence of volition in an apprentice indenture relegated the bound individual to the status of chattel.

As noted by Scott, an apprenticeship "was essentially a labor contract – to which the child was not necessarily a consenting party – characterized by strong restrictions on behavior and a deferred or nonexistent wage."[58] In effect, an apprenticeship indenture constituted a "contract of adhesion," a contractual concept introduced into the American legal system in the early twentieth century.[59] Although unfamiliar in postbellum North Carolina, both the apprentice indenture and the contract of adhesion derive their novelty and inequity from an imbalance of bargaining power. Typically a standardized form document, much like the court-issued indentures of the late 1800s, a contract of adhesion consists of mostly nonnegotiable terms. Those terms are prepared and used repeatedly in routine transactions by or for a sophisticated contracting party with superior bargaining

power to contract with other parties, often unsophisticated and generally in a weaker bargaining position. A contract of adhesion is little more than a "take it or leave it" commercial transaction. In contrast, the typically involuntary servitude of an apprentice indenture, much like its slavery predecessor, offered few or no options to be left.

Although not necessarily without legal effect, such contracts are almost universally assailed. They are frequently held unenforceable under various theories – including unconscionability, violation of public policy, inequitable bargaining power, and economic duress – seeking to prevent victimization of a weaker contracting party by a party with a virtual monopoly on bargaining power.[60] One commentator has tellingly described the potential impact of contracts of adhesion in terms reminiscent of North Carolina's nineteenth century apprenticeship system: "Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."[61] In much the same manner, apprenticeship indentures facilitated a postbellum feudal order. Like the Code itself, apprenticeship indentures, made *for* but not *by* the individuals impacted by their terms, bound black North Carolinians to a system of inherent inferiority.

Labor Contracts

Labor contracts proved no less problematic, notwithstanding the dogged advocacy of Brvt. Maj. Gen. John Robinson for "free labor" as the key for the advancement of black North Carolinians. Robinson's November 1866 report to Freedmen's Bureau Commissioner Brvt. Maj. Gen. O.O. Howard waxed poetic about the benefits of wage agreements for the freedpeople. As the Freedmen Bureau Assistant Commissioner for

North Carolina, Robinson argued as "fact beyond contravention" that free labor had "entirely exploded the oft-repeated fallacy" that former slaves would not work without the compulsion of involuntary servitude. "In all parts of [North Carolina]," Robinson wrote, "evidences [*sic*] of an unmistakable character show what can be accomplished by free labor; the incentive to better their condition in life, by accumulating means for acquiring a permanent home; their improved appearance, and the heartiness of their efforts, show the beneficial results." Conceding unanticipated complications stemming from cash-strapped landowners and an unseasonably small harvest, he still marveled at contract labor, with "great surprise that the system has proven so prosperous."[62] Yet the freedpeople remained skeptical of the proposed transition from shackles of iron to shackles of paper.[63]

Robinson's enthusiasm for free labor and the opportunity for ex-slaves to negotiate freely for their services echoed the Union army's pre-emancipation obsession with what historian Amy Dru Stanley has termed "the instrument of freedom," namely the labor contract.[64] Robinson, and the Union army in general, failed to recognize or perhaps acknowledge, however, that the success of a contractual-based labor system depended upon equal protection under the law for all contracting parties. While relatively easy to ensure with an occupying army that balance tipped decidedly in favor of North Carolina employers post-Reconstruction, regardless of the still nascent Fourteenth Amendment. The Black Code, with its newly-minted requirements of race-based contractual formalities and financial penalties for enticing contractual breaches, provided statutory certainty for legal redress against freedpeople who failed to satisfy their written commitments. After all, in the estimation of the members of the freedmen commission, if

the laborer's right to receive payment for his work is secure, "it is equally just to require him to comply with his deliberate and lawful contracts," under penalty of :the sharp reproof of the law" for any noncompliance.[65] The unwitting complicity of Bureau agents in pushing ambiguous labor contracts, combined with evolving enhanced statutory protections favoring landowners over laborers, accomplished little beyond the contractual constraint of the freedpeople to further statutory and social inferiority.

Historian Laura Edwards has observed that, in the antebellum South, "propertylessness signified dependence precisely because it forced a person to submit to another's authority."[66] That did not change with emancipation or with Robinson's esteemed free labor system. Already too familiar with submission, the freedpeople's aversion to labor contracts reflected their understanding that property, not contracts, meant freedom.[67] As noted in 1867 by Edwin L. Godkin, editor of *The Nation*, "when a man agrees to sell his labor, he agrees by implication to surrender his moral and social independence," leaving the emancipated laborer "legally free while socially bound."[68] The social subjugation inherent to contract labor, a primarily racial divide which state officials insisted remained within each state's sovereignty to define, had been forged by black code legislation and ensconced into its incipient segregation regime. Propertyless laborers, of which the freedmen comprised the majority – particularly those engaged in unskilled labor – remained dependent upon and inferior to the propertied employers, regardless of slavery's abolition.[69] The Bureau's free labor system simply memorialized that dependence in written form.

Starting in early 1865, North Carolina-based Bureau agents used form contracts, little more than cursory standardized terms of varying degrees of ambiguity, to establish

labor relations for the freedpeople for the 1866 calendar year. The basic terms usually included a nonspecific definition of duties ("all kinds of labor common to the farms of the country") and subjective performance standards (laborers agreed to "do their work faithfully and to be respectful in their deportment"). Minimal employer commitments remained nondescript, limited to the treatment of laborers ("treat them kindly and encourage the establishment of schools for their children") and the provision of room and board ("comfortable quarters, and sufficient rations"). The only substantive specificity detailed in those agreements tended to focus on laborers' daily work commitments, wages, and penalties for nonperformance. A typical Bureau labor contract contemplated at least ten hours of daily labor, an annual salary payable primarily in a single year-end amount (with small monthly incremental advances during the year), no compensation for work hours lost due to idleness or unexcused absences, and forfeiture of any outstanding salary balance if and immediately upon the laborer's contractual breach. On occasion, as facilitated by the handwritten agreements initially used by the Bureau, some level of negotiation and customization could be accommodated, usually in the form of personal property as compensation, ranging from apparel to livestock.[70]

That lack of objectively quantifiable contractual terms favored employers, to the detriment of laborers. Without unambiguously defined standards of satisfactory (and therefore contractually compliant) performance, employers enjoyed unilateral discretion in such determinations as the tasks "common" to area farms and whether a laborer had performed those tasks "faithfully" in an appropriately "respectful" manner. Without specified penalties for deficient workers performance, employers remained free to assess the financial impact of labor transgressions. Faced with a primarily backloaded salary

structure forfeitable upon breach or default, disenchanted laborers had few viable options for redress of employer transgressions, none of which avoided financial or legal penalty for the laborer. Job abandonment risked running afoul of the Black Code's vagrancy statute and could jeopardize parental custody by triggering the state's apprenticeship laws. Contractual breach, whether by work stoppage or otherwise, likely ended with immediate eviction and prolonged homelessness for the noncompliant laborer (and, if applicable, his or her family) while the employer and Bureau agents haggled over a resolution. Even the prospect of seeking improved working conditions or contractual terms with another employer raised the possibility of an anti-enticement claim by the jilted employer against both the laborer and the new prospective employer.

In one such case, where contract laborers allegedly sought to evade their existing unreasonable labor agreements by going to work for another employer, an impassioned dissent by justice Reade described the inequities of the dependence generated by such labor contracts:

> [H]ere is a condition worse than slavery. . . . There is no greater danger in any community than a dependent class upon whom is the hand of oppression bearing hard and who have no where to look for relief. . . . No one can read the contract without being satisfied that the best interest of society forbid that it should be enforced or in any way countenanced in the Courts. It bears upon its face the evidence that the plaintiff intended to get the labor of these men and discharge them and keep their earnings. And then

> what could they do? Men with families, the year gone, and all their earnings gone. The alternative is the poor house or crime and the jail.
>
> What would be the condition of society if every contract was of this character? And if one may be, all may be. On the first of November the plaintiff might drive off the laborers and their families, and keep all their earnings; and then for the winter, they would be without shelter, food or raiment; they would be paupers, and every community must support its paupers.[71]

With limited affirmative obligations and no specified penalties for defaulting employers, the Bureau's cursory contracts favored postbellum employers, who could compel performance of open-ended labor requirements with minimal reciprocal exposure for nonperformance of unspecified commitments. Much like the localized enforcement discretion that infused the Black Code's criminal provisions, the amorphous contract labor system sponsored by the Bureau empowered North Carolina employers with unchecked discretion over workers and little disincentive to forswear abusive control tactics in compelling their labor.

Neither time nor experience improved the situation. By December 1865, as employers' demands for labor increased, so too did Bureau caseloads, prompting agents to seek the procedural efficiency of preprinted labor contract templates. Even more cursory than the Bureau's original handwritten contracts, the preprinted templates seemingly discouraged negotiations or alterations for more favorable terms for laborers,

as evidenced by the dearth of changes and addenda to surviving Bureau form contracts. The only contractual innovation of any import within those templates sought to mitigate the impact of wage forfeiture upon breach, by requiring clear proof of workers' alleged contractual violations or by capping the forfeitable amount to a maximum of half of a laborer's annual salary.[72] Inequitable bargaining power and overworked (and often unconcerned Bureau agents) left prospective contract laborers little choice but to accept the market terms dictated by North Carolina landowners and Bureau agents.

Landowners proactively leveraged labor's dependency with more detailed contracts that extended controls over the on- and off-duty activities of their workers. One such contract, touted as the form agreement "generally . . . adopted" by South Carolina's planters and freedpeople, appeared on the front page of Raleigh's *Daily Sentinel* in early January 1866. With even more nebulous labor performance standards, that agreement placed significant additional responsibilities on workers, including restrictive behavioral covenants, daily production expectations, specific financial penalties for lost labor, and requirements of proper care for equipment and farm animals (with financial penalties for any damage or injury to the employer's property). The contract even mandated tidiness of workers' quarters and personal appearances.[73] A provision authorizing worker dismissal with wage forfeiture for any violation of the unspecified "rules and regulations of the employer" granted employers unilateral discretion to amend the contract on an ad hoc basis simply by changing those rules and regulations.[74] In exchange for a few limited room and board commitments, employers received the added benefits of broader punitive rights and innovative evidentiary and non-compete concessions from the laborers.[75] The contract recommended a communal one-third crop share as the collective salary for the

entire workforce, with an alternative fixed annual salary range of forty to one hundred twenty dollars for laborers that insisted upon cash wages. That proposed salary range, effectively a means for regional price-fixing for labor costs, drew the strong support of the *Sentinel*'s editorial staff.[76] Subsequent contractual iterations continued to favor the employers providing the labor contracts, to the growing detriment of the workers.

The concept of crop shares as an alternative means for compensation became a particularly pernicious element of labor contracts. With the limited availability of federal currency across the South, "share wages" emerged as a substitute for cash wage payments, even gaining statutory lien protection under the Black Code.[77] In his November 1866 report to Bureau Commissioner Howard, however, Robinson bemoaned the fundamental problems with the share wage system: "Farmers in some cases have, as the crops matured, discharged their hands under frivolous pretexts, in this way depriving the laborers of their share, and rendering it necessary for the bureau to interfere to protect their rights. In other cases [laborers] find little or nothing due them, in consequences of exorbitant charges for provisions and clothing furnished by the planter." Based on such ongoing problems with the crop-sharing system, Robinson had adamantly recommended to North Carolina's freedpeople that they only accept labor contracts based on stipulated monetary wages, payable monthly.[78]

To Robinson's dismay, as he informed Howard, the freedpeople "appear, however, to prefer [share wages], although much complaint has been made by them in consequence of it, and more is anticipated." Subsequent legislation did loosen the Black Code's requirement for a written labor contract for enforceable liens on share wages, but only if the agreed-upon work had been successfully completed or terminated early

without the worker's default.[79] The susceptibility of share wages to innumerable contingencies impacting harvest output and share valuation – from bad weather and crop infestations to unscrupulous employers and market volatility for agricultural products – still only exacerbated the dependence of propertyless laborers on their landowner employers.

As the scope of contracted matters within such postbellum labor agreements evolved – like the contract recommended in the *Daily Sentinel*, to expand employers' control over the work and lives of their workers – the Bureau's vaunted free labor system denigrated into a derivative imitation of antebellum involuntary servitude. The Black Code's deceptively race-neutral anti-enticement statute bolstered those controls against third-party interference with the threat of onerous financial liabilities. Finding those penalties inadequate, legislators added criminal punishment to the anti-enticement statute in 1867, once again drawing from antebellum slavery statutes to bind workers even tighter to their employers.[80]

Subsequent legislation followed that contractual trend, becoming increasingly employer and landlord-centric, and tilting the balance of power decidedly against contract laborers. Landowners received vested possessory rights in all crops produced on their lands as a means for ensuring laborers' full contractual compliance. That preemptive lien received statutory priority over the Black Code's share wages lien for workers, reducing what little protection workers had in that currency-free compensation model. An abbreviated statute of limitations further restricted the Code's share wages lien. Laborers who failed to invoke the lien by filing a formal written petition within thirty days of harvest forfeited the Code's lien protection, exposing them to risk of nonpayment.

Laborers who accepted a salary advance or other benefit from employers and then failed to completed contracted work faced criminal charges for false pretenses, punishable by fines and imprisonment. Laborers also risked criminal liability for unauthorized removal of any crops from the land or for damage to tenement houses or other structures owned by the landowner.[81] Such legislative support only emboldened employers, such that increasingly abusive labor control practices – ranging from miserly compensation to corporeal punishment – became commonplace methods for ensuring workers' contractual compliance.[82] In an environment of racial stratification facilitated by the judicial precedent of *Manuel* and *Newsom* and the Black Code, the confluence of such aggressive labor practices with the Bureau's hapless labor contract legacy only reinforced the dependence of the propertyless. Postbellum employer control quickly rivaled the dominance previously wielded by slaveowners.

Free labor became anything but free for the state's freedpeople. Bound by onerous contracts rather than chains, and subject to the hostile legislative legacy of the Black Code, most black North Carolinians found themselves as tied to landowners as ever before. Very little distinguished their condition as contract laborers from their prior status as slaves, singularly reliant upon the unfettered discretion that the state's supreme court identified as the distinction between employment and servitude:

> If an employer has a right to have the work done as he pleases, can change the plans and periods of it from time to time, to suit his fancy or his business–in fine, if the hired man works *under* the other–then one is master, and the other is servant . . . .

> [W]hen a hireling is under the ordering of another, he is his servant; but when one person employs another at a fixed price to do a particular piece of work for him, not on his land, and over which the employer is to exercise no control, they stand in the relation of joint contractors, and not of master and servant.[83]

Increasingly overbearing labor contracts negated laborers' autonomy. Low contingency-based wages, revocable upon minor and often ill-defined offenses, added a financial subservience that only bolstered the subjugation and control initiated against the emancipated by the Black Code.

The ensuing inability of the freedpeople to maintain themselves and improve conditions for their families through contract labor bred hopelessness. The risk of substantial penalties for job abandonment fostered additional distress. Attempts to exercise newly-granted liberties and assert independence frequently escalated from uneasy tension to open conflict with employers. Confused by what freedoms had been gained through emancipation only to be surrendered by contract, frustrated black North Carolinians often found themselves at odds with their white neighbors. Behavioral lapses on either side risked intervention by the mostly white local officials invested with the discretionary enforcement authority crafted by the Black Code and its progeny. Such situations usually ended badly for blacks, frequently resulting in criminal punishment. Control begot more control, in that workers' efforts to avoid, or mounting frustrations with, contractual control all too often escalated into criminal liability, transferring custody of the laborer from his contracted employer to the state.[84] The racial control

conceived by the Black Code – elevating the state to overseer, whether as the arbiter of contract labor claims or as behavioral enforcer (and custodial "employer" through its prison system) – thereby evolved into the vicious cycle of segregation. As the new century approached, emancipation still did not constitute equality. Such was the Black Code's legacy.

* * *

North Carolina's Black Code endured. Left to the care of state lawmakers, its statutory subjugation evolved into the model for legislative discretion. It offered a platform for the adaptation of state laws and functions – such as criminal law and punishment, apprenticeships, and labor contracts – to manage and control the freedom of black North Carolinians.

The Code did not die. It sustained white supremacy, allowing white North Carolinians to remain at the pinnacle of a revered racial hierarchy central to the centuries-old southern way of life. It shielded some modicum of an antebellum status quo in a chaotic postbellum world. It was, by any other name, the precursor for segregation.

End Notes

[1] *Plessy v. Ferguson*, 163 U.S. 137, 550 (1896); *State v. Manuel*, 20 N.C. 144, 159 (1838).

[2] *Plessy*, 163 U.S. at 551.

[3] Ibid., 550-51, 540. Justice John Marshall Harlan authored the sole dissent. Justice David Josiah Brewer did not participate in the oral arguments or decision of the case, as he had left Washington on the day of the *Plessy* oral arguments due to the sudden death of his daughter. According to legal historian J. Gordon Hylton, Brewer likely would have joined Harlan's dissent. Ibid., at 552, 564; J. Gordon Hylton, "The Judge Who Abstained in *Plessy v. Ferguson*: Justice David Brewer and the Problem of Race," *Mississippi Law Journal* 61, no. 2 (Fall 1991): 315-16.

[4] "The Fourth in Raleigh," *North Carolina Standard* (Raleigh, NC), July 7, 1869, 2.

[5] *Laws & Resolutions Passed by the General Assembly of the State of North Carolina, at the Special Session, begun and held in the City of Raleigh on the First of July, 1868*, ch. 22, §§ 7, 17 (Raleigh, NC: N. Paige, 1868).

[6] *Public Laws of the State of North Carolina, Passed by the General Assembly at its Session 1871-'72, Begun and Held in the City of Raleigh on the Twentieth Day of November, 1871*, ch. 189, § 20 (Raleigh, NC: Theo. N. Ramsay, 1872); N.C. Const. art. IX, § 2 (as amended, 1875); *Public Laws and Resolutions, Together with the Private Laws, of the State of North Carolina, Passed by the General Assembly at its Session 1872-'73, Begun and Held in the City of Raleigh on Monday, the Eighteenth Day of November, A.D. 1872*, ch. 90, § 30 (Raleigh, NC: Stone & Uzzell, 1873).

[7] *Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session 1874-'75, Begun and Held in the City of Raleigh on Monday, the Sixteenth Day of November, A.D. 1874*, ch. 250 (Raleigh, NC: Josiah Turner, 1875); *The Code of North Carolina, enacted March 2, 1883*, 2 vols., ch. 20, § 783 (New York: Banks & Brothers, 1883); *Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session 1885, Begun and Held in the City of Raleigh on Wednesday, the Seventh Day of January, A.D. 1885*, ch. 32, § 7 (bond issuance by Hickory), ch. 120, § 59 (incorporation of Morganton) (Raleigh, NC: P. M. Hale, 1885); John H. Haley, *Charles N. Hunter and Race Relations in North Carolina* (Chapel Hill, NC: University of North Carolina Press, 1987), 31; *Public Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session of 1899, Begun and Held in the City of Raleigh on Wednesday, the Fourth Day of January, A.D. 1899*, ch. 164, § 11 (Raleigh, NC: Edwards & Broughton, and E. M. Uzzell, 1899).

[8] *State v. Newsom*, 27 N.C. 250, 254 (1844).

[9] Walter L. Fleming, *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial 1865 to the Present Time*, 2 vols. (1906; Gloucester, MA: Peter Smith, 1960), 1:245; J.G. de Roulhac Hamilton, "Southern Legislation in Respect to Freedmen, 1865-1866," in *Studies in Southern History and Politics* (1914; reprint, Port Washington, NY: Kennikat Press, Inc., 1964), 156.

[10] Theodore Brantner Wilson, *The Black Codes of the South* (University, AL: University of Alabama Press, 1965), 107-08. The apprenticeship legislation referenced by Wilson did not expressly repeal that preferential right of ex-slaveowners. It did, however, include a catch-all repeal provision that presumably ended the ex-slaveowner preference. *Public*

Laws of the State of North Carolina, Passed by the General Assembly at Sessions of 1866 '67, ch. 6, § 3 (Raleigh, NC: Wm. E. Pell, 1867); see note 45 and accompanying text below. According to Wilson, the surviving statutes – "though applicable in theory without distinction of color, [they] certainly seem to have been drawn to effect new controls over the freedmen without subjecting the state to the charge of discrimination" – consisted of the vagrancy, livestock, and sedition statutes proposed by the commissioners' "Bill Concerning Negroes," and a separate licensure statute for itinerant vendors. Wilson, *The Black Codes of the South*, 107-08 (referencing *Public Laws of North Carolina, 1866 '67*, chs. 42, 57, 64; ch. 72, Schedule B, § 18). Wilson overlooked the survival of several more onerous racially discriminatory provisions.

[11] John M. Mecklin, "The Black Codes," *South Atlantic Quarterly* 16, no. 3 (July 1917): 256-58.

[12] John David Smith, "Introduction: Segregation and the Age of Jim Crow," in *When Did Southern Segregation Begin?* (Boston: Bedford/St. Martin's, 2002), 5; James B. Browning, "The North Carolina Black Code," *Journal of Negro History* 15, no. 4 (October 1930): 473.

[13] Smith, "Introduction: Segregation and the Age of Jim Crow," 7 (quoting Roger A. Fischer, "Communications," *American Historical Review* 75, no. 1 (October 1969):327); William Cohen, *At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control 1861-1915* (Baton Rouge: Louisiana State University Press, 1991), 202.

[14] *State v. Underwood*, 63 N.C. 98, 99 (1869).

[15] *Official Proceedings of the Convention of the Freedmen of North Carolina, September 29-October 3, 1865* (Raleigh, NC: 1865), 10; Browning, "The North Carolina Black Code," 472-73.

[16] *State v. Hairston*, 63 N.C. 451, 452-53 (1869). Justice Reade's argument that the miscegenation law "operates on both races alike" recalled the careful distinction made by the freedmen commission between laws that "operate" upon and "govern" the races. Because one party to an interracial marriage would be as liable for a violation of the miscegenation law as the other party, such that neither could be independently guilty of the ensuing crime of fornication and adultery, miscegenation is the rare exception of a Black Code statute that "governed" both races. For further consideration of the operate/govern dichotomy, see chapter two, notes 67-70 and accompanying text.

[17] *Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session 1876-'77, Begun and Held in the City of Raleigh, on Monday, the Nineteenth Day of November, A.D. 1876*, "Resolutions Concerning the Relations between the White and Colored People of the State," January 31, 1877 (Raleigh, NC: News Publishing Company, 1877), 589-90; *Plessy*, 163 U.S. at 551 ("Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.").

[18] *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866*, ch. 40, § 2 (Raleigh, NC: Wm. E. Pell 1866).

[19] Ibid., ch. 40, §§ 1, 8; N.C. Const. art. XIV, § 8 (as amended, 1875) (prohibiting a white person from marrying "a negro" or "a person of negro descent to the third generation

inclusive"). The Supreme Court invalidated the miscegenation laws of sixteen states, including North Carolina, in *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). The state's 1875 miscegenation constitutional amendment did revise the Code's "fourth generation inclusive" standard to "third generation inclusive."

[20] *Public Laws of North Carolina, 1866*, ch. 35; *Public Laws of North Carolina, 1866 '67*, ch. 130.

[21] *Code of North Carolina, 1883*, ch. 10, § 588 (incorporating *Public Laws of North Carolina, 1866*, ch. 40, § 2), ch. 20, §§ 786-788, 791-793, 795-798 (incorporating *Public Laws of North Carolina, 1866*, ch. 35), ch. 25, §§ 1068, 1070, 1106, 1120 (incorporating *Public Laws of North Carolina, 1866*, chs. 54, 57, 60), ch. 42, § 1842 (incorporating *Public Laws of North Carolina, 1866*, ch. 40, § 5), ch. 33, § 3119 (incorporating *Public Laws of North Carolina, 1866*, ch. 58), ch. 63, § 3834 (incorporating *Public Laws of North Carolina, 1866*, ch. 42).

[22] *Plessy*, 163 U.S. at 551-52.

[23] *Executive and Legislative Documents Laid Before the General Assembly of North Carolina, Session of 1865-66*, "Report of Committee," Document No. 9 (Raleigh, NC: Wm. E. Pell, 1866), 6, 11 (the "Freedmen Commission Report").

[24] Freedmen Commission Report, 7.

[25] *Public Laws of North Carolina, 1866 '67*, ch. 124; *Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session of 1881, Begun and Held in the City of Raleigh, on Wednesday, the Fifth Day of January, A.D. 1881*, ch. 303 (Raleigh, NC: Ashe & Gatling, 1881); *Laws and Resolutions of North Carolina, 1868*, ch. 60; *Laws and Resolutions of North Carolina, 1868*, ch. 31; *Laws and Resolutions of the*

State of North Carolina, Passed by the General Assembly at its Session of 1879, Begun and Held in the City of Raleigh, on Wednesday, the Eighth Day of January, A.D. 1879, ch. 198, § 1 (Raleigh, NC: The Observer, 1879).

[26] *Laws and Resolutions of North Carolina, 1868*, ch. 44; *Public Laws of the State of North Carolina, Passed by the General Assembly at its Session 1868-'69, Begun and Held in the City of Raleigh on the Sixteenth of November, 1868*, ch. 167 (Raleigh, NC: M. S. Littlefield, 1869).

[27] With only one exception – a race-neutral statute briefly in effect in the late 1700s allowing anyone to be hired out to pay court-assessed costs – "the only instance of legal provision for labor in connection with offenses against the law in [North Carolina] prior to the Civil War occur in connection with free Negroes." Jesse F. Steiner and Roy M. Brown, *The North Carolina Chain Gang: A Study of County Convict Road Work* (1927; Montclair, NJ: Patterson Smith, 1969), 18.

[28] Freedmen Commission Report, 10.

[29] *Public Laws of North Carolina, 1866 '67*, ch. 30; *Public Laws of North Carolina, 1868-'69*, ch. 238, § 6; *Public Laws of North Carolina, 1872-'73*, ch. 174, § 10; *Laws and Resolutions of North Carolina, 1874-'75*, chs. 113, 246; *Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session 1876-'77, Begun and Held in the City of Raleigh, on Monday, the Nineteenth Day of November, A.D. 1876*, ch. 196 (Raleigh, NC: News Publishing Company, 1877); *Laws and Resolutions of North Carolina, 1879*, ch. 218.

[30] N.C. Const. art. XI, § 1 (as amended, 1875).

[31] *Laws and Resolutions of North Carolina, 1879,* ch. 39, §§ 3, 4, chs. 129, 143, 161, § 16, ch. 235, § 3, ch. 287, § 11, ch. 294, § 3, ch. 260, § 4, chs. 263, 270, 298, 487; ibid., Index, 848-49.

[32] Steiner and Brown, *The North Carolina Chain Gang,* 5.

[33] Ibid., 6.

[34] "Report of the Board of Directors, &c., of the State Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina,* Session of 1871-72; "Report of Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina,* Session of 1872-73; "Annual Report Board of Directors of State Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina,* Session of 1874-75; "Report of Board of Directors of State Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina,* Session of 1876-77; "Report of the Board of Directors of the Penitentiary," *Public Documents of the General Assembly of North Carolina,* Session of 1879; "Report of the Board of Directors of the North Carolina Penitentiary," *North Carolina Executive and Legislative Documents,* Session of 1881; "Report of the Board of Directors of the North Carolina Penitentiary," *Executive and Legislative Documents of the State of North Carolina,* Session of 1883; "Biennial Report of the Officers of the North Carolina State Penitentiary," *Executive and Legislative Documents of the State of North Carolina,* Session of 1885; "Biennial Report of the State Penitentiary for the two fiscal years ending November 30, 1886," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina,* Session of 1887; "Biennial Report of the North Carolina State Penitentiary," *Public Documents of the State of North Carolina,*

Session of 1889; "Biennial Report of the State Penitentiary," *Public Documents of the State of North Carolina*, Sessions of 1891, 1893; "Annual Report of the State's Prison for 1893," "Annual Report of the State's Prison for 1894," *Public Documents of the State of North Carolina*, Session of 1895; "North Carolina Penitentiary – The Report of the Board of Directors and the General Manager for the Two Years, 1895 and 1896," *Public Documents of the State of North Carolina*, Session of 1897; "Report of the N.C. Penitentiary," *Public Documents of the State of North Carolina*, Session of 1899; "Biennial Report of State's Prison," *Public Documents of the State of North Carolina*, Session of 1901 (Raleigh, NC: various publishers, 1872-1901).

[35] An 1889 law required county clerks to report all criminal dispositions from each court session to the state's attorney general, for purposes of a comprehensive biennial survey for the General Assembly. *Laws and Resolutions of the State of North Carolina Passed by the General Assembly at its Session of 1889, Begun and Held in the City of Raleigh on Wednesday, the Ninth Day of January, A.D. 1889*, ch. 341 (Raleigh, NC: Josephus Daniels, 1889). The preprinted forms provided county clerks for that task included each defendant's name, age, race, gender, occupation, and charged offense(s), as well as the disposition of each offense. An extensive search of the State Archives yielded only six such county court reports for Henderson and Craven counties. Henderson County Superior Court Criminal Statistics for the Fall 1889, Fall 1890, and Spring 1891 court terms, Henderson County Miscellaneous Court Papers 1861-1966, Superior and Court of Pleas, "Criminal Statistics," Craven County Superior Court Criminal Statistics for the Fall 1889, February 1890, and Spring 1890 court terms, Craven County Miscellaneous Records, 1757-1929, "Criminal Statistics," State Archives of North Carolina, Raleigh,

NC. Phone calls to the state attorney general's office, as well as a series of calls to county clerks across the state, produced no additional reports. Unfortunately, the attorney general's biennial surveys incorporated only the overall racial composition of defendants whose criminal charges had been concluded, without regard to the manner of disposal for those charges (anything from voluntary dismissals to jury verdicts of guilty, including any punishments as applicable), precluding comparative analysis to identify potential racial disparities in the indictments, convictions, and sentencings of North Carolina criminal defendants during that period. For example, see "Biennial Report of the Attorney General," document no. 9, *Public Documents of the State of North Carolina, Session 1891* (Raleigh, NC: Josephus Daniels, 1891).

[36] Freedmen Commission Report, 7.

[37] *Daily Sentinel*, July 23, 1866, 3; *Tri-Weekly Standard* (Raleigh, NC), July 26, 1866, 3.

[38] Even after emancipation, the North Carolina Supreme Court continued to enforce a master's rights to an apprenticed base-born slave child because, under the state's apprentice laws, "it is the duty of the court to bind out all free base-born colored children, whether they are paupers or not. At least such was the law at the time of this transaction. insisted upon the enforcement." *Ferrell v. Boykin*, 61 N.C. 9, 10 (1866).

[39] *Revised Code of North Carolina, Enacted by the General Assembly at the Session of 1854*, ch. 5, §§ 1-3, 5 (Boston: Little, Brown & Company, 1855); *Public Laws of North Carolina, 1866*, ch. 40, § 4.

[40] Eliphalet Whittlesey to George S. Hawley, May 23, 1866, Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian Institution, Smithsonian Online Virtual

Archives, Series 1: Letters Sent, volume 1, 126, https://sova.si.edu/details/NMAAHC.FB.M843?s=0&n=10&t=C&q=&i=0, accessed March 28, 2020 (emphasis in original).

[41] John Robinson to Allen Rutherford, August 3, 1866, Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian Online Virtual Archives, Series 1: Letters Sent, volume 1, 162, accessed March 28, 2020 (returning "a number" of indentures for cancellation for legal and procedural violations); Rebecca Scott, "The Battle Over the Child: Child Apprenticeship and the Freedmen's Bureau in North Carolina," *Prologue* 10, no. 2 (1978): 111.

[42] Circular No. 4 (November 10, 1865) and Circular No. 1 (February 16, 1866), Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian Online Virtual Archives, General Orders and Circulars, July 1, 1865-December 9, 1868, accessed March 28, 2020; Roberta Sue Alexander, *North Carolina Faces the Freedmen: Race Relations During Presidential Reconstruction, 1865-67* (Durham, NC: Duke University Press, 1985), 113-14; Scott, "The Battle Over the Child," 111.

[43] John Robinson to Jonathan Worth, October 30, 1866, Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian Online Virtual Archives, Series 1: Letters Sent, volume 1, 197-99, accessed March 28, 2020.

[44] *Executive and Legislative Documents Laid Before the General Assembly of North Carolina, Session 1866'-7,* "Governor's Message" (Raleigh, NC: Wm. E. Pell, 1867), 18-19.

[45] *Journal of the House of Commons of the General Assembly of the State of North Carolina, at its Session of 1866-'67* (Raleigh, NC: Wm. E. Pell, 1867), 53, 66; *Journal of the Senate of the General Assembly of the State of North Carolina, at its Session of 1866-'67* (Raleigh, NC: Wm. E. Pell, 1867), 22; *Public Laws of North Carolina, 1866 '67*, ch. 6, § 3. The Act expressly repealed all race-specific bonding requirements, as well as the mandatory binding requirement for children of habitually unemployed free blacks. Amendments to existing laws included revisions to the mandatory bonding requirement for base-born black children (making the provision race-neutral and limiting its effect to cases in which the mother lacked the means or ability to support the child) and the differing age requirements for female apprenticeships (prohibiting the binding of any female as an apprentice after the age of eighteen). *Public Laws of North Carolina, 1866 '67*, ch. 6, §§ 1, 2. The changes apparently worked. Shortly after passage of the "Act to Amend the 5th Chapter of the Revised Code, Entitled 'Apprentices,'" Worth wrote to Russell, reporting that Bureau Commissioner 's General O.O. Howard "is satisfied with our laws–and that there will probably be no further interference–but you know little reliance is to be placed on the decision of arbitrary tribunals." Jonathan Worth to Daniel L. Russell, February 16, 1867, in *The Correspondence of Jonathan Worth*, 2 vols., ed. J.G. de Roulhac Hamilton (Raleigh: Edwards & Broughton, 1909), 2:890.

[46] *The Code of Civil Procedure of North Carolina, to Special Proceedings*, ch. 12 (Raleigh, NC: N. Paige, 1868); *The Code of North Carolina, Enacted March 2, 1883*, ch.

3 (New York: Banks & Brothers, 1883); Karin L. Zipf, *Labor of Innocents: Forced Apprenticeship in North Carolina, 1715-1919* (Baton Rouge, LA: Louisiana State University Press, 2005), 60-61; *Public Laws of North Carolina, 1866 '67*, ch. 74.

[47] *Laws and Resolutions of North Carolina, 1889*, ch. 169, §§ 1, 17.

[48] The frequency of similar incidents prompted the delegates of the 1866 Freedmen's Convention to include among their declarations the condemnation that "[i]n and through the counties of this State our children, the dearest ties of which binds us to domestic life, and which makes the ties of home endearing, are ruthlessly taken from us and bound without our consent." *Minutes of the Freedmen's Convention, Held Minutes of the Freedmen's Convention, Held in the City of Raleigh, on the 2nd, 3rd, 4th and 5th of October, 1866* (Raleigh, NC: Standard Book & Job Office, 1866), 14.

[49] *In re Ambrose*, 61 N.C. 91, 95 (1867); Zipf, *Labor of Innocents*, 1-2, 98-101.

[50] *Owens v. Chaplain*, 48 N.C. 323 (1856).

[51] *Ambrose*, 61 N.C. at 94-95; Alexander, *North Carolina Faces the Freedmen*, 115-17; Scott, "The Battle Over the Child," 102; Zipf, *Labor of Innocents*, 44-47, 80. Not to be outdone, Bureau agents bound 393 children between September and December 1865, another 130 children by March 1866, and an additional 165 children by June 1866. Zipf, *Labor of Innocents*, 80.

[52] *Ambrose*, 61 N.C. at 94-95; Circular No. 5, February 16, 1867, Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian Online Virtual Archives, General Orders and Circulars, July 1, 1865-December 9, 1868, accessed March 28, 2020. In one reported instance, a private attorney filed motions in Hertford County seeking the investigation

and vacatur of the apprentice indentures allegedly issued illegally for one hundred and six black children. "Rebel Violence and Persecution in Hertford County," *Tri-Weekly Standard*, September 3, 1867, 3.

[53] Zipf, *Labor of Innocents*, 5, 7, 147, 151-52; Scott, "The Battle Over the Child," 102.

[54] *Public Laws of North Carolina, 1866*, ch. 56.

[55] *Beard v. Hudson*, 61 N.C. 180, 183 (1867). Given the opinion's rather patronizing conclusion, the apprentice's status as a freedman may be assumed: "In the new and embarrassing circumstances which exist the master is to be much commended, for that he forbore the exercise of his own undoubted powers over his apprentice and invoked the powers of the court. It is best that the colored population should be satisfied that they are liable to no unlawful impressments, and that they should see that what is required of them has the sanction of the law. It may then be hoped that they will be contented, and will cheerfully submit to what they might otherwise mischievously resist." Ibid.

[56] Ibid., 181 (emphasis added).

[57] Ibid., 181-82.

[58] Scott, "The Battle Over the Child," 104.

[59] Friedrich Kessler, "Contracts of Adhesion–Some Thoughts About Freedom of Contract," *Columbia Law Review* 43, no. 5 (1943): 632 n.11.

[60] Todd D. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction," *Harvard Law Review* 96, no. 6 (1983): 1176-79, 1191-95.

[61] Kessler, "Contracts of Adhesion," 640.

[62] *Reports of the Assistant Commissioners of Freedmen and a Synopsis of Laws Respecting Persons of Color in the Late Slave States*, 39th Cong., 2nd Sess., Sen. Exec. Doc. 6 (1867), 103.

[63] Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998), 40-42.

[64] Ibid., 35. Stanley described how the Union army's use of labor contracts with fugitive slaves, particularly in South Carolina's Sea Islands, provided the model for the Bureau's post-war efforts. Ibid., 35-37.

[65] Freedmen Commission Report, 8.

[66] Laura F. Edwards, "The Problem of Dependency: African Americans, Labor Relations, and the Law in the Nineteenth-Century South," *Agricultural History* 72, no. 2 (Spring 1998): 321.

[67] Stanley, *From Bondage to Contract*, 41.

[68] E. L. Godkin, "The Labor Crisis," *North American Review* 105, no. 216 (July 1867): 186, 188 (quoted in part in Edwards, "The Problem of Dependency," 320).

[69] John David Smith, "More than Slaves, Less than Freemen: The 'Share Wages' Labor System During Reconstruction," *Civil War History* 26, no. 3 (September 1980): 262-63.

[70] Early surviving labor contracts generated, or at least approved, by North Carolina-based Freedmen's Bureau agents generally contemplated a range of annual wages loosely tied to laborers' age and gender, with men aged seventeen and older receiving approximately ninety-six to one hundred twenty dollars per year, teenagers and women paid approximately fifty to seventy-two dollars per year, and working children aged

twelve and younger receiving less than twenty-five dollars annually. Monthly installments, usually reserved for adult laborers and payable at month's end, ranged between one dollar and two dollars and fifty cents. Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian Institution, Smithsonian Online Virtual Archives, Series 18: Freedmen's Labor Contracts, https://sova.si.edu/details/NMAAHC.FB.M843#ref110, accessed March 31, 2020. Assuming a Bureau labor contract with payment obligations for a one-hundred-and-twenty-dollar annual salary, including with two dollars and fifty cents monthly advance, a male freedman declared in breach of his labor contract in early December 1866 risked forfeiture of ninety-two dollars and fifty cents.

[71] *Haskins v. Royster*, 70 N.C. 601, 618-19 (1874) (Reade, J., dissenting). Several of the employer's contractual rights criticized by Reade resembled comparable rights in the Bureau's contracts, including the breath of work assignments, unliteral determinations of laborers' satisfactory conduct (both as to work performance and respectful behavior), unilateral termination, and wage forfeiture. Ibid., 19.

[72] By way of example, see the Bureau-facilitated contracts with James M. Kornegay (December 23, 1865), James H. Hyatt (January 1, 1866), J. F. Jones (January 1, 1866), Richard Jordan (January 4, 1866), George W. Lamb (January 8, 1866), Elisha Barnes (January 11, 1866), Henry Kornegay (January 11, 1866), and Richard Edmondson (January 13, 1866). Records of the Assistant Commissioner for the State of North Carolina Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1870, Smithsonian

Online Virtual Archives, Series 18: Freedmen's Labor Contracts, accessed March 31, 2020.

[73] Requiring workers to "conduct themselves faithfully, honestly, civilly, and diligently," the agreement required employer approval for any animals, weapons, "ardent spirits," visitors, and departures from the premises. Illustrative work tasks with detailed quantity requirements, ranging from splitting rails (125 to 150 per day) to hoeing cotton ("70 to 300 rows an acre long" per day), defined daily production expectations. Labor "lost by absence, refusal or neglect to perform" prompted a fixed fifty-cent financial penalty, which increased incrementally for unexcused absences, and included dismissal (with an accompanying loss of share wages or cash wage balances, as applicable) upon more than one day's unexcused absence. Each worker's personal appearance, as well as housing and surrounding area, remained subject to surprise inspections to ensure a "neat condition." The overall workforce had to supply its own nurse, stock minder, and foreman, the latter responsible for managing workers and serving as their representative with the employer. "Freedmen's Labor in South Carolina – Form of Contract," *Daily Sentinel*, January 5, 1866, 1.

[74] Ibid. By way of example, in 1882, the Grimes family unilaterally imposed a five-page series of nonnegotiable rules on any person applying to become a sharecropper on their Pitt County, North Carolina, property, detailing specific requirements of the engagement ranging from proper storage of the Grimes family's portion of any crops to the family's exclusive right to gin and package (at the sharecropper's expense) any cotton raised on the property. Account Book, 1882-1883 (folder 388), Grimes Family Papers, 1713-1947,

Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill.

[75] By accepting the contract, the laborer acknowledged both the validity and enforceability of the employer's financial records (primarily as to any advances, fines, and forfeitures assessed against the laborer), and the admissibility of those records into evidence in any legal proceedings. Workers also forfeited the right to sell any agricultural products, which would have included his or her share wages, without the employer's prior approval. In exchange for those additional rights, the employer agreed to treat workers "with justice and kindness," provide housing with a quarter acre of land (for gardening) and firewood privileges, and pay "hirelings" with a communal crop share (a one-third interest in both the vegetable crops "gathered and prepared for market and the net proceeds from ginned cotton (or its equivalent market value). In addition, "when desired," the employer agreed "to furnish the usual bread and meat rations, to be accounted for at the market price out of their share of the crop." "Freedmen's Labor in South Carolina – Form of Contract," *Daily Sentinel*, January 5, 1866, 1.

[76] Ibid.; "Contracts with the Freedmen," *Daily Sentinel*, January 13, 1866, 2.

[77] Roger L. Ransom and Richard Sutch, *One Kind of Freedom: The Economic Consequences of Emancipation* (Cambridge: Cambridge University Press, 1977), 60-61; *Public Laws of North Carolina, 1866,* ch. 59.

[78] *Reports of the Assistant Commissioners of Freedmen,* 39th Cong., 2nd Sess., Sen. Exec. Doc. 6, 104.

[79] Ibid.; *Public Laws of North Carolina, 1866,* ch. 59; *Public Laws of North Carolina, 1868-'69,* ch. 117, § 1.

[80] *Public Laws of North Carolina, 1866*, ch. 58. The 1867 amendments included an additional one-hundred-dollar penalty for both the bad actor and the former servant, as well as criminal misdemeanor liability punishable with a fine of up to one hundred dollars and up to six months imprisonment. As an apparent accommodation for local enforcement discretion, the statute did not specify whether criminal liability applied to both the bad actor and the former servant. *Public Laws of North Carolina, 1866 '67*, ch. 124.

[81] Edwards, "The Problem of Dependency," 331-35; *Public Laws of North Carolina, 1868-'69*, ch. 156, §§ 5, 13-15, 32; *Laws and Resolutions of North Carolina, 1876-'77*, ch. 283, § 1; *Public Laws of North Carolina, 1868-'69*, ch. 117, § 4; *Laws and Resolutions of North Carolina, 1889*, ch. 444; *Laws and Resolutions of the State of North Carolina Passed by the General Assembly at its Session of 1891, Begun and Held in the City of Raleigh on Wednesday, the Eighth Day of January, A.D. 1891*, ch. 106 (Raleigh, NC: Josiah Turner, 1891) (amending the criminal penalties for crime of false pretenses); *Laws and Resolutions of North Carolina, 1876-'77*, ch. 283, §§ 1, 6; *Laws and Resolutions of the State of North Carolina, Passed by the General Assembly at its Session of 1883, Begun and Held in the City of Raleigh, on Wednesday, the Third Day of January, A.D. 1883*, ch. 224 (Raleigh, NC: Ashe & Gatling, 1883).

[82] Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015),166-67; Edwards, "The Problem of Dependency," 336-38.

[83] *Wiswall v. Brinson*, 32 N.C. 554, 569, 578 (1849) (Ruffin, C.J., dissenting) (italics in original).

[84] Edwards, “The Problem of Dependency,” 337-40.

AFTERWORD

On July 11, 1866, four months after enactment of North Carolina's Black Code, a white Tar Heel native's letter to his daughter devolved into a lamentation over the state's misguided General Assembly. "This legislature will not realize the condition of the country," he complained. "It has not the lofty patriotism and statesmanship to meet the new state of things _ It sticks to old prejudices, which every nation have ignored but us _ It glories in them and is willing to die martyrs to them, as if they were truths on which the salvation of their souls depended _ What else or worse could ignorant barbarians do?" He foresaw an ignominious future for the lawmakers of his beloved home state: "[F]ifty years from this day will present this General Assembly to an unprejudiced world, as a wretched remnant of an ignorant slave oligarchy with its head cut off and its body full of poisonous hate." Those frustrations stemmed in part from the writer's own intimate familiarity with the morass created by the state's elected officials. He had experienced firsthand the disingenuity of state lawmakers clamoring for reunification through calculated ingratiation with a hostile Congress while also holding fast to antebellum conventions and institutions. He had even aided their efforts.

Despite the writer's assistance, and legislators' nearly complete embrace of his recommendations, the state was no closer to readmission into the Union. The writer's critical assessment of the General Assembly is curious, however, given the nature of the assistance he had provided. As the primary architect of the state's Black Code, he bore much the same responsibility as the lawmakers whose ineptitude he now lambasted. Having crafted the four-month-old surreptitious codification of antebellum racial

stratification, Bartholomew F. Moore's complaints of a prejudiced slave oligarchy resounded with inexplicable sanctimony.[1] After all, his Code had girded that system.

Thirty years later, the United States offered little indication of the approaching unprejudiced world Moore had predicted. The country, at least its southern region, more closely resembled the racially-divisive environment into which Moore and others like him had introduced eleven black codes between 1865 and 1867. Although "in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens," North Carolina's Black Code lingered. Notwithstanding the lone plaintive objections of justice John Marshall Harlan to the *Plessy* result, North Carolina had and continued to maintain a racial caste system. The state's constitution, with its 1875 "third generation inclusive" definition of "person of negro descent," was not color-blind. It instead knew and tolerated distinct classes among its citizens, including within its mandated "separate public schools." While the "humblest" may have been "the peer of the most powerful" elsewhere, that did not hold true for the Old North State, where the persistence of its Black Code had solidified and sustained racial stratification until Jim Crow could gain his bearings.[2]

Justice Harlan warned of the enduring noxious effects of the black codes. "State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races." His admonition evokes Moore's handiwork, regardless of how fair or moderate North Carolina's Code later came to be categorized by the relevant historiography. Yet seven of Harlan's colleagues concluded

that no "annoyance or oppression of a particular class" resulted from a public accommodation rendered inherently unequal by race-based separate access. Had he not passed away eighteen years earlier, Moore might have been comforted by the *Plessy* result. North Carolina lawmakers were no longer the only men to be counted among the "wretched remnant of an ignorant slave oligarchy with its head cut off and its body full of poisonous hate."[3] The journey that culminated with segregation and *Plessy* traced its path back to the black codes.

North Carolina's journey started earlier, with the 1838 judicial validation of a racial caste system. William Gaston immunized from constitutional attack a law that he acknowledged "capriciously and by way of favoritism" singled out free blacks for punishment with involuntary labor, simply because of their race. The man Moore previously convinced of a slave's inherent right to self-defense – the same man who earlier praised his home state's "foremost" position "in Liberty's story" and steadfast refusal "to crouch to oppression" – himself crouched to excuse racial subjugation as an appropriate exercise of legislative discretion "to produce in effect that reasonable and practical equality in the administration of justice which it is the object of all free governments to accomplish."[4] The ensuing statutory diminutions of the freedom accorded free blacks bred familiar acceptance among white North Carolinians of the self-fulfilling racial primacy afforded by slavery.

Military defeat stripped southerners of the repressive reassurance of their "peculiar institution." The abolition of slavery – the quintessential racial hierarchy, balancing both superiority and subjugation – left in its stead an unrequited sense of white entitlement. North Carolina and its southern compatriots filled that void with the black

codes. North Carolina's Code offered legislative sustenance for white supremacy, a codified racial caste system designed to placate the white populace and to mollify suspicious northerners, all to the detriment of the freedpeople. The Code was no short-lived placeholder. It entrenched stereotypes of black inferiority, fostered social separation along racial lines, and concentrated racial control within the unrestrained enforcement discretion of local officials, all the while holding the door ajar for Jim Crow's ultimate arrival. As slavery's surrogate, the Black Code's statutory evasion of emancipation enabled decades of innovative discriminatory tactics.

To dismiss North Carolina's Code as moderate or progressive is to ignore justice Harlan's objection to the inherent inequality of race-based segregation, "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." To ignore the Code is to embrace the mantra of William Faulkner's V.K. Ratliff: "[T]hank God men have done learned how to forget quick what they ain't brave enough to try to cure."[5] As an all-too-often overlooked aspect of North Carolina's past, one that defies the swagger of Tar Heel exceptionalism, the Black Code provided an apt prologue for the difficulties that would follow.

End Notes

[1] Bartholomew F. Moore to Lucy Catherine Capehart, July 11, 1866, Moore, Blount, and Cowper Family Papers, 1789-1990, Southern Historical Collection, The Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill.

[2] *Plessy v. Ferguson*, 163 U.S. 137, 559-60 (Harlan, J., dissenting) (1896); N.C. Const. art. XIV, § 8, art. IX, § 2 (as amended, 1875).

[3] *Plessy*, 163 U.S. at 560-61 (Harlan, J., dissenting), 550; Bartholomew F. Moore to Lucy Catherine Capehart, July 11, 1866, Moore, Blount, and Cowper Family Papers, Southern Historical Collection.

[4] *State v. Manuel*, 20 N.C. 144, 163 (1838).

[5] *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting); William Faulkner, *The Hamlet* (1940; New York: Random House, 1956), 86.

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Ferrell v. Boykin, 61 N.C. 9 (1866).

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APPENDIX 1: SLAVE AND AGRICULTURE DATA FOR NORTH CAROLINA, MISSISSIPPI, AND SOUTH CAROLINA – 1850 AND 1860

	1850 Census			1860 Census		
Data Point	**North Carolina**	**Mississippi**	**South Carolina**	**North Carolina**	**Mississippi**	**South Carolina**
Total State Population	869,039	606,526	668,507	992,622	791,305	703,708
Total Slave Population	288,548	309,878	384,984	331,059	436,631	402,406
Slave Population as % of Total	33.20%	51.09%	57.59%	33.35%	55.18%	57.18%
Total Slaveowner Population	28,303	23,116	25,596	34,658	30,943	26,701
Slaveowner Population as % of Total	3.26%	3.81%	3.83%	3.49%	3.91%	3.79%
Total Number of Farms	56,963	33,960	29,967	75,203	42,840	33,171
Total Acres of Improved Farmland	5,453,975	3,444,358	4,072,551	6,517,284	5,065,755	4,572,060
Average Acres per Farm	369	309	541	316	370	488
Average Number of Slaves per Slaveholder	10.2	13.4	15.0	9.6	14.1	15.1
Average Number of Slaves per Farm	5.1	9.1	12.8	4.4	10.2	12.1
Number of Slaveowners with less than 10 slaves	19,001	15,011	15,967	24,520	19,559	16,199
Number of Slaveowners with 10-49 slaves	8,726	6,979	8,155	9,394	9,709	8,856
Number of Slaveowners with 50-99 slaves	485	910	990	611	1,359	1,197
Number of Slaveowners with 100+ Slaves	91	216	484	133	316	449
% of Slaveowners with less than 10 slaves	67.13%	64.94%	62.38%	70.75%	63.21%	60.70%
% of Slaveowners with 10-49 slaves	30.83%	30.19%	31.86%	27.10%	31.38%	33.2%
% of Slaveowners with 50-99 slaves	1.71%	3.94%	3.87%	1.76%	4.39%	4.48%
% of Slaveowners with 100+ Slaves	0.32%	0.93%	1.89%	0.38%	1.02%	1.68%

Sources: U.S. Census Office, *Agriculture of the United States in 1860; Compiled from the Original Returns of the Eighth Census, under the Direction of the Secretary of the Interior* (Washington, DC: Government Printing Office, 1864), 85-87, 109-11, 129-31, 184, 188, 222, 247-48; U.S. Census Office, *Population of the United States in 1860; Compiled from the Original Returns of the Eighth Census, under the Direction of the Secretary of the Interior* (Washington, DC: Government Printing Office, 1864), 599, 604.

APPENDIX 2: THE BLACK CODE OF NORTH CAROLINA (1866)

Note: The statutes referenced in the "Statutory Citations" entitled column of the following chart are of two categories: (1) statutes comprising the North Carolina Black Code, which were part of North Carolina's 1866 Public Laws, and may be found at *Public Laws of the State of North Carolina, Passed by the General Assembly at the Session of 1866* (Raleigh, NC: Wm. E. Pell 1866); and (2) bracketed in the chart below, earlier North Carolina statutes of precedential significance to the statutes within that Black Code. As to that second category, most of the statutes are derived from two prior versions of North Carolina's legislative code: the 1854 "*Revised Code*," *Revised Code of North Carolina, Enacted by the General Assembly at the Session of 1854* (Boston: Little, Brown & Company, 1855); and the 1837 "*Revised Statutes*," *The Revised Statutes of the State of North Carolina, Passed by the General Assembly at the Session of 1836-37* (Raleigh, NC: Turner and Hughes, 1837).

Statutory Citations [Prior Relevant Statutes]	**Summary of Statutes**
Chapter 40 [1854 *N.C. Revised Code*, ch. 107; 1837 *N.C. Revised Statutes*, ch. 111]	Entitled "An Act Concerning Negroes and Persons of Color or of Mixed Blood."
- Ch. 40, § 1 [1854 *N.C. Revised Code*, ch. 107, § 79; 1837 *N.C. Revised Statutes*, ch. 111, § 74]	Operational definition of "persons of color": any blacks and their children "even where one ancestor in each succeeding generation to the fourth inclusive, is white."
- Ch. 40, § 2	All persons of color then residing in North Carolina have the same legal privileges, burdens, and disabilities previously granted to free blacks by pre-emancipation law "except as the same may be changed by law."
- Ch. 40, § 3	Persons of color have the same privileges as whites to seek legal and equitable redress by jury trial, and their answers in equitable proceedings have the same effect as any answers of white claimants.
- Ch. 40, § 4 [1854 *N.C. Revised Code*, ch. 5; 1837 *N.C. Revised Statutes*, ch. 5]	Amends existing apprenticeship law (1854 *N.C. Revised Code*, ch. 5), extending to black apprentices each master's existing statutory duty to provide "fit and necessary" room, board, clothing, and education (as well as $6 and a new Bible and suit of clothes upon expiration of apprenticeship) for white apprentices. Added a statutory preferential right for former slaveowners to bind as apprentices any of their former slaves deemed "suitable" for apprenticeship by any court.
- Ch. 40, § 5	Ratified as a lawful marriage any male and female couple (consisting of at least one former slave) who "now cohabit" as

	husband and wife. Such marriage considered effective as of the start date of the couple's cohabitation. Each couple required to certify the marriage (with payment of a 25-cent filing fee) with the clerk of court for the couple's county of residence.
- Ch. 40, § 6	Failure to certify by September 1, 1866, any marriage ratified under Section 5 is a misdemeanor offense "punishable at the discretion of the court." Each subsequent month of continued failure to certify the marriage is a separate misdemeanor.
- Ch. 40, § 7 [1854 *N.C. Revised Code*, ch. 50, §§ 11-13, 16]	Any contract involving a person of color as a contracting party must be in writing, signed by all parties, and witnessed by a literate white person if the contract is: (i) for the sale or purchase of livestock, (ii) for the sale or purchase of any other item valued at or above $10, or (iii) executed or executory for the payment of $10 or more. Otherwise, the contract is void as to all parties.
- Ch. 40, § 8 [1854 *N.C. Revised Code*, ch. 34, § 80, ch. 68, §§ 6-8, ch. 107, § 61; 1837 *N.C. Revised Statutes*, ch. 34, § 72, ch. 71, §§ 5, 6]	Any marriage between a white person and a person of color is void. Misdemeanor offense for any person authorized to consecrate or issue licenses for marriages to do so knowingly for an interracial couple. Penalty for that misdemeanor includes mandatory $500 penalty payable "to any person sueing [sic] for the same."
- Ch. 40, § 9 [1854 *N.C. Revised Code*, ch. 107, § 71; 1837 *N.C. Revised Statutes*, ch. 111, § 50]	Persons of color may provide sworn evidence as witnesses in court proceedings, but only in cases where the interests of a person of color are in issue, either as the victim or accused of an alleged crime or as to his/her personal or property rights. Otherwise, all such evidence is inadmissible without the litigants' mutual consent. Applicability of this section conditioned upon federal restoration of exclusive jurisdiction over North Carolina freedmen cases to the State's courts.
- Ch. 40, § 10 [1854 *N.C. Revised Code*, ch. 107, § 72; 1837 *N.C. Revised Statutes*, ch. 111, § 51]	Judges required to warn any person of color testifying as a witness of the obligation to provide truthful testimony.
- Ch. 40, § 11 [1854 *N.C. Revised Code*, ch. 107, § 44; 1837 *N.C. Revised Statutes*, ch. 111, § 78]	Assault of a white woman by a person of color with the intent to commit rape is punishable by death.
- Ch. 40, § 12	Except as otherwise provided in this Act, the State's criminal laws and associated penalties are applicable "in like manner" to whites and persons of color.
- Ch. 40, § 13	The justices of each county's court of pleas are authorized to elect "two distinct and independent court of wardens," one for the county's "white poor" and one for its "colored poor."
- Ch. 40, § 14	Courts and wardens selected pursuant to Section 13 have comparable powers, authority, duties, and liabilities, regardless of the race of the population served.
- Ch. 40, § 15	This section identifies and repeals or amends a series of enumerated free black or slave-specific laws in order to reconcile

	existing state laws with this Act Concerning Negroes and the 1865 North Carolina Constitutional Convention's ordinance abolishing slavery. Legislation repealed by this section included all but six sections (identified below by *) of chapter 107 (the "Slaves and Free Negroes" chapter) of North Carolina's 1854 Revised Code.
- Ch. 40, § 16	A catch-all backstop for § 15, repealing all legislative acts that address the same subjects as, or are otherwise "repugnant" to, this Act Concerning Negroes (other than this Act itself and any acts amended by § 15) passed prior to the General Assembly's 1866 legislative session.
- Ch. 40, § 17	The legislative repeals mandated by §§ 15 and 16 do not affect any pre-existing actions, accrued rights, or legal proceedings.
- Ch. 40, § 18	Offenses committed prior to this Act remain punishable, but lesser penalties mandated by this Act will apply to convictions for those offenses, and convicted persons of color will be punished "in like manner only as if he were a white man."
- Ch. 40, § 19	Legal actions pending as of the effective date of this Act remain unaffected by this Act and any laws repealed by this Act.
Chapter 35 [1854 *N.C. Revised Code*, ch. 30, ch. 107, §§ 75-77]	The justices of each county's court of pleas and quarter sessions are permitted, upon their majority vote, to establish "houses of correction, with workshops and other suitable buildings for the safe keeping, correcting, governing and employing of offenders legally committed thereto" (including farms) and to implement any rules "as they may deem proper, for the kind and mode of labor, and the general management of said houses." Details the intended structure for these institutions, investing local officials with significant autonomy and discretion in their operations.
Chapter 42 [1854 *N.C. Revised Code*, ch. 34, § 43, ch. 107, § 60; 1837 *N.C. Revised Statutes*, ch. 34, § 44, ch. 111, § 69]	Misdemeanor offense for vagrancy, applicable to any person: (i) potentially able to work who has "no apparent means of subsistence" and fails to support himself (and, if applicable, his family) by "honest occupation"; *or* (ii) whose time is spent "in dissipation," "gaming," "sauntering about without employment," or pursuing "undue or unlawful means." Upon arrest, the offender may be released on recognizance bond, subject to payment of all court costs and conditioned upon "good behavior and industrious, peaceable deportment for one year." Upon violation of bond requirements, offenders may be prosecuted for vagrancy and, if convicted, punished (in the court's discretion) by fine or incarceration, or both, or by a sentence to "the workhouse for such time as the court may think fit."
Chapter 56 [1854 *N.C. Revised Code*, ch. 107, §§ 75-77; 1837 *N.C. Revised Statutes*, ch. 111, §§ 86-89]	Discretionary alternative penalty for any litigant ordered to pay fines for criminal convictions, child support for bastard children, or court costs: court is permitted to sentence such litigant to a house of correction for up to 12 months "as the court may deem proper," unless the litigant opts to be bound via indenture as an apprentice "for such time and at such price as the court may direct."
Chapter 57 [1854 *N.C. Revised Code*, ch. 34, §§ 104, 105, ch. 48, §§ 3, 4]	Misdemeanor offense to pursue or injure, with the intent to steal, another person's livestock (regardless of whether the offender gains possession of the animal), or to assist or facilitate such acts by another person.

Chapter 58 [1854 *N.C. Revised Code*, ch. 34, §§ 12, 81]	Civil liability for any person who entices an indentured or contracted servant to violate that obligation by leaving the employer's service, or who knowingly harbors and hires any such obligated servant to be his own servant. Penalty is a judgment in the amount of twice the value of any assessed damages.
Chapter 59	Statutory lien protection for servant/agricultural worker wages payable by a portion of the crops cultivated by that employee, pursuant to a written employment contract. That protected portion of crops cannot be sold under execution against the employer or the landowner.
Chapter 60 [1854 *N.C. Revised Code*, ch. 34, § 21, ch. 48, § 4]	Misdemeanor offense to trespass upon another person's premises after being forbidden to do so. Misdemeanor offense to enter another person's premises and take that other person's wood or other property; escalated to larceny if done with felonious intent. Limited exception for the daytime, unarmed retrieval of roaming livestock, if the accused has previously filed a sworn affidavit to that effect with a local justice of the peace.
Chapter 64 [1854 *N.C. Revised Code*, ch. 34, §§ 16-17, ch. 107, §§ 35-39; 1837 *N.C. Revised Statutes*, ch. 34, §§ 17-18, ch. 111, §§ 35-39]	Any person convicted of attempting to incite "a spirit of insurrection, conspiracy, sedition or rebellion against the government of the State . . . shall" be punished by one hour in the pillory, "one or more public whippings not less than thirty-nine lashes each," *and* 12 months' imprisonment. Death penalty for any person convicted of participating in, agreeing to join, persuading others to join, or aiding and abetting "a state of rebellion or insurrection against the government of the State . . . or a conspiracy to make such rebellion or insurrection."
*1854 *N.C. Revised Code*, ch. 107, § 54	Misdemeanor offense for any "free negro" to migrate into North Carolina. Continued unlawful presence within the State constitutes multiple punishable offenses. Penalty of $500 for each conviction, and offender may be "hired out" to satisfy penalty.
*1854 *N.C. Revised Code*, ch. 107, § 55	Anyone bringing a "free negro" into North Carolina subject to a $500 fine for each free negro. Not applicable if the free negro is employed as a servant or crew member of a vessel and leaves the State with employer.
*1854 *N.C. Revised Code*, ch. 107, § 56	Unless currently residing lawfully in North Carolina, "free negroes" and their children can "never" become lawful residents of the State "by any length of time." Such free negroes under age 16 required to be removed from the State; misdemeanor offense and $500 fine for those that remain in-state.
*1854 *N.C. Revised Code*, ch. 107, § 57	Any "free negro" lawfully residing in North Carolina who leaves the State and remains absent for at least 90 days is no longer a lawful North Carolina resident and cannot lawfully return, unless absence caused by illness "or other unavoidable occurrence."
*1854 *N.C. Revised Code*, ch. 107, § 58	Imposes statutory "duty" on all county solicitors and grand juries to pursue and prosecute all cases involving violations of the laws relating to the migration of "free negroes."
*1854 *N.C. Revised Code*, ch. 107, § 66	Misdemeanor offense for any "free negro" to carry or keep at home any firearm or knife without a license issued by his/her county court of pleas and quarter-sessions.

*Sections from North Carolina's 1854 *Revised Code* expressly retained by the North Carolina Black Code.

APPENDIX 3: NORTH CAROLINA CONVICTION AND INCARCERATION DATA – 1870-1900

Table 1 – North Carolina State Population

	White			Black			Combined
	Male	Female	Total	Male	Female	Total	Total
1870	325,705	352,765	678,470	192,418	199,232	391,650	1,070,120
1880	424,944	442,298	867,242	262,363	268,914	531,277	1,398,519
1890	523,155	532,227	1,055,382	275,994	286,571	562,565	1,617,947

Table 2 – Distribution of State Population

	White			Black			Combined
	Male	Female	Total	Male	Female	Total	Total
1870	30.44%	32.96%	63.4%	17.98%	18.62%	36.60%	100.00%
1880	30.39%	31.63%	62.01%	18.76%	19.23%	37.99%	100.00%
1890	32.33%	32.90%	65.23%	17.06%	17.71%	34.77%	100.00%

Sources: U.S. Census Office, *The Statistics of the Population of the United States in 1870, Compiled from the Original Returns of the Ninth Census, (June 1, 1870,) under the Direction of the Secretary of the Interior* (Washington, DC: Government Printing Office, 1872); U.S. Census Office, *The Statistics of the Population of the United States in 1880, Compiled from the Original Returns of the Tenth Census, (June 1, 1880), under the Direction of the Secretary of the Interior* (Washington, DC: Government Printing Office, 1883); U.S. Census Office, *Report on Population of the United States at the Eleventh Census: 1890* (Washington, DC: Government Printing Office, 1895).

Table 3 – Incarcerated Population

	White			Black			Combined	Larceny
	Male	Female	Total	Male	Female	Total	Total	Incarcerations[1]
11/1/1870 to 10/31/1871	86	1	87	286	16	302	389	234
11/1/1871 to 10/31/1872	101	1	102	376	15	391	493	109
1873 Data Not Available								
11/1/1873 to 10/31/1874	70	1	71	361	23	384	455	305
11/1/1874 to 10/31/1875	77	1	78	543	26	569	647	Unavailable
11/1/1875 to 10/31/1876	91	0	91	676	27	703	794	634
1877 Data Not Available								
11/1/1878	112	2	114	939	48	987	1,101	413
11/1/1880	110	2	112	832	49	881	993	383
11/1/1882	134	3	137	802	57	859	996	370
11/1/1884	132	7	139	888	58	946	1,085	390
11/1/1886	163	4	167	1,087	61	1,148	1,315	474
12/1/1887	225	5	230	1,114	65	1,179	1,409	480
12/1/1888	218	4	222	1,088	66	1,154	1,376	399
12/1/1889	233	5	238	1,080	58	1,138	1,376	411
12/1/1890	217	7	224	1,034	42	1,076	1,300	360
12/1/1891	216	7	223	855	43	898	1,121	236
12/1/1892	192	8	200	869	52	921	1,121	344
1/1/1894	194	7	201	907	68	975	1,176	423
1/1/1895	224	6	230	966	64	1,030	1,260	378
1/1/1896	225	7	232	955	58	1,013	1,245	337
1/1/1897	243	7	250	839	55	894	1,144	284
1/1/1898	238	4	242	825	47	872	1,144	272
1/1/1899	223	3	226	823	41	864	1,090	254
1/1/1900	138	4	142	677	40	717	859	430

[1]Persons convicted of larceny or larceny and receiving stolen goods transferred each year to the North Carolina State Penitentiary for incarceration.

Note: Data on incarcerations were maintained on an annual basis and assumed to be amounts as of December 31. Incarcerated population included persons confined in the state penitentiary and supervised by penitentiary officials in work projects across North Carolina.

Sources for Tables 3-7: "Report of the Board of Directors, &c., of the State Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina*, Session of 1871-72; "Report of Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina*, Session of 1872-73; "Annual Report Board of Directors of State Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina*, Session of 1874-75; "Report of Board of Directors of State Penitentiary," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina*, Session of 1876-77; "Report of the Board of Directors of the Penitentiary," *Public Documents of the General Assembly of North Carolina*, Session of 1879; "Report of the Board of Directors of the North Carolina Penitentiary," *North Carolina Executive and Legislative Documents*, Session of 1881; "Report of the Board of Directors of the North Carolina Penitentiary," *Executive and Legislative Documents of the State of North Carolina*, Session of 1883; "Biennial Report of the Officers of the North Carolina State Penitentiary," *Executive and Legislative Documents of the State of North Carolina*, Session of 1885; "Biennial Report of the State Penitentiary for the two fiscal years ending November 30, 1886," *Executive and Legislative Documents Laid Before the General Assembly of North Carolina*, Session of 1887; "Biennial Report of the North Carolina State Penitentiary," *Public Documents of the State of North Carolina*, Session of 1889; "Biennial Report of the State Penitentiary," *Public Documents of the State of North Carolina*, Sessions of 1891, 1893; "Annual Report of the State's Prison for 1893," "Annual Report of the State's Prison for 1894," *Public Documents of the State of North Carolina*, Session of 1895; "North Carolina Penitentiary – The Report of the Board of Directors and the General Manager for the Two Years, 1895 and 1896," *Public Documents of the State of North Carolina*, Session of 1897; "Report of the N.C. Penitentiary," *Public Documents of the State of North Carolina*, Session of 1899; "Biennial Report of State's Prison," *Public Documents of the State of North Carolina*, Session of 1901 (Raleigh, NC: various publishers, 1872-1901).

Table 4 – Distribution of Incarcerated Population

	White			Black		
	Male	**Female**	**Total**	**Male**	**Female**	**Total**
11/1/1870 to 10/31/1871	22.11%	0.26%	22.37%	73.52%	4.11%	77.63%
11/1/1871 to 10/31/1872	20.49%	0.20%	20.69%	76.27%	3.04%	79.31%
1873 Data Not Available						
11/1/1873 to 10/31/1874	15.38%	0.22%	15.60%	79.34%	5.05%	84.40%
11/1/1874 to 10/31/1875	11.90%	0.15%	12.06%	83.93%	4.02%	87.94%
11/1/1875 to 10/31/1876	11.46%	0.00%	11.46%	85.14%	3.40%	88.54%
1877 Data Not Available						
11/1/1878	10.17%	0.18%	10.35%	85.29%	4.36%	89.65%
11/1/1880	11.08%	0.20%	11.28%	83.79%	4.93%	88.72%
11/1/1882	13.45%	0.30%	13.76%	80.52%	5.72%	86.24%
11/1/1884	12.17%	0.65%	12.81%	81.84%	5.35%	87.19%
11/1/1886	12.40%	0.30%	12.70%	82.66%	4.64%	87.30%
12/1/1887	15.97%	0.35%	16.32%	79.06%	4.61%	83.68%
12/1/1888	15.84%	0.29%	16.13%	79.07%	4.80%	83.87%
12/1/1889	16.93%	0.36%	17.30%	78.49%	4.22%	82.70%
12/1/1890	16.69%	0.54%	17.23%	79.54%	3.23%	82.77%
12/1/1891	19.27%	0.62%	19.89%	76.27%	3.84%	80.11%
12/1/1892	17.13%	0.71%	17.84%	77.52%	4.64%	82.16%
1/1/1894	16.50%	0.60%	17.09%	77.13%	5.78%	82.91%
1/1/1895	17.78%	0.48%	18.25%	76.67%	5.08%	81.75%
1/1/1896	18.07%	0.56%	18.63%	76.71%	4.66%	81.37%
1/1/1897	21.24%	0.61%	21.85%	73.34%	4.81%	78.15%
1/1/1898	21.36%	0.36%	21.72%	74.06%	4.22%	78.28%
1/1/1899	20.46%	0.28%	20.73%	75.50%	3.76%	79.27%
1/1/1900	16.07%	0.47%	16.53%	78.81%	4.66%	83.47%

Sources: See Table 3.

Table 5 – Incarcerated Populations – Work Projects

	White			Black			Combined
	Male	Female	Total	Male	Female	Total	Total
11/1/1878	45	0	45	668	24	692	737
11/1/1880	63	0	63	621	8	629	692
11/1/1882	57	0	57	525	2	527	584
11/1/1884	65	0	65	611	0	611	676
11/1/1886	71	0	71	851	0	851	922
12/1/1887	183	0	183	1045	45	1090	1273
12/1/1888	174	0	174	977	53	1030	1204
12/1/1889	169	0	169	935	39	974	1143
12/1/1890	157	0	157	946	26	972	1129
12/1/1891	162	0	162	734	30	764	926
12/1/1892	159	0	159	806	40	846	1005
1/1/1894	170	0	170	839	44	883	1053
1/1/1895	182	0	182	890	38	928	1110
1/1/1896	160	0	160	782	32	814	974

Table 6 – Distribution of Work Project Populations

	White			Black		
	Male	Female	Total	Male	Female	Total
11/1/1878	6.11%	0.00%	6.11%	90.64%	3.26%	93.89%
11/1/1880	9.10%	0.00%	9.10%	89.74%	1.16%	90.90%
11/1/1882	9.76%	0.00%	9.76%	89.90%	0.34%	90.24%
11/1/1884	9.62%	0.00%	9.62%	90.38%	0.00%	90.38%
11/1/1886	7.70%	0.00%	7.70%	92.30%	0.00%	92.30%
12/1/1887	14.38%	0.00%	14.38%	82.09%	3.53%	85.62%
12/1/1888	14.45%	0.00%	14.45%	81.15%	4.40%	85.55%
12/1/1889	14.79%	0.00%	14.79%	81.80%	3.41%	85.21%
12/1/1890	13.91%	0.00%	13.91%	83.79%	2.30%	86.09%
12/1/1891	17.49%	0.00%	17.49%	79.27%	3.24%	82.51%
12/1/1892	15.82%	0.00%	15.82%	80.20%	3.98%	84.18%
1/1/1894	16.14%	0.00%	16.14%	79.68%	4.18%	83.86%
1/1/1895	16.40%	0.00%	16.40%	80.18%	3.42%	83.60%
1/1/1896	16.43%	0.00%	16.43%	80.29%	3.29%	83.57%

Note: No information concerning racial composition of inmates assigned to work projects is available for 1897-1900.

Sources: See Table 3.

Table 7 – Percentage of Incarcerated Population on Work Projects

	White			Black		
	Male	**Female**	**Total**	**Male**	**Female**	**Total**
11/1/1878	4.09%	0.00%	4.09%	60.67%	2.18%	62.85%
11/1/1880	6.34%	0.00%	6.34%	62.54%	0.81%	63.34%
11/1/1882	5.72%	0.00%	5.72%	52.71%	0.20%	52.91%
11/1/1884	5.99%	0.00%	5.99%	56.31%	0.00%	56.31%
11/1/1886	5.40%	0.00%	5.40%	64.71%	0.00%	64.71%
12/1/1887	12.99%	0.00%	12.99%	74.17%	3.19%	77.36%
12/1/1888	12.65%	0.00%	12.65%	71.00%	3.85%	74.85%
12/1/1889	12.28%	0.00%	12.28%	67.95%	2.83%	70.78%
12/1/1890	12.08%	0.00%	12.08%	72.77%	2.00%	74.77%
12/1/1891	14.45%	0.00%	14.45%	65.48%	2.68%	68.15%
12/1/1892	14.18%	0.00%	14.18%	71.90%	3.57%	75.47%
1/1/1894	14.46%	0.00%	14.46%	71.34%	3.74%	75.09%
1/1/1895	14.44%	0.00%	14.44%	70.63%	3.02%	73.65%
1/1/1896	12.85%	0.00%	12.85%	62.81%	2.57%	65.38%

Note: No information concerning racial composition of inmates assigned to work projects is available for 1897-1900.

Sources: See Table 3.

Table 8 – Superior Court Dispositions for Craven and Henderson Counties, North Carolina, 1899-1991

				Distribution	
Craven County	White	Black	Total	White	Black
Population (per 1890 US Census)	7,175	13,358	20,533	34.94%	65.06%
Defendants[1]	24	70	94	25.53%	74.47%
Larceny Indictments[2]	1	26[3]	27	3.70%	96.30%
Larceny Convictions	1	23	24	4.17%	95.83%
Larceny Incarcerations	1	12	13	7.69%	92.31%

[1]Cumulative Data for Craven County Superior County Terms for Fall 1899, February 1890, and Spring 1890.
[2]Includes the crimes of larceny and larceny and receiving stolen goods.
[3]One black male convicted in three separate larceny indictments sentenced to one three-year term of imprisonment. A second black male convicted in two separate larceny indictments also sentenced to one three-year term of imprisonment.

Table 9

				Distribution	
Henderson County	White	Black	Total	White	Black
Population (per 1890 US Census)	11,211	1,378	12,589	89.05%	10.95%
Defendants[1]	64	25	89	71.91%	28.09%
Larceny Indictments[2]	5	6	11	45.45%	54.55%
Larceny Convictions	1	3	4	25.00%	75.00%
Larceny Incarcerations	1	2	3	33.33%	66.67%

[1]Cumulative Data for Craven County Superior County Terms for Fall 1899, February 1890, and Spring 1890.
[2]Includes the crimes of larceny and larceny and receiving stolen goods.

Sources: Henderson County Superior Court Criminal Statistics for the Fall 1889, Fall 1890, and Spring 1891 court terms, Henderson County Miscellaneous Court Papers 1861-1966, Superior and Court of Pleas, "Criminal Statistics," Craven County Superior Court Criminal Statistics for the Fall 1889, February 1890, and Spring 1890 court terms, Craven County Miscellaneous Records, 1757-1929, "Criminal Statistics," State Archives of North Carolina, Raleigh, NC.