

# Stories of Crimes, Trials, and Appeals in Civil War Era Missouri

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# STORIES OF CRIMES, TRIALS, AND APPEALS IN CIVIL WAR ERA MISSOURI

FRANK O. BOWMAN, III\*

## I. A LYNCHING IN BOONE COUNTY

Near dark on Friday, August 12, 1853, in Columbia, Missouri, Miss Nancy Hubbard, a fifteen-year-old white girl, was returning from a funeral with her older married sister, Mrs. Mary Jacobs, and her little daughter Amanda.<sup>1</sup> Miss Hubbard dismounted from her horse to open a gate when, so she said, a completely naked black man jumped out of a thicket and attempted to rape her.<sup>2</sup> According to Miss Hubbard, she struggled with her attacker for ten minutes and succeeded in fighting off the assailant, who fled. The commotion spooked Mrs. Jacobs' horse, which threw her and her daughter. The daughter ran to the house of a neighbor, who dashed to the scene to find Miss Hubbard and Mrs. Jacobs, but no assailant.<sup>3</sup> The locals seized and then released a number of black men as suspects before settling on Hiram, a slave, as Miss Hubbard's attacker.<sup>4</sup>

Hiram was brought before two local justices of the peace, John Ellis and Walter C. Maupin,<sup>5</sup> who sat in Cedar Township,<sup>6</sup> a section of Boone County

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\* Floyd R. Gibson Missouri Endowed Professor of Law. This Article could not have been written without the laborious digging in historical sources performed by my tireless research assistants, Bradley Dixon, Mark Ellebracht, Michael Henderson, Michael Spillane, and Scott Snipkie, as well as the resources and advice provided by John Dethman of the University of Missouri Law Library and the staffs of the Missouri State Archives and the Western Historical Manuscripts Collection at the University of Missouri.

1. WILLIAM F. SWITZLER, *HISTORY OF BOONE COUNTY, MISSOURI* 371 (St. Louis, Nixon-Jones Printing Co. 1882); *see also* NORTH TODD GENTRY, *THE BENCH AND BAR OF BOONE COUNTY MISSOURI* 253 (1916).

2. SWITZLER, *supra* note 1, at 371. Ever since I first read about this incident, the victim's account of the assault has seemed highly implausible. Even supposing a black man in pre-Civil War Missouri were to be suicidal enough to attempt the rape of a white girl in the daytime in front of witnesses, the claim that the attacker was lurking in the bushes in the nude takes the affair from the deeply improbable to the completely fantastic. Whatever the truth, the white community of Columbia took Miss Hubbard's tale in deadly earnest.

3. *Id.* at 371–72.

4. *Id.* at 372.

5. *Id.*

6. GENTRY, *supra* note 1, at 72 (identifying Ellis and Maupin as justices of the peace for Cedar Township).

just south of Columbia proper.<sup>7</sup> The JPs conducted a factual inquiry, characterized in one source as a “trial,”<sup>8</sup> and discharged Hiram.<sup>9</sup> However, the citizenry was not satisfied with that outcome, and on Tuesday, August 16, 1853, someone obtained and executed a warrant for Hiram’s arrest from Justice of the Peace Thomas Porter,<sup>10</sup> who sat in Columbia Township.<sup>11</sup> On Saturday, August 20, Hiram appeared in the Columbia courthouse before yet another justice of the peace, David Gordon, and Columbia Recorder Francis T. Russell.<sup>12</sup> Although again called a “trial” by lay chroniclers of the period,<sup>13</sup> it is unclear whether the courthouse proceeding was a trial on the merits or only a probable cause hearing. A felony charge, even when brought against a slave, was not cognizable by a justice of the peace and could only be tried on the merits by the circuit court judge,<sup>14</sup> who at the time was William A. Hall.<sup>15</sup> However, if the charge against Hiram was limited to attempted rape, the penalty for attempted rape of a white female by a negro was

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7. Illustrated Historical Atlas of Boone County, Missouri (1875), reproduced on inside cover of SWITZLER, *supra* note 1.

8. *See id.* at 372. It is not clear what sort of legal proceeding Justices Ellis and Maupin conducted. If the offense suspected was a felony, justices of the peace lacked jurisdiction to try such a case on the merits. *See* Justices’ Courts §§ 2, 9, Mo. Rev. Stat. 372–73 (1835). But *see infra* notes 16–17 and accompanying text on the question of whether the charges against Hiram would have constituted a felony. Justices of the peace were empowered to issue arrest warrants and to examine a person accused by warrant of a felony and the evidence against him to determine whether probable cause existed to bind him over for trial. Justices’ Courts §§ 3–5, Mo. Rev. Stat. 372–73 (1835) (authorizing justices of the peace to issue warrants for criminal offenses); §§ 8–9 (setting forth the procedure for examining a defendant and evidence against him to determine whether the defendant should be bound over for trial in the circuit court). No warrant had been issued for Hiram’s arrest at the time, so the proceeding may have been a sort of informal hybrid essentially aimed at determining whether probable cause existed to hold and charge Hiram.

9. SWITZLER, *supra* note 1, at 372. An interesting sidelight on the weakness of the case against Hiram appears from the fact that Justice of the Peace Ellis was ousted from his office in 1861 for refusal to take the required oath of loyalty to the Union. GENTRY, *supra* note 1, at 265. One may reasonably assume that he was not a secret abolitionist or disposed to be unduly generous in his assessment of charges against the town’s slave population.

10. SWITZLER, *supra* note 1, at 372.

11. GENTRY, *supra* note 1, at 73.

12. Switzler characterizes Gordon as a justice of the peace and Russell as recorder of Columbia, SWITZLER, *supra* note 1, at 372, but both men were justices of the peace of Columbia Township at one time, GENTRY, *supra* note 1, at 73. David Gordon later served five terms as a county court judge, beginning in 1863; he died in office in 1875. *Id.* at 67. Francis T. Russell was a substantial citizen of Columbia. Among other things, he served as a curator of the University of Missouri and was integrally involved in creating a faculty of law at the university. SWITZLER, *supra* note 1, at 231, 298, 300.

13. SWITZLER, *supra* note 1, at 372.

14. *See supra* note 8; *see also* State v. Gilbert, 24 Mo. 380, 381 (1857) (noting that, while a misdemeanor charge against a slave is triable by a justice of the peace, a felony proceeding against a slave must be instituted by indictment in the ordinary way).

15. GENTRY, *supra* note 1, at 62.

castration rather than death or imprisonment,<sup>16</sup> and the Missouri Supreme Court had held in 1844 that this crime was not a felony.<sup>17</sup> Whatever the technical character of the proceeding, both defendant Hiram and the State were represented by counsel. Hiram's owner, Edward Young, retained James S. Rollins and Samuel A. Young to represent him.<sup>18</sup> The case was prosecuted by Odon Guitar.<sup>19</sup> Rollins and Guitar, in particular, were or would later become men of note.

James S. Rollins was born in Kentucky in 1812, and educated in Kentucky, Pennsylvania, and Indiana. He not only "read law" under a prominent practitioner, but somewhat unusually for the time, also graduated from a law school.<sup>20</sup> He entered practice in Columbia, Missouri, in 1834, was elected to the state legislature as a representative in 1838 and 1840, and served as state senator from 1846 to 1850.<sup>21</sup> He was the (unsuccessful) Whig candidate for governor in 1848, and the leading (though again unsuccessful) Whig candidate for U.S. Senate in the same period.<sup>22</sup> By the time of Hiram's arrest in 1853, Rollins had also been a newspaper owner and editor, real estate speculator, and railroad booster.<sup>23</sup> In 1854, Rollins was again elected state representative, and in 1857 he lost the race for Missouri governor by only 230 votes.<sup>24</sup> Although a significant slave owner himself,<sup>25</sup> Rollins opposed extension of slavery to the territories<sup>26</sup> (by no means a popular view in

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16. Nathan v. State, 8 Mo. 631, 632 (1844).

17. *Id.*

18. SWITZLER, *supra* note 1, at 372.

19. *Id.*

20. Rollins attended Washington College, Pennsylvania, for three years, transferred to and graduated from Indiana University in Bloomington, Indiana, in 1830, read law for two years with a practitioner, and then attended and graduated from Transylvania Law School in Lexington, Kentucky, in 1834. *Id.* at 934.

21. GENTRY, *supra* note 1, at 51, 53.

22. SWITZLER, *supra* note 1, at 935. At the time, U.S. Senators were selected by the state legislature and not by popular vote. See Senators—United States, ch. 147, § 1, Mo. Rev. Stat. 1460 (1856), available at [http://books.google.com/books?id=MTETltYSr-EC&dq=Revised+Statutes+of+the+State+of+Missouri+1835&source=gbs\\_navlinks\\_s](http://books.google.com/books?id=MTETltYSr-EC&dq=Revised+Statutes+of+the+State+of+Missouri+1835&source=gbs_navlinks_s). Rollins' candidacy for the Senate occurred within the legislature and indicated his stature in the legislative wing of the Whig party.

23. SWITZLER, *supra* note 1, at 934; 2 WALTER B. STEVENS, CENTENNIAL HISTORY OF MISSOURI (THE CENTER STATE): ONE HUNDRED YEARS IN THE UNION 1820–1921, at 801 (1921).

24. SWITZLER, *supra* note 1, at 935; WILLIAM BENJAMIN SMITH, JAMES SIDNEY ROLLINS 28 (New York, DeVinne Press 1891). Another source puts the margin of defeat at 334 votes. *The Late Elections in Missouri*, N.Y. TIMES, Sept. 10, 1857, at 4.

25. SWITZLER, *supra* note 1, at 936–37. One source maintains that Rollins held thirty-four slaves at his home in Columbia in 1860. Missouri's Little Dixie, <http://littledixie.net/Slave%20Housing.htm> (last visited June 7, 2010). Another claims he was one of the largest slave owners in the entire state. 2 STEVENS, *supra* note 23, at 704.

26. SWITZLER, *supra* note 1, at 935. Rollins' views on slavery were convoluted. He owned slaves, but seems to have viewed the institution as an evil. He opposed the extension of slavery to the territories as a matter of policy, *id.*, but appears to have supported the "popular sovereignty"

antebellum central Missouri), and as the threat of southern secession loomed in 1860, Rollins placed himself firmly in the unionist camp.<sup>27</sup>

The tension between Rollins' economic interests as a wealthy owner of real and human property and his allegiance to the federal Union was a microcosm of the stresses tearing at Missouri generally and Boone County in particular in the late 1850s. Missouri was the only slave state north of the Mason–Dixon line and west of the Mississippi. Boone County, situated roughly thirty miles north of the state capital of Jefferson City and in the agricultural zone created by the flow of the Missouri River across the state from Kansas City to its junction with the Mississippi at St. Louis, was a part of “Little Dixie,” so-called because it was settled primarily by immigrants from the slave South who brought with them their peculiar institution and the peculiar culture built around it.<sup>28</sup> By 1860, Boone County had the third-largest number of slaves among the state's 114 counties, with 5,034.<sup>29</sup> On the other hand, Columbia, the Boone County seat, being close to the capital and home to the state university, was a relatively cosmopolitan place for the time and its leading citizens were not unaware that the state's economic future was tied just as closely to the urbanizing and industrializing northern states as to the slave South. When the secession crisis broke in 1861, the governor, Claiborne Fox Jackson, and the state legislature tried to take Missouri into the Confederacy. After a series of pitched battles between pro-Union and pro-Confederate citizen armies, the secessionist governor and legislators were run out of the state and Missouri's allegiance to the Union was precariously upheld.<sup>30</sup>

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approach of allowing the citizens of each prospective state to choose whether slavery should be permitted, *id.* at 381 (recounting the events of an 1855 public meeting in Boone County called to debate the events in Kansas, in which Rollins supported resolutions endorsing the popular sovereignty approach of the Kansas–Nebraska Act and opposed resolutions that, in effect, supported extension of slavery into the territories regardless of the views of the inhabitants). A possible indicator of Rollins' personal views on slavery is an 1860 letter to William F. Switzler in Rollins' papers, and apparently in his hand, noting that the author is “opposed to all kinds of human merchandise” and observing that the Founders viewed slavery as a “cankrous ulcer, baleful to the body politic where ever it existed,” but implicitly defending the constitutional right of states to adopt or reject slavery within their own boundaries. Western Historical Manuscripts Collection, University of Missouri, Collection No. C1026, file 191 (on file with author).

27. SWITZLER, *supra* note 1, at 935.

28. T.J. STILES, *JESSE JAMES: LAST REBEL OF THE CIVIL WAR* 10–11 (2002).

29. *Slaves in Missouri in 1860*, HOWARD COUNTY ADVERTISER, Jan. 9, 1903, available at <http://www.usgennet.org/usa/mo/topic/afro-amer/slavesinmo.html>. Howard County, which adjoins Boone to the west along the Missouri River, had the second-largest slave population in 1860, with 5,886. *Id.*

30. This two-sentence summary of the events in Missouri at the outset of the Civil War is a tremendous oversimplification of a complex history. For the full story, see 3 WILLIAM E. PARRISH, *A HISTORY OF MISSOURI* 1–86 (1973).

In 1860, Rollins, a unionist Whig, was elected to the first of two terms in the U.S. House of Representatives, serving from 1861 to 1864.<sup>31</sup> After the Civil War, he returned to civic activism and state politics, securing election to the Missouri state senate in 1868.<sup>32</sup> While there, he was instrumental in ensuring that the University of Missouri, which opened in 1841 but had fallen on hard times during the war,<sup>33</sup> would remain in Columbia.<sup>34</sup> As a result, Rollins is known as the “Father of the University of Missouri.”<sup>35</sup> Throughout his long, successful, and lucrative career,<sup>36</sup> Rollins continued to practice law in both criminal and civil matters, though he was known to fret that the routine of law practice did not give adequate scope to a man with broad interests and ambitions.<sup>37</sup>

Odon Guitar, Hiram’s prosecutor, was fifteen years younger than Rollins, having been born in Madison County, Kentucky, in 1827.<sup>38</sup> His parents moved to Boone County, Missouri, when he was two, and Guitar lived in central Missouri for the rest of his life. He graduated from the University of Missouri in 1846, departing even before his degree was conferred to join American forces in the Mexican War.<sup>39</sup> Upon his return, Guitar read law with his uncle, John B. Gordon,<sup>40</sup> and was admitted to the bar in 1848.<sup>41</sup> Like many young lawyers, Guitar sought to gain experience and a reputation by serving as a prosecutor. In 1852, he became the Boone County attorney, succeeding Rollins, and he held that office when Hiram was arrested.<sup>42</sup> Like Rollins, Guitar was both a slaveholder<sup>43</sup> and an ardent unionist.<sup>44</sup> When the

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31. SWITZLER, *supra* note 1, at 935, 937.

32. *Id.* at 937; *see also* GENTRY, *supra* note 1, at 53.

33. *See* JAMES OLSON & VERA OLSON, *THE UNIVERSITY OF MISSOURI: AN ILLUSTRATED HISTORY* 6–7 (1988).

34. SWITZLER, *supra* note 1, at 937.

35. OLSON & OLSON, *supra* note 33, at 3 (describing Rollins’ contributions to the rescue of the university and noting that in 1872, the board of curators of the university recognized him formally as “*Pater Universitatis Missouriensis*”).

36. In 1858, Rollins had the second-highest tax bill in Boone County, second only to Eli Bass. By 1881, Rollins was the largest taxpayer in the county. SWITZLER, *supra* note 1, at 392.

37. “Major Rollins, of Boone County, was a member of the bar, but, like [Thomas Hart] Benton, preferred political to a professional life . . . .” John W. Henry, *Personal Recollections, in THE HISTORY OF THE BENCH AND BAR OF MISSOURI* 388 (A.J.D. Stewart ed., St. Louis, The Legal Publishing Co. 1898) [hereinafter *BENCH AND BAR OF MISSOURI*].

38. SWITZLER, *supra* note 1, at 877.

39. *Id.*

40. *Id.* Gordon was a prominent Columbia attorney who served five terms in the Missouri legislature. GENTRY, *supra* note 1, at 51.

41. SWITZLER, *supra* note 1, at 877.

42. GENTRY, *supra* note 1, at 54. James Rollins was Boone County attorney from 1848 to 1852. Guitar took over the office in 1852 and held it until the middle of the Civil War in 1863. *Id.*

43. Guitar is said to have owned seven household slaves in 1860. Missouri’s Little Dixie, *supra* note 25.

war broke out, Guitar was commissioned by the unionist governor, Hamilton Gamble,<sup>45</sup> to recruit a regiment of volunteers for federal service. He became, in effect, the military commandant of central Missouri (and sometimes of other sections), and by the close of the war held the rank of brigadier general of volunteers and of the Missouri State Militia.<sup>46</sup> After the war, General Guitar (as he was ever after called) returned to law practice, and served two terms in the Missouri legislature.<sup>47</sup> Guitar's private practice was primarily criminal, and he seemed to have a particular affinity for murder cases. He is reputed to have defended over 140 homicides, and several sources claim that only one of his clients was ever hung, and only five ever went to prison.<sup>48</sup> We will discuss one of his few failures presently.<sup>49</sup>

On Saturday, August 20, 1853, when Hiram was brought to court, the courthouse was packed with agitated spectators and a crowd had gathered outside. At about 3:00 p.m., some of the people outside rushed the courtroom and tried to drag Hiram out to hang him. They got a rope over his neck, which Rollins managed to cut once, but another was put around him and he was dragged out to a nearby wood. Rollins followed the mob, stood before them, and implored them to return Hiram to official custody for a fair trial.<sup>50</sup> Such was his eloquence that, amazingly, the mob gave the defendant back to the sheriff.<sup>51</sup>

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44. SWITZLER, *supra* note 1, at 877.

45. 3 PARRISH, *supra* note 30, at 31 (describing Gamble's appointment as Missouri governor in 1861 by a state convention).

46. SWITZLER, *supra* note 1, at 877–78. *See also* THE BENCH AND BAR OF ST. LOUIS, KANSAS CITY, JEFFERSON CITY, AND OTHER MISSOURI CITIES 221 (Chicago, Am. Biographical Publ'g Co. 1884) [hereinafter BENCH AND BAR OF MISSOURI CITIES].

47. SWITZLER, *supra* note 1, at 878.

48. *Id.* at 879; BENCH AND BAR OF MISSOURI CITIES, *supra* note 46, at 221. However, this version of Guitar's record seems to involve a little selective counting. We know of at least four men he represented who were hung—John Chapman, a white man whose case we will consider presently, *see infra* Part II.B, Joe Robinson, a slave executed for murder in 1857, *see* SWITZLER, *supra* note 1, at 388, and the Underwood brothers, tried and executed in Macon County in 1873, *see* 4 STEVENS, *supra* note 23, at 279. Perhaps since Mr. Robinson confessed and had “no defence to make,” SWITZLER, *supra* note 1, at 388, the chroniclers only counted clients who went to trial, or more distressingly, as a slave, perhaps Robinson simply was not considered a real client. As for the Underwoods, it may be that the events in Macon County made little impression on Guitar's admirers back home in Columbia. Still, everybody agreed that Odon Guitar was a great criminal defense lawyer.

49. *See infra* Part II.B.

50. Rollins' appeal to the mob was apparently supported by William Switzler, the editor of the *Weekly Missouri Statesman* newspaper, as well as several other prominent local citizens. *See Negro Hung for Attempted Rape*, WKLY. MO. STATESMAN, Aug. 26, 1853, at 3.

51. SWITZLER, *supra* note 1, at 372–73. A rather different account of the affair appears in GENTRY, *supra* note 1, at 117. Gentry relates the story of the mob storming the courtroom, Rollins cutting the rope, his appeal to the mob, and the initial return of the prisoner to jail. However, he bowdlerizes the story's ghastly end by reporting that, due to Rollins' eloquent intervention, mob

The next day, Sunday, August 21, while in custody, Hiram—according to period accounts—confessed.<sup>52</sup> Monday the trial resumed, but the confession had the perverse effect of increasing mob agitation for summary justice. Odon Guitar, the prosecutor, and Rollins’ co-counsel, Colonel Samuel Young, addressed the crowd, appealed for calm, and urged them to do whatever they were going to do “decently and in order.”<sup>53</sup> They may also have urged the mob to disperse, but if so, that part of their plea does not come down to us. So, outside the courthouse, the mob convened a meeting and, incredibly, elected a chairman, Eli Bass, one of the largest plantation owners and slaveholders in Boone County.<sup>54</sup> The question before the meeting was not whether Hiram should be killed, but how—should he be hanged or burnt?<sup>55</sup> Mr. Bass put the question to a vote. Those in favor of hanging prevailed by a large margin. The mob then appointed a committee, chaired by George N. King,<sup>56</sup> charged with securing a rope, a cart, and a coffin, and with breaking into the jail to remove the prisoner and hang him “decently and in order.”<sup>57</sup> Over the protest of the sheriff, they did so, took Hiram to a nearby grove and

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violence was averted. It was, but only temporarily.

52. SWITZLER, *supra* note 1, at 373. One is suspicious of this highly convenient confession and disposed to wonder what methods were employed to secure it. Even in antebellum Missouri, a confession obtained by force, even from a slave, was inadmissible evidence. *Hector v. State*, 2 Mo. 135, 136 (1829) (excluding a confession to burglary obtained from the defendant, an African-American slave, by flogging him).

53. SWITZLER, *supra* note 1, at 373.

54. *Id.* In his account of the affair, Switzler refers to Bass as “one of our most respectable and influential citizens.” *Id.* Bass owned large tracts of land south of Columbia, considerable livestock, *id.* at 747, numerous slaves, and was in 1858 the largest taxpayer in Boone County, *id.* at 392. He was arguably the leading citizen of Boone County and of prewar central Missouri. For example, he was on the first Board of Curators of the University of Missouri in 1839. *Id.* at 261. During the war, Bass’s political views seem to have shifted to accommodate changing military and political tides. He appeared at a pro-secessionist meeting in April 1861, *id.* at 405, but in a unionist meeting on July 18, 1863, Switzler commended Bass’s vote at the Missouri state convention in favor of emancipation of the slaves in Missouri, *id.* at 432.

55. *Id.* at 373. Burning slaves accused of crimes against whites was apparently the brutal fashion of the time. On August 12, 1853, the same day the attempted rape of Miss Hubbard allegedly occurred, a Columbia newspaper reported that the citizens of Carthage, Missouri, had seized from the sheriff’s custody two slaves convicted of killing a white man, taken them into the countryside, and burned them. *See Negroes Burnt at Carthage*, WKLY. MO. STATESMAN, Aug. 12, 1853, at 3.

56. SWITZLER, *supra* note 1, at 373. We know little about Mr. King other than that he left Boone County to join the California gold rush in 1850, *id.* at 361–62, but he had apparently returned by 1853. Given the prevalence of vigilantism in the gold camps, perhaps King brought his enthusiasm for mob law back with him from California. Remarkably, we also know the names of the other members of the duly appointed lynching committee, which were published in the local newspaper. They were Henry Wilkinson, John Ballinger, William Breakey, William B. Cato, John Robinett, John Hume, William Hubbard, A.R. Vest, and R.P. Waters. *Id.* at 374; *Negro Hung for Attempted Rape*, *supra* note 50.

57. SWITZLER, *supra* note 1, at 373.

hung him.<sup>58</sup>

Obviously there would be no appeal for Hiram, at least in the courts of this world, so why does an article in a symposium devoted to criminal appeals open with an account of so disgraceful and savage a distortion of the legal process? The tale serves at least two introductory functions. First, it illustrates that in Missouri before the Civil War, criminal law was often a very public business. At least in locally prominent cases, a criminal trial was not something to be read about in the paper, but witnessed in person. It was not a sealed-off world of legal professionals. It was news, entertainment, spectacle.

Second, it is worth noting, even in this setting of mob violence, how important a role a certain subset of the lawyer's arts assumed. Lawyers in old Missouri were public characters. Their forensic skills, their physical presence, their powers of verbal persuasion, were not only their professional stock in trade, but were the foundations of their reputations and careers.<sup>59</sup> Notice that, although Rollins failed to save his client in the end, his speech to the mob convinced them to return their victim, at least for awhile. And Guitar, too, managed to persuade the mob at least to clothe their violence with orderly procedure. These were oral advocates par excellence, as well as men of not inconsiderable physical and moral courage. Of course, they were also men of their time. Neither was going to lay down his life for the due process rights of a slave accused of rape. And Guitar's plea for, in effect, an orderly lynching may be thought pretty small beer from the elected prosecutor of the county. But they were willing to stand against the hysterical bigotry of their fellows, at least to a point. As their subsequent careers show, the people of central Missouri valued advocacy of this sort (even if on this particular grim occasion, one bloodthirsty faction was determined not to be cheated of its hanging). Indeed, as I hope to demonstrate, for a very long time, oral advocacy was the dominant mode of legal persuasion even in the appellate courts of nineteenth-century Missouri.

## II. CRIMINAL APPEALS IN ANTEBELLUM MISSOURI

### A. *The Dearth of Criminal Appeals in Old Missouri*

To the modern lawyer, one of the most striking things about mid-nineteenth-century Missouri criminal practice is that the absence of an appeal

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58. *Id.* at 374.

59. Rollins, in particular, was widely known as an orator and perhaps as a man with his eye firmly on the main chance. One nineteenth-century chronicler characterized him as an "accomplished scholar and orator," and then related the remarks of one of Rollins' early teachers, Judge John F. Ryland, who said that the first letter Rollins learned "was the letter I, and it would be the last he would forget." WILLIAM VAN NESS BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI 272 (St. Louis, F.H. Thomas & Co. 1878).

was not a phenomenon peculiar to trials interrupted by lynchings. To the contrary, hardly any criminal defendants sought appellate review of their convictions. Understanding why requires an inquiry into the legal culture, institutions, and rules of the time.

Missouri became a state in 1821, and by 1860 was the eighth-most populous with 1.2 million people.<sup>60</sup> But before the Civil War, Missouri had one appellate court, the state supreme court, which consisted of three judges, one clerk, and perhaps a couple other employees.<sup>61</sup> It sat in various cities,<sup>62</sup> and had both appellate jurisdiction over every class of civil and criminal case and “general superintending control over all inferior courts.”<sup>63</sup> It was therefore a very busy tribunal. But for a long time it did very little criminal business. In 1822, its first year of operation, the Missouri Supreme Court decided only three criminal cases,<sup>64</sup> no criminal cases at all in 1823, one in 1824,<sup>65</sup> five in 1825,<sup>66</sup> none in 1826, and two in 1827.<sup>67</sup> In its first ten years of operation, the court decided only twenty-five criminal matters.<sup>68</sup> Four or five criminal cases a year remained the norm until the late 1830s,<sup>69</sup> with the annual average rising to just shy of eleven by the 1840s.<sup>70</sup> By 1859, Missouri

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60. Population of the United States (1860), <http://www.civilwarhome.com/population1860.htm> (last visited June 9, 2010); see also 3 PARRISH, *supra* note 30, at 7 (placing Missouri’s 1860 population at 1,182,012).

61. Laurance M. Hyde, *Historical Review of the Judicial System of Missouri* (pt. 2), 5 MO. SUPREME CT. HIST. J. 3, 3 (1993).

62. Originally, the Missouri General Assembly was authorized to establish judicial districts, not to exceed four, in each of which the supreme court was required to hold two sessions annually. *Id.* Thereafter, the legislature periodically changed the required locations for convening the court. Beginning in 1843, the court convened at least one of its annual sessions in the state capital, Jefferson City. Joseph S. Summers, Jr., *A Home for the Supreme Court*, 1 MO. SUPREME CT. HIST. J. 8, 8 (1987).

63. Hyde, *supra* note 61, at 3.

64. *State v. Newell*, 1 Mo. 177 (1822); *Calloway v. State*, 1 Mo. 150 (1822); *State v. Bray*, 1 Mo. 126 (1822).

65. *Journey v. State*, 1 Mo. 304 (1824).

66. *State v. Bird*, 1 Mo. 416 (1825); *State v. Cook*, 1 Mo. 390 (1825); *State v. Logan*, 1 Mo. 377 (1825); *State v. Douglass*, 1 Mo. 374 (1825); *State v. Ames*, 1 Mo. 372 (1825).

67. *Lowry v. State*, 1 Mo. 518 (1827); *King v. State*, 1 Mo. 514 (1827). A third case, *Strother v. State*, 1 Mo. 554 (1827), involves a fine against an attorney for contempt of court, but this appears to be a civil contempt.

68. See generally the first three volumes of the Missouri Reports at 1–3 Mo.

69. In 1835, the Missouri Supreme Court decided only one criminal case, *State v. Epperson*, 4 Mo. 90 (1835), but by 1839, the court’s criminal caseload was up to ten: *Laporte v. State*, 6 Mo. 208 (1839); *Page v. State*, 6 Mo. 205 (1839); *State v. Mitchell*, 6 Mo. 147 (1839); *Fanny v. State*, 6 Mo. 122 (1839); *State v. Acuff*, 6 Mo. 54 (1839); *Nicholas v. State*, 6 Mo. 6 (1839); *Garret v. State*, 6 Mo. 1 (1839); *Hilderbrand v. State*, 5 Mo. 548 (1839); *Porter v. State*, 5 Mo. 538 (1839); and *Frasier v. State*, 5 Mo. 536 (1839).

70. In 1845, only five criminal cases were decided by the Missouri Supreme Court, see 9 Mo., while 1847 saw a decade-high of nineteen, see 10–11 Mo.

had over one million people living in 114 counties<sup>71</sup> and eighteen judicial districts,<sup>72</sup> but only seventeen criminal appeals, or fewer than one per judicial district, were decided by its supreme court.<sup>73</sup> Not only was the absolute number of criminal cases low, but criminal matters constituted a tiny fraction of the overall supreme court docket throughout the prewar period. For example, in 1859, the court issued written opinions in 213 cases,<sup>74</sup> but the seventeen criminal appeals decided that year made up only 8% of the total.

Figuring out why this was so requires an understanding of contemporary criminal procedure, and the economic realities and professional norms of lawyers, trial courts, and the Missouri Supreme Court. Start with criminal procedure. From its inception in 1822, the Supreme Court of Missouri had jurisdiction over appeals from final judgments in all criminal cases brought by “writ of error.”<sup>75</sup> At common law, a writ of error in criminal cases was a plea for appellate relief based on, as Blackstone put it, “notorious mistakes in the judgment or other part of the record.”<sup>76</sup> The examples Blackstone gives of such mistakes—entering judgment of a felony for conviction of a crime that was only a misdemeanor, “not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held”<sup>77</sup>—make it clear that in his day criminal writs of error were designed primarily to correct technical legal mistakes in pleadings or the entry of judgments, and were not a vehicle for examining trial errors of the sort that now form the basis for most criminal appeals. In early nineteenth-century Missouri, appeal by writ of error probably had a broader potential scope than in Blackstone’s England, but it was still aimed at opening to appellate scrutiny only errors manifest on the face of the record, such as whether a prosecution under a given statute must be initiated by indictment<sup>78</sup> or might be brought by information,<sup>79</sup> the proper form of indictments,<sup>80</sup> challenges to the jurisdiction of particular courts

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71. See List of Counties in Missouri, [http://en.wikipedia.org/wiki/List\\_of\\_counties\\_in\\_Missouri](http://en.wikipedia.org/wiki/List_of_counties_in_Missouri) (last visited June 9, 2010).

72. See 1859 Mo. Laws 27 (“An Act to establish the Nineteenth Judicial Circuit . . .”).

73. See 27–29 Mo.

74. By contrast, in 2008, the seven judges of the Missouri Supreme Court with all their law clerks, support staff, and computer technology, issued only 100 opinions.

75. *Calloway v. State*, 1 Mo. 150 (1822); *State v. Foster*, 2 Mo. 170 (1830) (noting that the then-applicable statute made issuance of writs of error “a matter of right”).

76. 4 WILLIAM BLACKSTONE, COMMENTARIES \*391.

77. *Id.*

78. *State v. Stein*, 2 Mo. 56 (1828) (holding that, as a federal constitutional matter, charges of assault and battery must be brought by indictment).

79. *Journey v. State*, 1 Mo. 304 (1824).

80. All three criminal appeals decided in 1825 were of this type. *State v. Cook*, 1 Mo. 390 (1825) (quashing an indictment because the allegation regarding the place where the offense was committed was written into the margin); *State v. Logan*, 1 Mo. 377 (1825) (upholding an indictment for stealing a book against the challenge that it failed to state the title of the book); *State v. Ames*,

over particular crimes<sup>81</sup> or to the procedure employed to summon a jury,<sup>82</sup> and some constitutional questions such as double jeopardy.<sup>83</sup> However, a moment's reflection reveals that errors of this kind represent only a small fraction of what we would now consider the potentially appealable errors in a criminal case.

Most of the errors that go to the heart of whether a defendant really received a procedurally correct and substantively fair trial are not discernible merely from examination of the indictment, the jury rolls, the judgment, and other formal pleadings. Appeal on the merits presupposes a robust record of the evidence presented, the legal motions and objections made, the judge's instructions to the jury, and the rulings and reasons of the court below, accompanied by an enumeration of the supposed errors and the relief requested. At common law, the enumeration of errors that initiated this kind of appeal was called a "bill of exceptions."<sup>84</sup> Bills of exceptions were prepared by counsel and then endorsed or approved by the trial judge before transmission to the appellate tribunal. In antebellum Missouri, there was a series of obstacles to the more complete appellate review afforded by a bill of exceptions.

First, although bills of exceptions were not unknown in early Missouri practice—the second criminal case ever decided by the Missouri Supreme Court entertained arguments brought by a bill of exceptions<sup>85</sup>—in 1830, the court held that a bill of exceptions was only available in civil cases.<sup>86</sup> It reiterated this view on several occasions,<sup>87</sup> until the new procedural code

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1 Mo. 372, 373 (1825) (rejecting a challenge to an indictment for illegal gambling on the ground, *inter alia*, that it failed to identify the particular game of chance being played); *see also* Lilly v. State, 3 Mo. 8 (1831); *State v. Foster*, 2 Mo. 170 (1830).

81. *State v. Simonds*, 3 Mo. 292 (1834); *Wilder v. State*, 3 Mo. 291 (1834).

82. *Samuels v. State*, 3 Mo. 50, 51 (1831).

83. *State v. Payne*, 4 Mo. 376, 377 (1836) (considering whether a conviction by a justice of the peace lacking jurisdiction over an offense acts a double jeopardy bar to subsequent prosecution in a court with jurisdiction).

84. 3 BLACKSTONE, *supra* note 76, at \*372. William G. Hammond, editor of an early American edition of the COMMENTARIES, described a bill of exceptions as "embodying all the evidence and rulings thereon, or so much as is necessary to show the grounds of exception to an appellate court." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 523 n.\* (William G. Hammond ed., San Francisco, Bancroft-Whitney Co. 1890). The Missouri Supreme Court explained that "the writ of error removes merely the record proper [to the appellate court, whereas] the bill of exceptions is intended to place upon the record some matter that would not appear in the regular progress of the cause." *Mitchell v. State*, 3 Mo. 201, 202 (1833); *see also* *State v. Wall*, 15 Mo. 208, 209 (1851) (holding that where an indictment is quashed for causes not appearing on its face, the action of the court and its reasons should be made part of the record by a bill of exceptions).

85. *Calloway v. State*, 1 Mo. 150 (1822).

86. *State v. Henry*, 2 Mo. 178, 178 (1830).

87. *Vaughn & Vaughn v. State*, 4 Mo. 290, 293 (1836); *Mitchell v. State*, 3 Mo. 201, 202

enacted in 1835 explicitly guaranteed the right to such bills in criminal matters.<sup>88</sup>

The 1835 code (which remained substantially unchanged during the prewar period)<sup>89</sup> specified that all convicted criminal defendants had an absolute right of appeal to the Missouri Supreme Court,<sup>90</sup> and that appeals on writs of error from such judgments were appeals as of right.<sup>91</sup> The law legislatively overturned the supreme court's restrictions on bills of exceptions. It created a right to a bill of exceptions in criminal cases to the same extent allowed in civil ones.<sup>92</sup> It also imposed a duty on the clerk of the circuit court from which an appeal was taken "to make out a full transcript of the record in the cause, including the bill of exceptions, judgment and sentence, and certify and return the same to the office of the clerk of the supreme court."<sup>93</sup>

The effect of the 1835 law was immediately evident in the supreme court's published reports. Beginning in 1836, the reports began to include much more factual detail about evidence and pre- and post-trial proceedings—detail that can only have come from the evidentiary summaries and other components of the record that were necessary to filing a bill of exceptions.<sup>94</sup>

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(1833).

88. *Vaughn & Vaughn*, 4 Mo. at 294–95 (“As the law now stands under the revised statutes of the last session of the legislature, the plaintiffs would be entitled to their bill of exceptions, but this case originated under the old law.”).

89. Compare Mo. Rev. Stat. (1835) with Mo. Rev. Stat. (1856). The 1835 procedural code survived largely unchanged well into the 1870s. See, e.g., Mo. Rev. Stat. § 2986 n.(a) (1879) (referring to “the statute of 1835, of which the present statute is almost an exact copy”).

90. “In all cases of final judgment rendered upon any indictment, an appeal to the supreme court shall be allowed, if applied for during the term at which such judgment is rendered.” Practice and Proceedings in Criminal Cases, art. VIII, § 1, Mo. Rev. Stat. 498 (1835) (emphasis supplied). It appears that this jurisdiction extended to both felony and misdemeanor convictions. Although the statute refers to judgments “upon any indictment,” suggesting to the modern reader that this provision would apply only to felonies, it appears that under contemporary practice, both misdemeanor and felony prosecutions were initiated by indictment. See Practice and Proceedings in Criminal Cases, art. III, § 22, Mo. Rev. Stat. 481 (1835), which prescribes the procedures for indictments in a “trespass against the person or property of another, not amounting to felony.” Even before 1835, it appears that some misdemeanors were indictable offenses. See *Journey v. State*, 1 Mo. 304, 304 (1824) (finding the crime of “retailing spirituous liquors, without [a] license,” punishable by a fine of \$100, might be “an indictable offence” if that mode of procedure were prescribed by the legislature, but that in this case the law prescribed an information).

91. Practice and Proceedings in Criminal Cases, art. VIII, § 2, Mo. Rev. Stat. 498 (1835).

92. Practice and Proceedings in Criminal Cases, art. VI, § 23, Mo. Rev. Stat. 491 (1835); see also Practice and Proceedings in Criminal Cases, ch. 127, art. VI, § 27, Mo. Rev. Stat. 1193–94 (1856) (reiterating the language first adopted in 1835).

93. Practice and Proceedings in Criminal Cases, art. VIII, § 9, Mo. Rev. Stat. 498–99 (1835).

94. See *Vaughn & Vaughn v. State*, 4 Mo. 290, 291 (1836) (including the brief of Shannon, Hunt, and Porter, the defendants' attorneys, which noted, “The record proper, we have brought here by writ of error, and the bill of exceptions we now have here sworn to, and ask that the same may be filed as a part of the record”); *Polk v. State*, 4 Mo. 544 (1837) (beginning with the parties' briefs, and concluding with the opinion of the court, which describes and rules on the contents of the bill of

It became common practice for the court to publish the “briefs” of the parties as an introduction to the opinion of the court.<sup>95</sup> And although technical pleading issues remained common,<sup>96</sup> the range of questions considered by the court notably broadened to include more challenges based on the sufficiency of the evidence<sup>97</sup> and matters such as the competency, credibility, and impeachment of witnesses<sup>98</sup> or the correctness of jury instructions given the facts of a case.<sup>99</sup> Nonetheless, despite the increased latitude of issues cognizable on appeal after 1835, the number of appeals remained small. What else might have been at work?

One part of the answer may have been that filing an appeal did not stay the execution of the criminal judgment and sentence unless either the trial court or the supreme court certified that there was “probable cause for such appeal . . . or so much doubt as to render it expedient to take the judgment of the supreme court thereon,”<sup>100</sup> although a trial judge refusing certification was obliged to enter a temporary stay of “sufficient time to make application to the supreme court” for a certification.<sup>101</sup> Absent certification from either the trial court or the supreme court, the circuit court clerk would prepare the record, with its bill of exceptions, and the appeal could proceed,<sup>102</sup> but the judgment would be entered and the sentence—whether the imposition of a fine, confinement to prison, or execution—would go forward. This procedural obstacle to full review of a defendant’s appellate arguments shortened the life of John Chapman in 1858.

#### B. State v. John Chapman—*An Appeal Stillborn*

On Friday, June 29, 1855, somebody shot and killed John C. Denham from ambush while he was plowing his fields in northeastern Boone County.<sup>103</sup> Suspicion immediately fell on John Chapman, one of Denham’s neighbors, but before Chapman could be detained, he fled to Ohio. Roughly a year later, Chapman imprudently returned, and was discovered and arrested.<sup>104</sup> He was represented by four lawyers—James Rollins and Odon Guitar of

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exceptions).

95. *See, e.g., id.*; State v. Heatherly, 4 Mo. 478 (1837) (beginning with the brief of Wood, counsel for the defendant, and concluding with the opinion of the court).

96. *See, e.g.,* Porter v. State, 5 Mo. 538, 540 (1839) (concluding that a challenged change of venue was proper).

97. *See, e.g.,* Frasier v. State, 5 Mo. 536, 536 (1839).

98. *See, e.g.,* Garret v. State, 6 Mo. 1, 1 (1839).

99. *See, e.g.,* Nicholas v. State, 6 Mo. 6, 6 (1839).

100. Practice and Proceedings in Criminal Cases, art. VIII, § 3, Mo. Rev. Stat. 498–99 (1835).

101. *Id.* § 4.

102. *Id.* §§ 10–11.

103. SWITZLER, *supra* note 1, at 385.

104. *Id.*

Columbia, Jerre P. Lancaster of Ralls, and Andrew Herndon of Howard County<sup>105</sup>—a sort of old Missouri dream team.<sup>106</sup> They were opposed by John F. Williams, then the circuit attorney of the second judicial circuit (which encompassed both Boone and Howard Counties) and later one of Guitar's military subordinates,<sup>107</sup> and Robert T. Prewitt, formerly the second judicial circuit attorney.<sup>108</sup> The defense lawyers engaged in all sorts of legal maneuvering, including securing a change of venue to Fayette in Howard County, and conducted the defense with, as an admiring contemporary described it, "a zeal and eloquence unsurpassed in criminal trials in the West."<sup>109</sup> Rollins was so good that one young lawyer watching the trial remembered his closing argument forty years later.<sup>110</sup> Nonetheless, Chapman was convicted on June 11, 1858, and sentenced to hang.<sup>111</sup> On June 14, 1858, Rollins wrote to his son back East:<sup>112</sup>

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105. *Id.* at 386. Herndon seems to have been a solid, but unspectacular, longtime Howard County practitioner taken on as local counsel, perhaps to provide knowledge of the local judiciary and jury venire to the out-of-towners from Columbia. See BENCH AND BAR OF MISSOURI CITIES, *supra* note 46, at 244 (characterizing Herndon as "one of the oldest and most respected lawyers of Howard county"). I can find no information about Lancaster, other than his association with this case.

106. SWITZLER, *supra* note 1, at 386.

107. *Id.* at 385–86; see also GENTRY, *supra* note 1, at 54, 64. Williams had received his legal training from Prewitt. BENCH AND BAR OF MISSOURI CITIES, *supra* note 46, at 228. During the Civil War, he sided with the Union and served with, and under, Odon Guitar in the Ninth Cavalry of the Missouri State Militia. See SWITZLER, *supra* note 1, at 877 (noting that Guitar raised the Ninth Cavalry and commanded it until his promotion in 1863 to brigadier general); BENCH AND BAR OF MISSOURI CITIES, *supra* note 46, at 228 (noting that Williams helped raise the Ninth Cavalry and became its colonel in 1863). Williams emerged from the war as a colonel and went on to become speaker of the Missouri House of Representatives and superintendent of Missouri's insurance department. *Id.* at 228–29.

108. Prewitt was second judicial circuit attorney from 1852 to 1856, although one source gives the dates of Prewitt's service as 1853 to 1857. BAY, *supra* note 59, at 533; see also GENTRY, *supra* note 1, at 54. He was reputed to be "a fluent and impressive speaker, but not an orator. His style of declamation was more conversational than otherwise." BAY, *supra* note 59, at 535. Another source called him "one of the ablest lawyers in that part of the State." Henry, *supra* note 37, at 389.

109. SWITZLER, *supra* note 1, at 385–86.

110. Writing in 1898, Thomas Shackelford said, "Major Rollins' appeal to the jury surpassed, in my youthful opinion, anything I ever heard. His impassioned address still lingers in my memory." Thomas Shackelford, *Reminiscences of the Bench and Bar in Central Missouri*, in BENCH AND BAR OF MISSOURI, *supra* note 37, at 398.

111. The article *Chapman Convicted*, WKLY. MO. STATESMAN, June 25, 1858, at 4, reported that Chapman "was convicted of murder in the first degree on Friday evening last," which would appear to put the conviction on June 18, 1858; however, the article was apparently reprinted from the Fayette newspaper, and we know from a letter by James Rollins that Chapman was convicted prior to June 14, 1858. Letter of James S. Rollins to James H. Rollins (June 14, 1858), Western Historical Manuscripts Collection, University of Missouri, Collection No. C1026, file 191 [hereinafter Rollins Letter (6/14/1858)].

112. Rollins' eldest son was attending the U.S. Military Academy at West Point, from which he later graduated. BENCH AND BAR OF MISSOURI CITIES, *supra* note 46, at 242.

I returned home last evening from the Howard court, where I went to defend a man charged with murder. I made a great speech for him, but to no purpose as the jury found him guilty and he will be hung next Friday 4 weeks [i.e., four weeks from next Friday]. Guitar also made for him a splendid speech besides one or two other gentlemen.<sup>113</sup>

Two points in these remarks leap out at the modern reader. The first is the emphasis Rollins placed on the “speeches,” what we would call closing arguments, rather than on the evidence. Contemporary newspaper accounts of the trial provide one hint about why the speeches assumed such a prominent place in Rollins’ mind. After prosecutor Prewitt gave a two-hour opening summation, *all four defense lawyers addressed the jury*: Lancaster for two hours, Herndon for three, followed by Rollins, and then by Guitar, whereupon Circuit Attorney Williams rose in rebuttal.<sup>114</sup> Although the lengths of the orations by Rollins, Guitar, and Williams are not recorded, closing arguments in the case must have run no less than ten to twelve hours. All the surviving mentions of the case in the public press describe the oratory,<sup>115</sup> but none says a word about the facts or legal issues that make up the merits of a case.

The second notable feature of Rollins’ letter to his son is the obvious air of resignation to the inevitability of a prompt execution. The letter exudes the sense that, having given a “great speech,” a defense attorney’s job was done. There is no hint that appellate review might even postpone the hanging. Yet we know that the defense team publicly declared their intention to appeal.<sup>116</sup> And by June 14, the date of Rollins’ letter, the defense had already filed the bill of exceptions with the Howard County Circuit Court, whose clerk noted that the appeal was “approved.”<sup>117</sup> Nonetheless, as Rollins foretold, the sentence was carried out four weeks after the verdict, on Friday, July 16, 1858.<sup>118</sup>

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113. Rollins Letter (6/14/1858), *supra* note 111.

114. *Chapman Convicted*, *supra* note 111.

115. According to the press, Prewitt spoke with “great power and ingenuity.” Lancaster led off the defense “in an eloquent and searching speech . . . which would have done honor to one of much longer experience in his profession.” Herndon’s address “was bold, eloquent, and logical.” Rollins “made one of his finest efforts.” Guitar’s argument was “an extraordinary one.” And Williams concluded with “his greatest effort, and he showed himself able to meet the ablest lawyers in the State.” *Id.*

116. The Fayette newspaper reported, “We learn that the case will be taken up to the Supreme Court.” *Chapman Convicted*, *supra* note 111.

117. *State v. John Chapman* (1858), *microformed on* Records of Circuit Court of Howard County, Missouri, Missouri State Archives, box 23, folder 77, unit 1, rows 5–8, microfilm roll 33860. According to the clerk, the defense also filed an “affidavit for an appeal.” *Id.* The function of this affidavit is not clear.

118. SWITZLER, *supra* note 1, at 386–87; *Hung*, WKLY. MO. STATESMAN, July 23, 1858, at 3; *Execution of John Chapman*, WKLY. MO. STATESMAN, July 30, 1858, at 3. Perhaps Rollins’

What happened? Why was Chapman's execution not at least postponed by the appellate process? Surely a case that provided grist for ten to twelve hours of jury argument must have presented at least one substantial appellate issue. Rollins and Guitar certainly seem to have thought so. They rushed to file the trial record with the supreme court and in their pleadings enumerated six grounds for appeal.<sup>119</sup> However, so far as can be determined from the Howard County records, while the trial judge "approved" the appeal, he never issued a certification that there was probable cause for an appeal, thus effectively denying a stay and leaving the execution date undisturbed. On July 8, 1858, Rollins and Guitar filed a motion for stay of execution of the judgment with the Missouri Supreme Court and asked that the case be set over to the following term of court.<sup>120</sup> The court denied the motion without comment the following day<sup>121</sup> and Chapman was hung a week later, protesting his innocence to the last.<sup>122</sup>

The refusal of the Supreme Court to hear Chapman's appeal on the merits is startling, at least to the modern legal sensibility. The case was locally notorious and Chapman's counsel were prominent men, Rollins having come within several hundred votes of being elected governor only months before. Moreover, as a review of the trial record makes clear, the evidence against Chapman, though sufficient to support the conviction, was entirely circumstantial and hardly unimpeachable.<sup>123</sup> And denying this stay sent a man to the gallows.

We do not know how common it was for trial judges to decline certification of cases for appeal or for the supreme court to refuse to grant a stay, but if certifications and stays were often denied, that practice would have discouraged pursuit of appellate relief. Indeed, one suspects that the court's summary treatment of Chapman's widely publicized case would in itself have chilled the appellate ardor of Missouri criminal practitioners.

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fatalism was the product of experience. Not only had his oratory failed to save Hiram from lynching, but as a young lawyer in 1836, he defended a slave named Conway on a murder charge and "delivered an argument of great eloquence and ability" that was remembered decades later "for its remarkable power and beauty." Conway was convicted nonetheless and hung four weeks later, despite lingering doubts about his guilt. SWITZLER, *supra* note 1, at 206-07.

119. Motion for Supersedeas, State v. John Chapman (1858), Supreme Court Case Files, Missouri State Archives, location 16A/6/3, box 227, folder 13.

120. Motion for Stay of Judgment, *id.*

121. Order Refusing an Application for Supersedeas, *id.*

122. See *supra* note 118.

123. According to the record filed with the Missouri Supreme Court, no one saw Chapman shoot the victim. His conviction was based, *inter alia*, on testimony that Chapman had threatened the deceased and others before the murder, that Chapman was seen in the area carrying a rifle at about the time of the shooting, and some extraordinarily primitive forensic testimony. Record on Appeal, *Chapman*, *supra* note 119.

### C. Other Impediments to Appeals

Available evidence suggests that another significant impediment to filing appeals in old Missouri was the very process made possible by the 1835 code reform. Filing an appeal on a bill of exceptions required getting someone to write out, in longhand, a record of the evidence adduced at trial and of all the objections and motions and the court's ruling on them (or at least all the objections, motions, and rulings the appellant thought pertinent), as well as making copies, in longhand, of the indictment, the jury instructions, the final judgment, and any other official documents that were part of the trial record.<sup>124</sup> Not only were there no electronic means of recording testimony or copying documents, but in old Missouri, there was no cadre of court reporters routinely taking notes of everything that transpired in every case. Each circuit court had a court clerk, who was charged by statute to "seasonably record the judgments, rules, orders, and other proceedings of the court,"<sup>125</sup> but the clerk's charge did not include creating a verbatim transcription, or even contemporaneous notes, of testimony, legal objections, or arguments. One supposes that at least some clerks assumed responsibility for taking good contemporaneous notes or delegated that task to a deputy clerk, but there was no legal requirement that they do so or even that they have any training that would suit them for the task.<sup>126</sup> Accordingly, the creation of the record of witness testimony and trial proceedings necessary to create a bill of exceptions seems to have been a retrospective exercise of reconstructing what occurred once the trial was over, undertaken only if one of the advocates was contemplating appeal. Moreover, it appears that, at least in many counties, it was the lawyer contemplating appeal himself who had to write up both the summary of the evidence, objections, and rulings *and* the bill of exceptions.

Not until 1887 did the Missouri Legislature pass a law authorizing the appointment of shorthand reporters in circuit courts. According to Judge North Todd Gentry of Boone County,

Before 1887, the lawyer or lawyers who lost in the circuit court prepared the bill of exceptions; and usually did so one night during that term of court. Old lawyers say that it often took them all night to write out the testimony; and that no one thought of taking until the next term in which to prepare the bill. But the appointment of a stenographer almost

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124. And the job had to be done right for the supreme court to accept that errors were properly preserved. *See* *Nathan v. State*, 8 Mo. 631, 632 (1844) (discussing deficiencies in the bill of exceptions).

125. Clerks, ch. 26, § 21, Mo. Rev. Stat 338 (1856).

126. In 1855, the sole legal prerequisites for appointment or election as clerk were that the candidate be free, white, twenty-one years old, a resident of the state for a year, and of the county in which he would serve for three months. *Id.* § 10.

revolutionized the practice. Prior to that, few lawyers practiced in the appellate courts and few cases were appealed. But after Miss Matthews<sup>127</sup> learned to prepare bills of exceptions, appellate practice was simplified and Boone county lawyers soon became familiar with proceedings in the higher courts.<sup>128</sup>

If the difficulty and inconvenience of writing up testimony and bills of exceptions acted as a barrier to appellate review even for lawyers practicing in and around a relatively populous county seat like Columbia, the impediment would have been greater still for the not inconsiderable portion of the bar that rode circuit. Judge Charles B. McAfee, writing in 1897, recalled that in southwest Missouri both before and for some years after the Civil War, “a lawyer’s practice was largely away from home, and often embraced several judicial circuits. The circumstances of those days generally involved an absence from home of from two to eight weeks and the attorney was in court almost every day that he was not on the road.”<sup>129</sup> A lawyer riding circuit lacked both the time and convenient facilities for writing up bills of exceptions in any but the most extraordinary case. Even if a circuit-riding lawyer took the trouble to arrange preparation of the record and a bill of exceptions, just ensuring that these documents reached the supreme court presented some difficulty. For example, Columbia is only thirty miles from the state capital of Jefferson City, where the supreme court was headquartered from its inception, but regular mail service between the two cities was not instituted until 1856.<sup>130</sup>

Another, seemingly circular, reason for the dearth of criminal appeals was the dearth of existing appellate law. Between 1822 and 1860, the Missouri Supreme Court wrote perhaps 550 criminal opinions. This sounds like a goodly number, but, examined carefully, these cases contained strikingly little help for the would-be criminal appellant. First, they addressed a very narrow range of potential issues. As we have seen, for a long time, the court focused primarily on the technical questions appealable on a writ of error. More widespread use of bills of exceptions beginning in the late 1830s slowly broadened the court’s decisional coverage, but the importance of the advent of shorthand reporters in 1887—and of their absence before—can hardly be exaggerated. We assume as a matter of course that a neutral official will automatically create and preserve a “record” of the precise wording and

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127. Laura Matthews was Boone County’s first official court stenographer. She was appointed in 1887 and served until 1904. GENTRY, *supra* note 1, at 63.

128. *Id.* at 63–64.

129. Charles B. McAfee, *Riding the Circuits in Southwest Missouri*, in BENCH AND BAR OF MISSOURI, *supra* note 37, at 72, reprinted in 6 MO. SUPREME CT. HIST. J. 6, 6 (1998).

130. SWITZLER, *supra* note 1, at 383.

sequence of questions, answers, objections, arguments, remarks from the bench, and rulings in any trial. Such a record is the raw material of the appellate lawyer's trade to be mined in retrospective leisure for evidence of error. But prior to 1887, even if a lawyer or clerk had the foresight to take good notes during a trial or a nearly photographic memory upon which to rely afterward, the trial record was, at best, a summary containing only the basic thrust and major points of testimony, together with descriptions of the objections and legal rulings the lawyer taking the appeal thought critical at the time the record was being prepared.<sup>131</sup> And of course, the federal criminal procedure revolution with its exclusionary rule was more than a century in the future so, with only rare exceptions,<sup>132</sup> the conduct of citizens or law enforcement officials in securing evidence was not a live appellate question. In short, the number of criminal questions the Missouri Supreme Court had ever decided stayed small for decades.

Second, even on the questions it addressed, the court's opinions were very short. Prior to the 1835 statute authorizing bills of exceptions, most cases were resolved in a page or perhaps two. The opinions were not only terse, but they often did nothing more than announce the court's resolution of the case, with little added in the way of explanation or even citation of authority.<sup>133</sup> After bills of exceptions became *de rigueur*, the number of pages devoted to each case in the Missouri Reports increased somewhat, but much of the initial increase consisted of reprinting all or portions of the summaries of testimony or the parties' briefs<sup>134</sup> as introductions to the opinions of the court, which themselves tended to remain short.<sup>135</sup> By the mid-1850s, the practice of printing testimonial summaries in full seems to have fallen out of favor, although the parties' briefs were still sometimes reproduced.<sup>136</sup> But the judges remained curt. Of the seventeen criminal cases decided in 1859, thirteen consume less than three printed pages in the Missouri Reports, everything included. The overwhelming impression produced by reading its opinions is that, with occasional exceptions, the early antebellum court conceived of its

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131. See, e.g., *McMillen v. State*, 13 Mo. 30, 32 (1850) ("All the testimony given on the trial is not preserved in the bill of exceptions, but enough is stated to show the important facts in the case.").

132. For an exception, see *Hector v. State*, 2 Mo. 135, 136 (1829) (excluding a slave's confession to burglary on the ground that it was obtained through flogging).

133. See, e.g., *id.* The court reversed Hector's conviction without reference to any authority whatsoever.

134. See, e.g., *Schaller v. State*, 14 Mo. 502, 503–04 (1851) (beginning with the arguments of Mr. Blennerhassett, attorney for the appellant, and Mr. Lackland, counsel for the state).

135. See, e.g., *Fanny v. State*, 6 Mo. 122 (1839) (containing an eighteen-page summary of evidence and testimony, one-half page constituting the appellant's entire brief, and a two-page judicial opinion).

136. See, e.g., *State v. Woodward*, 21 Mo. 265, 265 (1855) (prefacing the opinion of Judge Ryland with the brief of Cline and Jamison for the respondent).

job primarily as resolving the particular disputes before it, rather than as creating a body of reasoned precedent for the guidance of the trial bench and bar. This impression is reinforced if one goes into the state archives and examines the original appellate files (which happily still exist). Even in cases where the lawyers and scribes who created the record took some pains to write clearly, well, and at length, the court's opinion is sometimes a nearly illegible scrawl on a half-sheet of paper.

Not only was the Missouri Supreme Court creating relatively little law in the criminal field, but the trial bench and bar had difficulty accessing it. Publication of the court's opinions was slow, sometimes involving years of lag time,<sup>137</sup> and there was no system of advance sheets. Even when collected in the Missouri Reports, the court's opinions obviously could not be searched electronically and there was, as yet, no equivalent of the West key number system or the Shepard's citator system, which had its beginnings in Chicago in the 1870s.<sup>138</sup> The relative paucity of published opinions probably made keeping up with new developments in a single field relatively easy, if one had ready access to the Reports. But few, if any, lawyers could afford to be specialists. And by 1858, when Rollins and Guitar were crafting an appeal for Chapman, the Missouri Reports had filled their twenty-seventh volume.<sup>139</sup> Well-to-do town-based practitioners like Rollins and Guitar would certainly have had their own sets of the Reports ready at hand, but circuit-riding lawyers and judges could hardly throw twenty-seven volumes in a saddlebag.<sup>140</sup>

The want of written legal authority extended beyond the small number, narrow scope, and relative inaccessibility of the Missouri Supreme Court's published opinions. Even persuasive authority was at a premium. Most lawyers owned a copy of Blackstone and a few other basic books,<sup>141</sup> but law

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137. For example, the second volume of supreme court reports was compiled and published by a private attorney, Louis Houck, and collected opinions issued from 1827 to 1830. The third volume, also compiled by Houck, included one 1829 opinion left out of the earlier volume, *Tracy & Wahrendorff v. State*, 3 Mo. 3 (1829), followed by cases from 1831 to 1835. 2-3 Mo. (Houck). A Missouri lawyer practicing in 1835 would have had a long wait for an authoritative volume containing cases decided four or five years before. By the early 1840s, the lag between issuance of an opinion and its publication in the Reports was still as much as three years. *See, e.g.*, 7 Mo. (containing cases from 1840 to 1842 and published in 1843). By the 1850s, the lag was down to about a year. *See, e.g.*, 16 Mo. (containing 1852 opinions and published in 1853).

138. ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING 183* (1990).

139. *See, e.g.*, *State v. Cross*, 27 Mo. 332 (1858).

140. *See McAfee, supra* note 129, at 10 (recounting an argument before a justice of the peace, who after hours of disputation, exclaimed, "You attorneys differ so widely about the law and we have not the books that each of you claim settles the case. So how am I to decide it? If we had the books, there would be no trouble, as each of you claim, but what am I to do without these books?").

141. *Id.* at 7 (noting that Blackstone, Greenleaf (a treatise on evidence), and Chitty (a treatise on criminal law and procedure) were common sources).

libraries were rare and sparsely filled. Treatises, statutes, and reported cases from England and other states were sometimes cited by lawyers<sup>142</sup> or the court itself.<sup>143</sup> But even the court seems to have been surprisingly ill-supplied, at least in its early days, as it was obliged to confess in one 1831 opinion where it wrote: “To prove this, [plaintiff’s counsel] cites 18 *Johnson’s R.*, 212, and the authorities there cited. *We have not got the book before us, but if we recollect correctly*, the decision is, that a *venire* is necessary in N[ew] Y[ork]; though they say they cannot see much use in it at this day.”<sup>144</sup>

Law begets law. The more law you have, the easier it is to invoke. The more law is invoked, the more courts and legislatures expand its compass and fill in its gaps and the easier it becomes to invoke again. For antebellum Missouri lawyers, the job of pursuing new appeals was made more difficult in inverse relation to the small quantity of readily accessible existing law upon which appellate arguments might plausibly be based.

Finally, the small number of criminal appeals in prewar Missouri must surely have had some relation to economics. There was no system of appointed counsel for the indigent at trial, and certainly no provision for free appellate counsel. Then as now, criminal defendants as a class were less likely to be able to afford lawyers. And even the court costs associated with an appeal could be significant. The case file of the 1857 case of *State v. McClure*<sup>145</sup> preserved in the Missouri State Archives contains a long, itemized bill of costs exceeding \$600, which would have been many thousands in today’s dollars. If, as appears to have been the case, these costs were taxed to defendants, the burden could be crippling.<sup>146</sup>

We cannot know how many cases were not appealed for lack of funds, but the prevalence of two types of criminal cases among those that did get to the supreme court suggests the centrality of cash to the appellate calculus. First, throughout the antebellum period, a strikingly high percentage of all criminal appeals were essentially regulatory in character, usually criminal “dram shop”

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142. Perhaps unsurprisingly, lawyers from the big city of St. Louis seem to have been better armed with outstate authority. *See, e.g.*, *State v. Woodward*, 21 Mo. 265, 265–66 (1855) (including counsel’s brief citing cases from England, Alabama, Pennsylvania, South Carolina, Mississippi, and Iowa).

143. *See, e.g.*, *Hemmaker v. State*, 12 Mo. 453, 455 (1849) (citing one English treatise and cases from Massachusetts, Tennessee, North Carolina, and New York); *Whitney v. State*, 8 Mo. 165, 168 (1843) (citing cases from New York and Virginia); *Mitchell v. State*, 3 Mo. 201, 202 (1833) (citing an English statute).

144. *Samuels v. State*, 3 Mo. 50, 51 (1831) (second emphasis supplied).

145. 25 Mo. 338 (1857).

146. *See Fees*, ch. 64, § 11, Mo. Rev. Stat. 449–50 (1856) (enumerating the fees chargeable by clerks of courts having criminal jurisdiction); *id.* § 12 (specifying that “[n]o fee shall be charged by any clerk, in any criminal case against the State or county, unless it is expressly allowed in the foregoing section”).

cases involving the sale of liquor in violation of state or local ordinance. For example, of the roughly twenty-five criminal cases decided by the Missouri Supreme Court in its first two decades, nine were liquor violations.<sup>147</sup> In 1859, five of the court's seventeen criminal decisions, or nearly a third, were dram shop cases.<sup>148</sup> The appellants in these cases were business owners with both the money and the motivation to resist application of liquor laws to their premises.<sup>149</sup>

The second proof of the importance of money to criminal appeals is the relative frequency of appeals on behalf of criminally convicted slaves, at least ten of which made their way to the supreme court between 1822 and 1860.<sup>150</sup> These cases highlight the paradoxes of slave society in many ways, not least among them the oddity of a legal system that insisted black people were property not essentially different from cattle or sheep, but which afforded them relatively complete due process rights before convicting and punishing them for crimes. But for present purposes the key point about these cases is that their black defendants received the benefit of representation before the supreme court that poor whites of the period could not afford *because* slaves were valuable property. They belonged in law to relatively affluent whites with the resources and incentive to ensure that their property was not damaged or destroyed by hanging, castration, imprisonment, or flogging. Recall that, before the matter was ripped from the hands of the law, Hiram's owner retained for his defense James Rollins, one of the best lawyers and most prominent men in central Missouri.

The dearth of law affected not only the choice of whether to appeal, but the way cases were conducted before the supreme court. Characterizing today's massive appellate pleadings as "briefs" always carries with it a certain mordant humor. But in old Missouri, briefs were brief. They usually consisted of short declarative statements, the closest analogue to which in modern practice would be the "Issues Presented for Review" section of a U.S. Supreme Court brief, plus lists of whatever authorities the lawyer thought

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147. *Casey v. State*, 6 Mo. 646 (1840); *State v. Spear*, 6 Mo. 644 (1840); *Frasier v. State*, 6 Mo. 195 (1839); *Frasier v. State*, 5 Mo. 536 (1839); *State v. Hunter*, 5 Mo. 360 (1838); *State v. Corwin*, 4 Mo. 609 (1837); *Storrs v. State*, 3 Mo. 7 (1831); *State v. English*, 2 Mo. 147 (1829); *Journey v. State*, 1 Mo. 304 (1824).

148. *State v. Wells*, 28 Mo. 565 (1859); *State v. Mitchell*, 28 Mo. 562 (1859); *State v. Andrews*, 28 Mo. 19 (1859); *State v. Andrews*, 28 Mo. 17 (1859); *State v. Andrews*, 28 Mo. 14 (1859).

149. A typical case is *Wells*, 28 Mo. at 566, in which the holder of a license to sell drugs and medicines is resisting the application of laws governing the retail sale of alcohol to his store.

150. *State v. Gilbert*, 24 Mo. 380 (1857); *State v. Joe*, 19 Mo. 223 (1853); *Nathan v. State*, 8 Mo. 631 (1844); *Lucy v. State*, 8 Mo. 134 (1843); *Fanny v. State*, 6 Mo. 122 (1839); *Mary v. State*, 5 Mo. 71 (1837); *Jim v. State*, 3 Mo. 108 (1832); *Jane v. State*, 3 Mo. 45 (1831); *State v. Henry*, 2 Mo. 178 (1830); *Hector v. State*, 2 Mo. 135 (1829).

relevant.<sup>151</sup> The evident purpose of these documents was to alert the court to the subjects that would be addressed in oral argument, which was the real heart of the proceeding. Missouri Supreme Court practice provided for more than two hours of argument for each case.<sup>152</sup> In old Missouri, even appellate work was primarily an exercise in oral advocacy.

Which brings us back to John Chapman, facing his mortal end in four weeks despite the thunderous declamations and heart-wrenching perorations of his Dream Team. Someone had enough money to retain not one, but four, lawyers for Chapman's defense. And even if the money was exhausted after the trial, the impending execution loomed to inspire further exertions on the condemned client's behalf. Between them, these lawyers had the money, time, facilities, and incentive to prepare a writ of error and bill of exceptions. In Columbia, they had access to the books, and though perhaps not appellate specialists, they were not complete novices. Prior to 1858, Guitar or his firm had appeared before the supreme court twice and his defense colleague, Andrew Herndon, once,<sup>153</sup> albeit in civil cases.<sup>154</sup> They were plainly prepared to ride the thirty miles from Columbia to the state capital in Jefferson City to argue the case.

The fact that not even these lawyers could get a full hearing on the merits from the Missouri Supreme Court in a capital case surprises us, but it was, I think, consistent with the legal spirit of the times. Criminal lawyers in old Missouri would happily split hairs over the wording of an indictment or the jurisdiction of the trial court, but the pervasive hyperproceduralism that, depending on your point of view, either protects or infects modern law did not exist. To Rollins and Guitar and their brethren practicing before the war, the idea of a fair trial implied one good, thorough airing of the facts before a local judge and jury, with ample opportunity for the lawyers to exercise their rhetorical gifts. If the indictment charged the right crime, no egregious evidentiary errors of inclusion or exclusion occurred, and the jury received reasonably correct instructions on the law, that was satisfactory. The notion of procedurally perfect justice with multiple layers of fine-grained review would, I think, have seemed an extravagance to them, at least in any case

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151. *See, e.g.*, *State v. Dunn*, 18 Mo. 419, 422 (1853) (including the brief of P.R. Hayden for the appellant consisting of five numbered declarative statements and one citation of authority); *State v. Leapfoot*, 19 Mo. 375, 375–76 (1854) (including briefs of both the attorney general and defense counsel, the attorney general's brief consisting of four sentences and citation of four cases, and defense counsel's brief consisting of three sentences and two citations of authority).

152. *See, e.g.*, G.A. FINKELNBURG & TYRRELL WILLIAMS, *PRACTICE IN THE SUPREME COURT AND THE COURT OF APPEALS OF MISSOURI IN APPELLATE PROCEEDINGS AND ORIGINAL WRITS* 258 (2d ed. 1906) (noting that, as late as 1906, the practice was "to allow an hour and a half to each side, without permitting any separate preliminary statement of the case as was formerly the custom").

153. *Thompson v. Botts*, 8 Mo. 710 (1844).

154. *Pearson v. Inlow*, 20 Mo. 322 (1855); *Northcutt v. Northcutt*, 20 Mo. 266 (1855).

where the stake was much less than life itself. And even in such a case, the executioner's hand would not be stayed for any but the most palpable legal error.

III. *AUTRES TEMPS, AUTRES MOEURS*:  
CRIMINAL APPEALS DURING AND AFTER THE CIVIL WAR

In 1861, the low-grade irregular conflict between pro- and anti-slavery forces that had plagued the Kansas–Missouri border throughout the 1850s exploded into national civil war. From the parochial perspective of the criminal appellate lawyer, however, the war changed less than might have been expected, despite some dramatic changes in personnel at the supreme court. In 1861, once pro-Union forces took control of the state, evicted its secessionist governor and legislators, and created a unionist provisional government, the three judges of the Missouri Supreme Court, all of whom were southern in sympathy, resigned rather than take the loyalty oath required of all state officeholders.<sup>155</sup> They were promptly replaced by three reliable, but conservative, Union men—Barton Bates, William V.N. Bay, and John D.S. Dryden<sup>156</sup>—who also won a special election in November 1863 to keep their seats.<sup>157</sup> During the war, overt southern sympathizers being either in exile, fighting for the Confederacy, or disqualified from public life by the loyalty oath, the state's political hierarchy was divided between Conservative and Radical unionists. The latter gained control of the state convention in 1865. Anticipating opposition to emancipation and other measures thought necessary as the war drew to a close, they pushed through an ordinance ousting all the judicial officers in the state, with the vacant offices to be filled by gubernatorial appointment.<sup>158</sup> Governor Fletcher appointed David Wagner, Walter L. Lovelace, and Nathaniel Holmes to the vacancies, though Judges Bay and Dryden had to be arrested and forcibly removed from the supreme court bench before the transition could be effected.<sup>159</sup>

Despite all the turmoil, the court kept churning out opinions, civil and criminal, throughout the war at only slightly less than its usual pace. It issued eight criminal opinions in 1861, thirteen in 1862, eight in 1863, fifteen in 1864, and fourteen in 1865. There are some indications that local legal institutions were understandably reluctant to be too aggressive in pursuing perpetrators of personal violence in a period dominated by bushwhacking and

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155. D.A. Divilbiss, *The Ousting of the Judges*, 1 MO. SUPREME CT. HIST. J. 1, 2 (1986). William Scott, William B. Napton, and Ephraim B. Ewing resigned. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 3. See also *State v. Bernoudy*, 36 Mo. 279, 279 (1865) (discussing the ousting ordinance in relation to the elected recorder of St. Louis County).

159. Divilbiss, *supra* note 155, at 4–5.

revenge killing.<sup>160</sup> But in reading the substance of the supreme court's decisions, one would almost never have known there was a war on. Other than a few cases relating to the administration of loyalty oaths,<sup>161</sup> perhaps the most notable clue that something was amiss was the delay in rendering decisions.<sup>162</sup>

When the war ended, however, changes in the judicial system followed thick and fast. A new state constitution adopted in 1865 reinstated the same three-judge supreme court, but also created district courts of appeals, to be composed of panels of circuit court judges.<sup>163</sup> These intermediate courts were apparently unpopular and were abolished in 1870.<sup>164</sup> However, in 1872 the membership of the supreme court was increased to five, and the constitutional amendment of 1890 increased it to seven; an earlier constitutional amendment in 1884 authorized three intermediate courts of appeals to sit in different sections of the state.<sup>165</sup> The courts of appeals had jurisdiction over all appeals from felony convictions.<sup>166</sup>

The result of these changes, in combination with the restoration of civil order and the growth in the state's population and industrial and commercial base,<sup>167</sup> was a rapid increase in the incidence of criminal appeals. By 1875, the five-member Missouri Supreme Court was deciding nearly forty criminal appeals per year. The increase in both its civil and criminal docket was so great that, by the mid-1870s, the court's docket was two years behind.<sup>168</sup> The addition of the courts of appeals authorized by the 1875 constitution pushed the number of criminal appeals above fifty annually.<sup>169</sup> By 1885, the number

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160. In Boone County, for example, it is said that one judge "held court in Columbia several times during the Civil War . . . with two pistols buckled around his waist. Although it was known that men were being killed, houses burned and property stolen, it was considered best not to indict nor even to investigate. Circuit court was adjourned for one whole year during this war." GENTRY, *supra* note 1, at 266.

161. *See, e.g.*, State v. Cummings, 36 Mo. 263, 263 (1865) (concerning charges that a pastor had carried on his ministering trade without taking the required loyalty oath).

162. *See, e.g.*, State v. Edwards, 36 Mo. 394, 394 (1865) (deciding an appeal arising from an 1859 receiving stolen goods indictment); State v. Jenkins, 36 Mo. 372, 374 (1865) (resolving issues in an 1862 robbery).

163. Hyde, *supra* note 61, at 4.

164. *Id.* at 5.

165. *Id.*

166. *Id.*

167. *Id.*

168. 1 Mo. App. at v. (1877).

169. In 1876, Missouri appellate courts decided fifty-six criminal appeals, seventy-five in 1877, fifty-one in 1878, and fifty-two in 1879. By 1885, the number of criminal appeals reached sixty-four. Interestingly, the addition of the courts of appeals does not seem to have materially reduced the supreme court's overall backlog. In January 1883, the Court had 1,404 undecided cases on its docket. Norwin D. Houser, *Missouri Supreme Court Commissioners, 1882-1885 and 1911-1982*, 1 MO. SUPREME CT. HIST. J. 2 (1986).

of criminal appellate decisions reached sixty-four, and the advent of a statewide system of shorthand reporters in 1887<sup>170</sup> seems to have had its effect, as well, with the number of annual decisions exceeding eighty in 1888 and succeeding years.

The new fashion for criminal appellate practice did not leave our friends in Boone County entirely behind. In around 1869, a Hallsville, Missouri, physician, Dr. Thomas H. Keene, got into a dispute with one Peter Evans,<sup>171</sup> who, for reasons lost to history, was violently angry that Keene was engaged to marry a niece of Evans' wife.<sup>172</sup> So enraged was Evans that "he violently assaulted [Keene] with a pistol and knife, and swore that he would kill him, and that nothing but his blood would satisfy him."<sup>173</sup> Although Keene escaped, "Evans renewed his threats; declared that he would make no compromise in reference to the matter; that he would kill defendant on sight, if it was the last act of his life. These threats were communicated to defendant the same evening."<sup>174</sup> The next day, Keene encountered Evans again, whereupon Evans repeated his determination to kill Keene. Evans was struggling with some other men who were trying to restrain him, when Keene shot and killed him. Keene was charged with second-degree murder. He retained Odon Guitar. At trial, the evidence of Evans' prior threats to kill Keene was excluded, and despite the no-doubt-stirring oratory of Guitar on his behalf, Keene was convicted and sentenced to sixteen years in the penitentiary.<sup>175</sup>

Once again, Guitar was not surrendering without fighting all the way to the top. Whether because of his own increased appellate experience<sup>176</sup> or the changed Missouri legal environment or simply having better facts, Guitar accomplished for Keene what he and Rollins could not for John Chapman. Guitar first appealed to the newly created district court of appeals, but apparently was unable to secure an opinion before that court was abolished in 1870.<sup>177</sup> He then brought an appeal to the Missouri Supreme Court, arguing that exclusion of the prior threat evidence was error. The court agreed and

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170. *See supra* note 128 and accompanying text.

171. GENTRY, *supra* note 1, at 237–38.

172. *State v. Keene*, 50 Mo. 357, 358 (1872).

173. *Id.*

174. *Id.*

175. *Id.* at 358–59.

176. Beginning around 1860, with an interruption caused by the war, Guitar and his partners had started to appear more regularly in appeals. *See, e.g.*, *Keene v. Barnes*, 29 Mo. 377 (1860); *Williams v. Christian Female Coll.*, 29 Mo. 250 (1860); *Wright v. Tinsley*, 30 Mo. 389 (1860); *Singleton v. Boone County Home Mut. Ins. Co.*, 45 Mo. 250 (1870); *Hume v. Wainscott*, 46 Mo. 145 (1870); *Mathews v. Switzler*, 46 Mo. 301 (1870); *Head v. Curators of the Univ. of Mo.*, 47 Mo. 220 (1871).

177. *See supra* note 164 and accompanying text.

reversed the conviction.<sup>178</sup> Armed with the excluded evidence, Guitar won the retrial and Keene walked free.<sup>179</sup> In a macabre postscript, in 1876, on almost exactly the same spot where Keene killed Evans, Keene himself was shot and killed by another Hallsville physician named Benjamin Austine as a result of a dispute over an anonymous circular letter. Austine hired Guitar, who secured his acquittal for the murder of Guitar's former client, this time without recourse to an appeal.<sup>180</sup>

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178. *State v. Keene*, 50 Mo. 357, 358, 361 (1872).

179. GENTRY, *supra* note 1, at 238.

180. *Id.*

## IV. CONCLUSION

I have indulged in this antiquarian excursion into nineteenth-century criminal practice with the entirely frivolous aim of trying to inhabit, at least for awhile, the world of my professional predecessors in the little town where I live. I wasn't seeking, and can't say I found, any profound lessons or deep insights. But if forced to stretch for some generalizations about what I have learned, I might offer two.

First, it is striking to realize the degree to which our modern American legal system depends on the existence of a complex physical and intellectual infrastructure—a body of existing case law covering a broad range of topics reproduced in a form quickly and easily accessible to lawyers, courthouse buildings sheltering judges and books so the one can find the other when required, a cadre of court reporters to generate the verbatim transcripts from which appellate arguments are woven, and so forth—that we take for granted, but which took decades to create on the American frontier. The absence of any of element of this infrastructure narrows the scope and changes the style of appellate review. And restricted appellate oversight in turn alters the nature of trial practice. If there is any practical lesson to be drawn from this observation, it might be in the international realm. The experience of nineteenth-century Missouri suggests that those seeking to foster the rule of law in the developing world must learn patience with systems which, despite a patina of modernity, may operate in ways not much different than 1850s Boone County.

Second, we should, on balance, be deeply thankful for the well-developed system of criminal appeals we now possess. The availability to every defendant of at least one thorough second look over the facts and legal rulings that produced his conviction is an indispensable element of a fair system of criminal justice. That said, I am left to wonder just a little bit. Old-time Missouri criminal appeals in the bill-of-exceptions era necessarily focused on the big stuff. Major errors of law. Manifest failures by the government to prove its case. The system relied on trial judges, lawyers, and local juries to sort out everything else. And, always assuming the availability of at least one appeal to look carefully and impartially at the big questions, I am not sure this approach is inferior to our own.

Years ago, when I was a working prosecutor and long before I became an academic, I started to write my very first law review article goaded by a Colorado appellate decision that found a prosecutor's characterization of a defendant's testimony as "lies" to be misconduct. I never finished the article (which was probably just as well), but the sense of annoyed wonderment remains that appellate judges would seriously contemplate forcing lawyers, trial judges, juries, witnesses, and victims to retry a case due to a choice of

words that did not comport with the appellate bench's elevated sense of verbal decorum.<sup>181</sup> Just before going off to attend the symposium on which this issue of the law review is based, I came across a scholarly paper that took as its starting point the rulings of a few trial judges across the country banning the use in court by witnesses and counsel of assertedly inflammatory terms such as "victim," "rape," "homicide," "drunk," "murderer," "killer," and "crime scene."<sup>182</sup> The article reports the results of an empirical study attempting to determine whether use of the word "victim" to describe victims affects trial outcomes.<sup>183</sup> While not even the author of this paper maintains that the use of such words is a big issue in many courts, for a modern legal academic—and obviously for some judges—minute scrutiny of the potential deleterious trial impact of participant word choices does not seem altogether strange.

I strongly suspect that James Rollins and Odon Guitar would have thought everyone involved in such discussions—judges, lawyers, academics, the lot—completely mad. And I suspect they would have felt at least considerable puzzlement over a great many other abstruse issues that now consume the attention of the criminal appellate bench and bar. I would not want to live under the Missouri system of the mid-1800s, particularly if I were a defendant, and even more particularly if I were non-white. But I am not entirely sure that in the vast majority of cases our incredibly intricate, detail-obsessed appellate process is any better at doing substantial justice than the courts of old Missouri. So, with all their flaws, I lift a glass to the shades of Rollins and Guitar, Lancaster and Herndon, Williams and Prewitt haunting, as I imagine they do, the courthouses that were once their stages and whispering eloquent closing speeches to rapt spectral throngs.

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181. The "liar" controversy lingers. See, e.g., Claire Gagnon, Note, *A Liar by Any Other Name? Iowa's Closing Argument Conundrum*, 55 DRAKE L. REV. 471 (2007).

182. Christopher Terranova, *Loaded Words in the Courtroom 2* & n.4 (May 12, 2009) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1403627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403627).

183. *Id.* at 3.