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DID THE FIRST JUSTICE HARLAN HAVE A BLACK BROTHER?

JAMES W. GORDON*

INTRODUCTION

On September 18, 1848, James Harlan, father of future Supreme Court Justice John Marshall Harlan, appeared in the Franklin County Court for the purpose of freeing his mulatto slave, Robert Harlan.¹ This appearance formalized Robert's free status and exposed a re-

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¹ The entry on the Order Book of the Franklin County Court reads as follows:

A Deed of emancipation from James Harlan to his Slave Robert Harlan was this day produced in Court, and acknowledged by said James Harlan to be his act and deed, Whereupon it is ordered that the Clerk of this Court Issue to Said Robert Harlan who is ascertained to be of the following description vis aged thirty two years 12th decr next six feet high yellow big straight black hair Blue Gray eyes a Scar on his right wrist about the Size of a dime and Also a small [illegible] Scar on the upper lip. A certificate of his freedom accordingly, upon his giving bond with Security in the penalty of five hundred dollars Conditioned that the said Robert Harlan shall not become a charge upon any County in this Commonwealth and thereupon the said James Harlan with George W Craddock his Security entered into and acknowledged bound to the Commonwealth accordingly which is approved by the Court.

FRANKLIN COUNTY COURT ORDER BOOK, Sept. 18, 1848, at 3. I would like to thank Clare McCann of the University of Kentucky, Special Collections, for her assistance in
markable link between this talented mulatto and his prominent lawyer politician sponsor.

This event would have little historical significance but for the fact that Robert Harlan was no ordinary slave. Born in 1816, and raised in James Harlan’s household, blue-eyed, light-skinned Robert Harlan had been treated by James Harlan more like a member of the family than like a slave. Robert was given an informal education and unusual opportunities to make money and to travel. While still a slave in the 1840s, he was permitted sufficient freedom to have his own businesses, first in Harrodsburg, Kentucky, and then later in Lexington, Kentucky. More remarkably still, he was permitted to hold himself out to the community as a free man of color at least as early as 1840, not only with James Harlan’s knowledge, but apparently with his consent. After making a fortune in California during the Gold Rush, Robert moved to Cincinnati in 1850 and invested his money in real estate and a photography business. In the years that followed, he became a member of the Northern black elite, and, in the period after 1870, established himself as one of the most important black Republican leaders in Ohio.

Although a humane master, James Harlan’s treatment of Robert was paradoxical. James’ tax records show that he bought and sold slaves throughout his life. The slave census of 1850 lists fourteen slaves in James Harlan’s household, ranging in age from three months to seventy years. The census for 1860 lists twelve slaves ranging in age from one to fifty-three years. James neither routinely educated nor often emancipated his slaves, although his ambivalence about the “peculiar institution” was well enough known to become a political liability in Kentucky, a state which was firmly committed to the

locating this entry. I have attempted to reproduce the Order Book entry as closely as possible, without adding punctuation or changing capitalization in the original.

2. FAYETTE COUNTY [KENTUCKY] MARRIAGE BONDS "COLORED," 1823-1874; LEXINGTON, KENTUCKY, CITY TAX RECORDS, 1841-1848. I would like to thank Harold Barker, Director of Records, Lexington-Fayette County Government, for his assistance in locating Robert Harlan’s tax records.

preservation of slavery.\(^5\)

What about Robert Harlan was so special as to lead to such exceptional treatment by James? In the view of one scholar, the peculiarity of James Harlan’s relationship with Robert Harlan is easily explained. Robert Harlan, he asserts, was James Harlan’s son.\(^6\) If true, this means that another of James’ sons, the first Justice John Marshall Harlan, had a black half-brother.

When James emancipated Robert, John Harlan was fifteen years old. Thereafter, James and Robert continued to have contacts. After James’ death in 1863, John and Robert remained in touch. Robert was an anomalous feature of John’s childhood in slaveholding Kentucky and remained a part of his perception of blacks as an adult.

John deeply loved and respected his father, James. He lived in his father’s house until after his own marriage. James taught John law and politics. In both arenas, father and son were partners and seem to have confided freely in one another. James remained the most important influence in John’s life until the older man died in 1863, when John was thirty years old.

James Harlan’s ambivalent, but generally negative, feelings about slavery surely influenced John’s views on the subject. But even more importantly, James’ peculiar relationship with Robert during John’s youth, and the ongoing contacts between James, John, and Robert after Robert’s emancipation, must have affected John’s attitudes toward

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5. See E. Merton Coulter, The Civil War and Readjustment in Kentucky 6-7 (Peter Smith 1966) (1926). Coulter must be read with a critical eye since his pro-Southern bias is pronounced and distorts his treatment. Despite this flaw, he remains the best source on Kentucky for the period here discussed. See also J. Winston Coleman, Jr., Slavery Times in Kentucky (1940); Ivan E. McDougle, Slavery in Kentucky, 1792-1865 (Negro University Press 1970) (1918).

6. This connection was made by Dr. Paul McStallworth in his brief biographical entry on “Robert James Harlan” in the Dictionary of American Negro Biography. Dictionary of American Negro Biography, supra note 4, at 287-88. Dr. McStallworth’s conclusion appears to rest primarily upon a biographical article about Robert Harlan, that was published in a Cincinnati newspaper 37 years after Robert’s death. See Brief Biography of Colonel Robert Harlan, Cincinnati Union, Dec. 13, 1934 [hereinafter Brief Biography]. This is the only cited source which asserts that Robert was James Harlan’s son. It is not clear to me why Dr. McStallworth attributes to Robert the middle name “James.” All references to Robert which I have seen give his name as “Robert Harlan.” This is also how he signed his correspondence.

A newly published biography on John Marshall Harlan, of which I did not have the benefit until after this Article was nearly completed, refers to the blood relationship between John Harlan and Robert Harlan as an established fact, and puts Robert into the Harlan family tree on the inside cover of the book—as either the son of John’s father, James, or as the son of John’s grandfather, James the elder. The textual discussion of Robert is brief, covering less than two pages. Loren P. Beth, John Marshall Harlan: The Last Whig Justice 12-13 (1992) [hereinafter Beth, John Marshall Harlan].
blacks. Robert was smart and ambitious, but lived his life in the twilight between two worlds, one black, the other white. He was never completely at home in either. Robert’s lifelong experience of the significance of the color line became, vicariously, a part of John’s experience. Robert was also a continuing example of something John Harlan could not later, as a Supreme Court Justice, bring himself to deny—the humanity of blacks, and the profound unfairness of their treatment by a racist America.

Given his connection to Robert, Justice John Harlan’s progressive views on race, views which he repeatedly articulated in his famous dissents as an Associate Justice of the United States Supreme Court, become more comprehensible. Indeed, it is reasonable to assume that we will never understand fully the sources of Justice Harlan’s advanced views on race until we better understand his relationship with the black man who might have been his half-brother. Justice Harlan argued repeatedly that the Civil War Amendments had given black Americans the same civil rights as whites:

[T]here cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against [free men] and citizens because of their race, color, or previous condition of servitude.

Harlan further denied that blacks constituted a class which may still be discriminated against, even in respect of rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a [free man] is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence.

In Plessy v. Ferguson, Harlan standing alone against the rest of the Court, again dissented:

In respect of civil rights, common to all citizens the Constitution of the United States does not, . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may

7. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting); Civil Rights Cases, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting); see also BETH, JOHN MARSHALL HARLAN, supra note 6, at 223-39.
9. Id. at 39-40.
have regard to the race of citizens when the civil rights of those citizens are involved.\textsuperscript{10}

Elsewhere in the same opinion, in words that have since become famous, Harlan wrote,

in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.\textsuperscript{11}

If Robert and John were brothers, a provocative dimension for contemplation is opened. The careers of these two talented, ambitious men offer us parallel examples of life on different sides of the color line in nineteenth century America. They grew up in the same household, and, if brothers, carried many of the same genes. Each was given every opportunity that his status and skin color permitted. Each succeeded to a remarkable extent, again, within the limits imposed upon him by the society in which they both lived. Each man was shaped by his own perceptions of these limits and by their reality. In the end, John Harlan climbed as high as his society permitted \textit{any man}. Robert Harlan climbed as high as his society permitted \textit{any black man}. Although in the end Robert did not rise as high as did John, his achievements were, upon reflection, equally impressive and worthy of exploration.

This Article will summarize the careers of James, John, and Robert Harlan. It will then examine the evidence of the blood relationship between Robert Harlan and James Harlan, and speculate on the influence that John Harlan’s contact with Robert Harlan might have had in shaping John’s views on race. Finally, the Article will reflect on the implications of the careers of John and Robert Harlan for our understanding of race in late nineteenth century America.

\section{Two Generations, Three Lives}

\subsection{James Harlan (1800-1863)\textsuperscript{12}}

James Harlan was born in Mercer County, Kentucky. His father,
James Harlan the elder (1755-1816), had migrated to Kentucky at the age of nineteen, in 1774, with James Harrod. By the time of James Harlan's birth in 1800, his father, James the elder, was one of the wealthiest men in Mercer County, and probably in the entire state. When James the elder died in 1816, he left an estate valued at $54,000, an enormous sum in those days. At the time of his death, he owned thirty-three slaves. This number put him among the top rank of slaveholders in the state.

James had the advantages that wealth could provide in frontier Kentucky. He was educated at a private academy, then engaged in mercantile business for a few years, and finally studied law. He was admitted to the bar in 1823, and practiced law in Harrodsburg, the county seat of Mercer County, until 1840 when he moved to Frankfort, the state capital. While practicing in Harrodsburg, James launched his political career, serving as Commonwealth's Attorney from 1829 to 1832. In 1835, he was elected to Congress, where he served two terms.

James was appointed Secretary of State in 1840, and moved his family thirty miles to Frankfort. By this time, he was one of the Whig leaders of the state, and a close associate of Henry Clay. He left executive office in 1844 and served one term in the state House of Representatives. In 1851, he was elected Attorney General of Kentucky and served in that capacity until 1859. In 1861, President Abraham Lincoln appointed him United States Attorney for Kentucky. He held that post until his death in 1863.

Throughout the 1840s and 1850s, James earned a reputation as one of the leading lawyers in the state. During these years, he argued more cases before the state court of appeals than any other lawyer. As Attorney General, he argued cases on behalf of the commonwealth. As a private lawyer, he corresponded with many members of the bar, acting as a resource on difficult points of law, and arguing appeals on behalf of other lawyers who sent him appellate cases and sought his professional advice. In 1853, he compiled a digest that covered all cases of the Court of Appeals of Kentucky from statehood in 1792 to the year 1853. The legislature adopted codes of civil and criminal

13. The Harlan family had the habit of using the same names over and over again. I will use "James the elder" when referring to John Marshall Harlan's grandfather, and "James" when referring to John's father. Four of James Harlan the elder's grandchildren were named James. See ALPHEUS H. HARLAN, HISTORY AND GENEALOGY OF THE HARLAN FAMILY 274-75 (1914).

14. DIGEST OF CASES AT COMMON LAW AND EQUITY, DECIDED BY THE COURT
A contributor to a collective biography of the Kentucky bar, published at the end of the nineteenth century, remembered James Harlan as a gifted lawyer. He described James as "a lawyer of great ability and . . . one of the most worthy and successful members of his profession in the state."\textsuperscript{15} James was also remembered as "a living, slow-speaking, incarnate digest of the decisions of the Kentucky Court of Appeals, as well as those of the Supreme Court of the United States."\textsuperscript{16}

James was a devoted Presbyterian, and, by all accounts, a quiet man of charm and great personal integrity.\textsuperscript{17} He was principled and independent, and entertained a life-long distaste for the Democratic Party. He believed in family—at one time his Frankfort household included, in addition to himself and his wife Eliza, two married sons and their wives, one unmarried son, two unmarried daughters, and, during the summer months, a married daughter and her two children.\textsuperscript{18} His sense of family extended beyond his wife and children, reaching out to include his eight siblings and their families as well.\textsuperscript{19} He had great personal courage, and believed strongly in national supremacy. He communicated all of these characteristics to his son,
John Marshall Harlan, whom he named after the great Chief Justice.\textsuperscript{20} James and John maintained the closest of ties until James died in 1863.

James disliked the institution of slavery, but, like his political idol, Henry Clay, could find no realistic alternative to its continuation. His mild anti-slavery views led him to represent a number of blacks in freedom suits even though this worked against him politically in Kentucky and forced him to defend himself against the charge that he was an abolitionist.\textsuperscript{21}

In 1853, John Harlan studied law in James' Frankfort office, and was admitted to the bar. Thereafter, throughout the 1850s, James and John practiced law and politics together. James served his son as father, friend, and political mentor. Their relationship was so close that there can be little doubt that James Harlan was the most important influence in shaping the younger man's values and ambitions.

After the disintegration of the Whig Party, in 1854, James and John, along with most of their Whig friends, joined the American Party—the Know-Nothings—and supported that nativist, anti-Catho-


\textsuperscript{21} See Letter from James Harlan to D. Howard Smith (Aug. 5, 1851) (available in John Marshall Harlan Papers, Library of Congress). In this angry, agitated letter—it was even stronger before Harlan scratched out and amended portions of it—Harlan denied in the strongest terms that he was an abolitionist.

I have never since I commenced the practice of law sought employment either from black or white persons; but nothing which may emanate from Negro traders or others will ever prevent me from instituting a suit for freedom if I believe the laws authorize it. The term “Abolitionist” has no terrors for me. He who applied it to me lies in his throat . . . .

\textit{Id.}

Alan Westin quotes from this letter in his discussion of the Harlan family's attitude toward slavery. Alan F. Westin, \textit{John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner}, 66 \textit{Yale L.J.} 637, 643 (1957). This article offers a first-rate treatment of John Harlan's attitudes and conduct on racial issues. However, Westin accepts the racist public statements John Harlan made in the 1850s and 1860s as a true reflection of his private views on race at that time. This leads Westin to look for the cause of the “transformation” of John's views on race in the years after John's retirement from the army in 1863. For examples of John's racist public statements, see Louis Hartz, \textit{John M. Harlan in Kentucky, 1855-1877: The Story of His Pre-Court Political Career}, 14 \textit{FILSON CLUB HIST. Q.} 17 (1940).

It seems to me that Westin gives too much weight to what Harlan said in his early years in politics. Thomas Owen argues more persuasively, that Harlan's racism was a guise, forced upon him by the realities of Kentucky politics in the 1850s and early 1860s, and that Harlan was never as racist, in fact, as he sounded in his public pronouncements. \textit{See} Thomas L. Owen, The Pre-Court Career of John Marshall Harlan (1970) (unpublished M.A. thesis, University of Louisville) [hereinafter Owen, Pre-Court Career]. This interpretation opens the possibility that the sources of John Harlan's enlightened views about race could be found in his formative years, much earlier than where Westin puts them.
Panic party until 1858. In that year the Whig remnants formed what became, in 1860, the Constitutional Union Party. Father and son both supported the Constitutional Union candidate, John Bell, in preference to either Abraham Lincoln or John C. Breckinridge in the 1860 presidential election. James and John were both active in preventing the secession of Kentucky during 1860-61. In response to his efforts on behalf of the Union, Lincoln named James as United States Attorney for Kentucky in 1861. James died in 1863, having lived practically his entire life in the public eye, as would his famous son.

B. John Marshall Harlan (1833-1911) 22

John Harlan was born on June 1, 1833, near Danville on the family farm, Harlan Station. His father, James, was by then an established lawyer and a rising politician, having already served as Commonwealth's Attorney in the circuit court. John received local primary schooling and then attended Presbyterian Centre College. After he graduated from Centre in 1850, he attended Transylvania Law School, in Lexington, and then completed his legal training in his father's law office in Frankfort. John practiced with his father until 1860, when he moved to Louisville in order to expand his professional opportunities. John received his political baptism in the mid-1850s as a successful stump speaker, and quickly became a rising political star. Unfortunately for John, the Whig Party destroyed itself in the Kansas-

22. John Harlan has been the subject of several articles, although fewer than he deserves. For a more detailed treatment of John's career and legal philosophy, as well as the biographical details outlined in this Article, the reader is encouraged to refer to the following sources. See generally Beth, John Marshall Harlan, supra note 6 (the first book-length biography on Harlan); Floyd B. Clark, The Constitutional Doctrines of Justice Harlan (Da Capo Press 1969) (1915); Henry J. Abraham, John Marshall Harlan: A Justice Neglected, 41 VA. L. REV. 871 (1955); Henry J. Abraham, John Marshall Harlan: The Justice and the Man, 46 KY. L.J. 449 (1958); Florian Bartosic, The Constitution, Civil Liberties and John Marshall Harlan, 46 KY. L.J. 407 (1958); Loren P. Beth, President Hayes Appoints a Justice, Y.B. SUP. CT. HIST. SOC'Y 68 (1989); David G. Farrelly, A Sketch of John Marshall Harlan's Pre-Court Career, 10 VAND. L. REV. 209 (1957); David G. Farrelly, Harlan's Formative Period: The Years Before the War, 46 KY. L.J. 367 (1958); Hartz, supra note 21 (the best published study of Harlan's political career before his appointment to the Court); Ellwood W. Lewis, The Appointment of Mr. Justice Harlan, 29 IND. L.J. 46 (1953); Lewis I. Maddocks, The Two Justices Harlan on Civil Rights and Liberties: A Study in Judicial Contrasts, 68 KY. L.J. 301 (1979-80); Robert T. McCracken, Justice Harlan, 60 U. PA. L. REV. 297 (1912); Edward F. Waite, How "Eccentric" Was Mr. Justice Harlan?, 37 MINN. L. REV. 173 (1953); Westin, supra note 21 (excellent, thoughtful piece about Harlan's career and his attitudes toward blacks); Alan F. Westin, The First Justice Harlan: A Self-Portrait from His Private Papers, 46 KY. L.J. 321 (1958); Owen, Pre-Court Career, supra note 21 (a solid treatment of Harlan's Kentucky career); Lewis I. Maddocks, Justice John Marshall Harlan: Defender of Individual Rights (1959) (unpublished Ph.D. dissertation, Ohio State University).
Nebraska controversy of 1854, and, as he came of age politically, he found himself a man without a party.

The period from 1858 to 1868 was a difficult one for John as well as for the country. After joining his father in crossing over from the disintegrating Know-Nothing Party in 1858, to an independent Opposition Party—which was defined in Kentucky by its opposition to Democratic Party principles and personalities more than by anything else—John followed his father into the Constitutional Union Party in 1860. Both men stood resolutely for the preservation of the Union. They were among the important leaders who espoused the Union cause in Kentucky during the secession winter, and played a major part in 1861 in keeping Kentucky in the Union. First, they engineered Kentucky's neutrality, and then helped raise a pro-Union militia to counterbalance the pro-Southern State Guard.23

After the war broke out in 1861, John raised an infantry regiment, the 10th Kentucky, and served as its colonel until his father's unexpected death in February 1863 led him to resign his commission and return to Frankfort. He worked to salvage his father's law practice and was again drawn into politics, being elected Attorney General of Kentucky on the Constitutional Union ticket in 1863. In the middle 1860s, he opposed ratification of the Thirteenth Amendment and postured to play to the racist electorate of Kentucky. John remained in Frankfort until 1867, when, having been defeated in his bid for re-election as Attorney General, he returned to Louisville and resumed his law practice. After 1865, the pro-Southern Democratic Party was supreme in Kentucky, riding the tide of popular reaction against the behavior of federal officials and the national Republican Party's reconstruction and racial policies.

By 1867 or early 1868, the Constitutional Union Party was dead. It had become clear that John Harlan had to choose between the two national parties and political oblivion. Unable to renounce his father's principles and his own past, John could not become a Democrat. In the summer or fall of 1868, John made his choice and publicly joined the Republican Party. By doing so, he helped to initiate the process by which a true two-party system would return to his home state.

With several of his Whig and Constitutional Union friends, Harlan immediately set about transforming the Kentucky Republican Party's radical image into one of moderation. He quickly built and

23. THOMAS SPEED, THE UNION CAUSE IN KENTUCKY 1860-1865, at 14, 100 (1907); see also BETH, JOHN MARSHALL HARLAN, supra note 6, at 40-52; see generally COULTER, supra note 5, at 35-110.
became the leader of the party's conservative wing. In partnership with men like Benjamin Bristow, his law partner, John Harlan became one of the "Great Men" of the party. He and Bristow wrested control of patronage away from the radicals and became players on the national party scene. In 1871, John made a strong bid to become the first Republican governor of Kentucky. During the campaign he argued that Kentuckians should accept the results of the war and the Civil War Amendments. At the end of the campaign Harlan polled enough votes to make himself conspicuous not only in state but also national Republican circles. He ran for governor again in 1875, and did even better than in 1871, attracting substantially more white votes than in his previous race. During the early 1870s, Bristow became a major figure in national Republican circles. He served as the first Solicitor General in 1870-71, and became President Ulysses S. Grant's Secretary of the Treasury in 1874. By 1876, Bristow was positioned, with John Harlan's help, for a serious run at the Republican presidential nomination as a reformer.

By switching the Kentucky delegation from Bristow to Rutherford B. Hayes in the 1876 Republican National Convention after it became clear that Bristow could not be nominated, Harlan earned Hayes' gratitude. This gratitude eventually led Hayes to nominate

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25. See generally COULTER, supra note 5; Hartz, supra note 21.
26. See infra note 257.
27. Harlan swung the Kentucky delegation to Hayes in order to prevent the nomination of James G. Blaine. Bristow did not feel betrayed by John Harlan. He wrote to John immediately after the national convention:

I cannot attempt to express to you the gratitude I owe you for your unselfish support and splendid fight made in my behalf at Cincinnati. . . . I think you conducted the campaign at Cincinnati with consummate ability, and that your movement for Hayes was exactly in the right time, and done in the right way . . . .

Letter from Benjamin Helm Bristow to John Marshall Harlan (June 20, 1876) (available in John Marshall Harlan Papers, Library of Congress). For a detailed account of the campaign and convention, see Webb, supra note 24, at 213-52, and Beth, John Marshall Harlan, supra note 6, at 98-105. This convention was held in Cincinnati and John Harlan, as the leader of the Bristow forces, was at the center of things. Although not a delegate, it is almost certain that Robert Harlan was present at the convention. John and Robert had corresponded before the convention. In one letter, Robert told John that he was working quietly for Bristow, and offered to assist him and the Bristow forces on the eve of the convention. Robert also offered to help John by working for Bristow at the Ohio State Republican Convention in Columbus. "I would like to see or hear from you before I
John Harlan to be an Associate Justice of the United States Supreme Court in 1877, and to give Harlan the platform from which to proclaim that blacks deserved the full rights of American citizens under our "color blind" Constitution.

C. Robert Harlan (1816-1897)

Much less is known for certain about Robert Harlan than about James or John. Black men and women, as individuals, were nearly invisible in Kentucky during the slavery period. Surviving accounts almost invariably treat blacks in the aggregate, noting few personal characteristics. Individual slaves had less personal history than fast horses or pedigreed dogs. Writers took little notice of them as individuals, and they rarely appeared in public records other than the minute books of the county courts, where individuals occasionally brushed against local authorities. Robert Harlan lived the first thirty-four years of his life as a member of this faceless human scenery. For this reason, his years in Kentucky are obscure. Most of the reliable information about him comes from his years in Cincinnati—after he acquired wealth and became active in Republican politics. His social and political prominence in Cincinnati resulted in some newspaper coverage of his activities, and this was a valuable resource unavailable for less prominent people, black or white. Land, tax, and census records also supply some information about his activities, as do a few of Robert’s letters to John, which have been preserved in the John Marshall Harlan Papers at the Library of Congress. Because there is so little information about nineteenth century blacks in general, and because there was so little solid information about Robert in particular, I have chosen to report in detail what I have found.

The most important narrative source of information about Robert Harlan’s life is a brief sketch written by William J. Simmons, a black educator, and published in 1887 in Simmons’ collection of biographies of notable black Americans, Men of Mark: Eminent, Progressive and Rising.28 At the time this book was first published, Robert Harlan was in the Ohio legislature serving as one of the first elected black members of the state House of Representatives. As such, he was in the public eye. This fact, coupled with the likelihood that Simmons knew Robert Harlan personally—Simmons was the President of the Ken-

28. SIMMONS, supra note 3, at 421-22.
tucky Normal and Theological Institution—and the probability that Robert Harlan was himself the source of most of the information contained in the sketch, make Simmons a credible source.29

Simmons reports that Robert Harlan was born in Mecklenburg County, Virginia, December 12, 1816, the son of a white father and a slave mother who was “three-parts” white. Simmons further states that Robert was brought to Kentucky at the age of eight and raised by James Harlan, the “father of the Hon. John M. Harlan, at present associate justice of the Supreme Court of the United States.”30

This is all the information about Robert’s origin provided by Simmons or any other source published during Robert Harlan’s lifetime. It is possible that Robert knew no more than this about his origin, however, this seems unlikely unless he was separated from his mother at a very early age.31 If he knew or suspected who his father was, his public silence on this question is strange, unless he maintained his silence for his father’s sake or for the sake of his father’s family.

Whatever may be the truth about the place of his birth—about this I will write more later—there is no doubt about his exceptional treatment at the hands of James Harlan. Robert was intelligent and ambitious, and was given some education in the Harlan household. Although Kentucky, unlike her sister states further South, never made it a crime to teach slaves to read and write, such behavior was not encouraged. Most slaveholders believed that a slave who could read would prove less manageable than one who could not.32 Slaves who

29. In his introduction to the 1970 reprint edition of Simmons’ book, Lerone Bennett, Jr., notes that Simmons “participated in the major political and ideological struggles of the late nineteenth century. [He] knew many of the great men of that period and some of them provided him with documents and research materials.” SIMMONS, supra note 3, at viii. Simmons himself, however, in his original preface warns the reader: “I have not tried to play the part of a scholar, but a narrator of facts with here and there a line of eulogy.” Id. To the extent that I have been able, by means of my own research, to verify the facts contained in Simmons’ sketch on Harlan’s career, he has proved generally reliable.

A newspaper story about Robert Harlan, published by the leading Ohio black newspaper, the Cleveland Gazette, shortly before Simmons’ sketch appeared, contains much of the same information. See Honorable Robert Harlan, CLEVELAND GAZETTE, May 1, 1886. Slight discrepancies between this article and the Simmons sketch suggest that they were composed independently or that, if one was based upon the other, each author also had his own independent sources of information. Obituaries published at the time of Harlan’s death, in 1897, appear to draw primarily upon these two sources.

30. SIMMONS, supra note 3, at 421.

31. Separating small children from their slave mothers broke a taboo that most slaveholders would only reluctantly violate, and then, only for some reason. See generally EUGENE O. GENOVESE, ROLL JORDAN ROLL 453-54 (First Vintage Books 1976) (1930). Therefore, it seems likely that there would have been some time for Robert’s mother to tell him something of his paternity.

32. McDOUGLE, supra note 5, at 79.
could write were a direct threat to the slave system because that system relied upon written passes to restrict a slave’s mobility. A slave who could write could forge passes facilitating his own flight to freedom or assisting others in theirs.

Simmons wrote that James Harlan attempted to send Robert to school with James’ own sons, but that Robert was “discovered” to be black and sent home. Simmons says that Robert was thereafter educated at home by James’ older sons. Surviving examples of Robert’s speeches and letters show that he learned a great deal from these informal educational opportunities, although his polished work displays much more refinement than do his private letters. Because of his light skin and his education, Robert was almost certainly a house slave who spent much time with the Harlan family. Simmons wrote that Robert was trained as a barber, subsequently opened a barber shop in Harrodsburg, and later a grocery in Lexington.

Robert does not appear in population schedules of the United States Census for 1830 or 1840 in Kentucky, indicating slave status when the enumerations were made. It is possible that he was still in

33. See Jarrett v. Higbee, 21 Ky. (1 T.B. Mon.) 546 (1827).
34. Simmons, supra note 3. This seems unlikely since James did not marry until 1822, and had his first sons, Richard D. Harlan and William L. Harlan, in 1823 and 1825. By the time either of James’ “older” sons could have taught Robert to read and write, he would have been a young adult. If he was educated in the Harlan household, it seems likely that James, and James’ wife, Eliza Davenport Harlan, were his teachers. The editor of the Cincinnati Enquirer reported in Harlan’s obituary,

When this colored boy became old enough to go to school Judge Harlan sent him to the village school at Harrodsburg, along with his own boys. Although his appearance would hardly reveal the fact of his being a colored child, some one [sic] informed the school authorities of the fact the same day that the boy was admitted to the school and he was summarily discharged. Out of this circumstance Colonel Harlan often remarked that he had only “a half a day’s schooling.”


35. Compare Proceedings of the Semi-Centenary of the African Methodist Episcopal Church of Cincinnati, Held in Allen Temple, February 8th, 9th, and 10th, 1874, at 107-09 (B. Arnett ed., 1874) (Harlan speech); Anniversary of the Proclamation of Emancipation, Cincinnati Commercial, Sept. 23, 1871, at 2 (Harlan speech); Closing Remarks of Colonel Robert Harlan at the Thirteenth Ward Meeting Last Night, Cincinnati Commercial, Oct. 10, 1871, at 6 (Harlan speech); Discussion of the Civil Rights Bill-Views of Colonel Robert Harlan and Others, Cincinnati Commercial, Mar. 28, 1875, at 2 (Harlan speech); Interview with Colonel Robert Harlan, Cincinnati Commercial, Aug. 26, 1871, at 10; Letter to the Editor by Robert Harlan, Cleveland Gazette, Feb. 7, 1885 with Letters from Robert Harlan to John Marshall Harlan (June 9, 1873), (Oct. 4, 1873), (Mar. 28, 1876), (May 31, 1876), (June 22, 1876), (July 17, 1876), (Aug. 2, 1876), (Mar. 7, 1877), (Apr. 14, 1877), (June 1, 1877), (Oct. 10, 1877), (Nov. 10, 1877) (available in John Marshall Harlan Papers, Library of Congress).
36. Simmons, supra note 3, at 421.
the Harlan household in 1840 when the census was taken; however, he posted a marriage bond in Lexington in November 1840, in which he claimed to be free. It is possible that Robert remained in James Harlan’s household until James moved to Frankfort in 1840 to take up his duties as Secretary of State. If so, then John Marshall Harlan would have been a boy of seven when Robert left the Harlan household.

Robert also seems to have been permitted to travel while still formally a slave. Simmons asserted that Robert had visited “almost every state in the Union [and Canada],” “with the consent of his owner” and “without restriction.” This would represent remarkable freedom of movement for a man who was still nominally a slave. It is certain that he traveled widely after formal emancipation, and the restlessness he displayed later—a restlessness which took him to California in 1849 and produced later trips to Europe—coupled with his early interest in horse racing, offer some support for Simmons’ report in this regard. Permitting such travel would have been consistent with James’ other extraordinary treatment of Robert although it entailed some risk of Robert being swept up by white patrollers.

Robert’s separation from the Harlan household and his move to Lexington were almost certainly prompted by James’ move to Frankfort. Without James’ immediate protection Robert could not continue in Harrodsburg. He was known there to be a slave, and the town was hostile to unsupervised blacks. Lexington, unlike Frankfort or Harrodsburg, was more congenial to free blacks, and in Lexington Robert’s de jure slave status was unknown. In Lexington he could live as a free man, and with the probable connivance of James, he did.

37. *Fayette County Marriage Bonds, supra* note 2 (Nov. 19, 1840). The name of Robert’s intended bride was Margaret Sproule. On the back of this bond, the county clerk endorsed the following: “Clerk knowing both parties to be 21 years of age & free.” *Id.*

38. *Simmons, supra* note 3, at 421.

39. In describing such patrolling in Kentucky, J. Winston Coleman wrote, “It was the duty of the ‘patterollers’ to seize and whip every slave found away from home, unless on business or with the permission of his master or overseer, which had to be stated in writing.” *Coleman, supra* note 5, at 99. For an example of a slave who seems to have been in the same position as Robert and who was arrested, see Jarrett v. Higbee, 21 Ky. (1 T.B. Mon.) 546 (1827).

40. For a description of the kind of arbitrary treatment to which blacks were subjected, see *Coleman, supra* note 5, at 95-114.

41. It is extremely unlikely that Robert could have established his “free” status in Lexington without some form of documentation from James. It is possible that Robert misrepresented his background and claimed to have been born free, but this would have been extremely risky given Lexington’s proximity to Harrodsburg, and the fact that black or brown skin was prima facie evidence of slavery in Kentucky. This meant that the bur-
Whether he ran his own business, as Simmons asserts, cannot now be established, but he seems to have accumulated no tangible property. In 1841, he was living and probably working in a stable; although he changed residence frequently thereafter, he did not appreciably improve his economic position. Whatever the reason for Robert's move to Lexington, he lived there as a putatively free man of color from the time of his first appearance in that city's records, in 1840, until 1848.

It is impossible to characterize the relationship between James Harlan and his de jure slave during these years. James' political career continued to blossom as he became one of the Whig leaders of Kentucky, and a lieutenant of Henry Clay. Since Robert's legal emancipation was not completed until 1848 and since Lexington was only twenty miles from Frankfort, it seems likely that contact with James continued at need. However, whether James assisted Robert directly during these years is unknown.

In 1848, James formally emancipated Robert. John Harlan was fifteen at the time. Frankfort was a small community in 1848. It seems likely that John knew what his father intended to, and did do, that September morning before the county court. The county court records show that emancipations were unusual events, and it is likely that this one, especially since it involved a slave who was already believed to be a free man, elicited comment from James' neighbors. Surely John would have discussed Robert's unique status with his father at this time.

In late 1848, or early 1849, after reconnecting publicly with James Harlan long enough to be formally emancipated, Robert left his family and went to California in search of wealth. It is not clear den was on *all* blacks to prove their free status or they would be held as slaves. Coleman, supra note 5, at 205. It seems likely that James gave Robert papers which represented him to be free.

42. The real estate records for Mercer County (Harrodsburg) and Fayette County (Lexington) show no land transactions by Robert Harlan at any time. Nor does he appear in the Fayette County or Mercer County tax lists at all. The Lexington city tax records, where he does appear, show that he did not even own any horses at this time.

43. See *Lexington City Tax Records*, supra note 2. After his first appearance in the Lexington public records in November 1840, Robert remained in the city for almost nine years. From 1841 to 1848 he was listed in the Lexington city tax records as a "free black" citizen of the city. These records also reveal that Robert was living with a free woman of color and that they had five daughters during those years.

44. Simmons, supra note 3, at 421; *Brief Biography*, supra note 6; "Colonel" Robert Harlan, *Cleveland Gazette*, Oct. 2, 1897, at 1; *Honorable Robert Harlan*, *Cleveland Gazette*, May 1, 1886, at 1; *Life of Robert Harlan*, *Cincinnati Enquirer*, Sept. 22, 1897, at 6. Another account of Robert Harlan's life, which was published in 1890, appears to draw heavily upon Simmons, lifting some passages directly from his sketch. *One of the Best Known and Widely Travelled Colored Men in the United States*, *The Appeal* (St.
where he obtained the resources he needed in order to make the trip. His 1934 newspaper biography states that Robert arrived in San Francisco with $3000. It is possible that he had saved the cost of the trip, as the paper contends. However, if he had accumulated $3000 before leaving Lexington, why did not some of this substantial wealth appear in the tax records? It seems more likely that Robert won this money gambling or borrowed it from his long time patron, James Harlan. It is also possible that Robert set out for California with less money than he had when he arrived.

Robert traveled to San Francisco with a group of white men from Kentucky. It is possible that he accompanied the son of Dr. Christopher Columbus Graham, the owner of a famous resort near Harrodsburg. One of the Lexington newspapers reported that Graham’s son was leading a group to California with the intention of establishing a hotel in San Francisco. It is possible that Robert was in this group.

Robert went no further than San Francisco where he amassed a fortune of $45,000 in less than two years. Simmons does not state

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45. Brief Biography, supra note 6.
46. DICTIONARY OF AMERICAN NEGRO BIOGRAPHY, supra note 4, at 287.
47. When Robert Harlan was growing up in Harrodsburg, there was a nationally known resort nearby called Harrodsburg Springs, owned by Dr. Christopher Columbus Graham. The Springs was a famous watering hole and supplied a full round of services and entertainments to its patrons. One of the entertainments was horse racing. Numbers of blacks were always present at Harrodsburg Springs because they performed most of the menial labor and personal service. Robert Harlan would certainly have been aware of the Springs, and it would have been consistent with his later interests for him to have participated in the activities which were occurring there in his youth. Indeed, given his later activities, it is hard to believe that much could have kept him away from the Springs. See Martha Stephenson, Old Graham Springs, 12 REG. KY. HIST. SOC’Y 27 (Jan. 1914); Mai F. Van Arsdall, The Springs at Harrodsburg, 61 REG. KY. HIST. SOC’Y 300 (Oct. 1963). It was owned by the Graham family in the 1830s, and at one time part of the property appears to have belonged to James Harlan. VAN ARSDALL, supra at 325-27; see also MERCER COUNTY [KENTUCKY] DEED BOOK 18, at 525.

If Robert frequented or worked at the Springs, he might have become acquainted with Graham’s wayward son and later joined his California party.

48. SIMMONS, supra note 3, at 421. The Cincinnati Union put the figure at $90,000 and reported that Harlan accumulated this sum in one and one-half years. Brief Biography, supra note 6.
how Harlan made his money in California. One account printed after Harlan's death says he opened a store in San Francisco and made his fortune through trade.\(^49\) If this were true, Simmons would probably have reported it. It also seems unlikely that Harlan could have accumulated so much money so quickly in this fashion. He may have obtained this money by gambling, by running either a faro or monte table in a San Francisco saloon. This seems confirmed by an admission later elicited from Robert by one of his political enemies, that gambling was the foundation of his wealth.\(^50\)

When Harlan returned East in 1850, to settle in Cincinnati, Ohio, he was a very rich man. Robert's Kentucky wife had died during his absence but as soon as he was established in Cincinnati he sent for his three surviving daughters and their grandmother.\(^51\) Legally free, and with money to invest, he bought real estate and a photography business.\(^52\) As a man of leisure, he began to concentrate on what was ap-

\(^{49}\) Life of Robert Harlan, CINCINNATI ENQUIRER, Sept. 22, 1897, at 6.

\(^{50}\) In a newspaper account of a public exchange between Peter Clark and Robert Harlan which took place in Cincinnati in 1871, Clark, Robert's long time political enemy, is quoted as stating that Harlan had nothing to do with the founding of black schools in Cincinnati—for which, Clark charged, Harlan often took credit—because they were established in 1850-51, "at which time Harlan was running a faro bank in California." Colonel Harlan Visits the West End and Attends a Meeting—A Bit of His Political History By One Who Knows and Other Matters of Interest, CINCINNATI COMMERCIAL, Sept. 4, 1871, at 8. The account continues, "[a]t this touch of the most sensitive nerve . . . [Harlan] became furiously excited and advanced in a pugnacious attitude, but forebore [sic] to strike, simply contenting himself with pronouncing it false. He afterward explained, however, that it was no faro, but the more innocent game of monte . . ." Id.

This story about the source of Harlan's California fortune is plausible. He appears to have taken his gambling seriously. He kept and raced horses while living in Cincinnati, and he took horses and jockeys with him to England in 1859 when he emigrated there. He is also reported to have won a $5000 wager on a trotting horse while in England. Life of Robert Harlan, CINCINNATI ENQUIRER, Sept. 22, 1897, at 6; Brief Biography, supra note 6. See infra note 53, for further accounts of Robert Harlan's interest in racing.

\(^{51}\) There is no indication in the Lexington records that a mother or mother-in-law was part of the Robert Harlan household in Lexington. Was the woman who took over the care of his daughters when his wife died, his mother-in-law or his mother? If she was his mother, she was living in Kentucky and he had maintained contact with her long enough to have learned anything she could tell him about his paternity.

\(^{52}\) The Cincinnati real estate records show that Robert Harlan purchased his first Cincinnati real estate in October 1850, a house on the south side of Harrison Street, for which he paid $2500. HAMILTON COUNTY [OHIO] DEED BOOK 158, at 188. In subsequent years, he bought and sold several pieces of property in Cincinnati, tying up in land several thousand dollars at a time. See DEED BOOK 181, at 280, 284-86; DEED BOOK 208, at 443; DEED BOOK 220, at 316; DEED BOOK 251, at 599.

Robert Harlan appears in the Cincinnati city directory for the first time in the year 1851. He also appears there in 1853 and 1858. In 1851 and 1853 he is listed as residing on Harrison Street, east of Broadway. In 1858 his listing reads: "Harlan, Robert, Photographer, 28 and 30 E. 4th, h[ome] n[orth] e[ast] c[orner] 5th and Broadway." In
It stretches belief to imagine that Robert could have restrained himself from communicating his financial good fortune to his former master. If Robert informed James Harlan of his dramatic change of circumstances, such startling news would have been made known to John as well. John was living in his father’s house during many of these years (he did not marry Malvina French Shanklin until 1856) and practicing law and politics at his father’s side.

There is some evidence that Robert contacted James upon his return from California. Simmons writes that “[a]bout this time, . . . [Harlan] voluntarily returned to Kentucky and arranged for a formal acknowledgment of his freedom, paying five hundred dollars for the same.” This reference to the date of Harlan’s emancipation is clearly wrong, since he was freed before his trip to California, not upon his return. It is possible that Robert paid for his freedom in 1848, but this seems unlikely given his lack of resources and large family. If Robert ever made such a payment to James, it probably came upon Robert’s

1858, there is an entry for “Robt. Harlan (H. & W.) res[idence] Europe.” There is also an entry for “Harlan & Wilson, (Robt. H. & Geo. W.W.) Photographs, Ambrotypes, & c., 28th and 30 W. 4th.” WILLIAMS, CINCINNATI DIRECTORY (1836-37, 1840, 1842, 1843, 1846, 1849-98) (available at the Cincinnati Public Library, Cincinnati, Ohio). It is impossible to determine how long Harlan was in the photography business. Acting as an independent businessman was a particularly high status occupation for a black man at the time.

53. Robert Harlan’s involvement with race horses seems to go back to his early youth. Although considered not quite respectable by middle class blacks in the late nineteenth century North, an interest in horse racing was a sign of breeding and social position in much of the South. Simmons wrote in 1887 that Harlan “enjoys sport as much as any one; indeed he is specially fond of horse-flesh, and can relish a fine animal as only a native Kentuckian knows how.” SIMMONS, supra note 3, at 422. Simmons, however, carved Harlan’s passion for fast horses and “the sport of Kings” down to a shadow of its reality. Id.; see also Colonel Robert Harlan, CLEVELAND GAZETTE, Oct. 2, 1897 (where there is no mention at all of Harlan’s involvement in horse racing). It is in newspaper reports of Harlan’s activities in Cincinnati that the intensity of his commitment to horse racing comes through. One report states that “[f]or years no great turf event or political gathering of his party ever took place but that the stalwart figure of ‘Bob’ Harlan was to be noticed in the throng of celebrities.” Life of Robert Harlan, CINCINNATI ENQUIRER, Sept. 22, 1897, at 6; see also Interview with Colonel Harlan, CINCINNATI COMMERCIAL, Aug. 26, 1871, at 10.

Wendell Phillips Dabney also notes “Bob” Harlan’s interest in horse racing in his book. WENDELL P. DABNEY, CINCINNATI’S COLORED CITIZENS; HISTORICAL, SOCIOLOGICAL, AND BIOGRAPHICAL 46, 109, 179 (1926).

It is likely that Harlan first developed his love of horses and his expertise about horses while growing up in the Harlan household in Harrodsburg or while living in Lexington. It is unlikely that James Harlan encouraged Robert’s interest in gambling, but he might have encouraged Robert to learn about horses as a possible means of earning his livelihood, an occupation which was not uncommon for blacks in antebellum Kentucky.

54. SIMMONS, supra note 3, at 421; see also Honorable Robert Harlan, CLEVELAND GAZETTE, May 1, 1886.
return from California.\textsuperscript{55} Perhaps Robert was repaying money lent him by James which had made the trip to California possible. If a payment was made after Harlan returned from California, it is proof of renewed contact with James Harlan’s family after Robert settled in Cincinnati.

By 1852, Robert had remarried.\textsuperscript{56} Robert’s first son was born in 1853 and was named Robert James Harlan.\textsuperscript{57} That his son should be named after both Robert and Robert’s benefactor is not surprising. It suggests that Robert felt good will toward James. It may also hint that Robert privately made a claim to a closer relationship to James than any he put forward in public. It would be remarkable if Robert had not announced to James Harlan the birth of a child named for him. This also suggests that contact between the Frankfort Harlans and the Cincinnati Harlans was maintained. Within a few months of the birth of his son, Robert Jr., Robert’s second wife, Josephine M. Harlan, died.\textsuperscript{58}

Robert spent the 1850s speculating in real estate and racing horses. Having visited England in 1851, he decided in 1858 to emigrate with his family, reportedly taking his race horses, a trainer, and a jockey with him.\textsuperscript{59}

There is no clear evidence as to why Robert Harlan left Cincinnati. There had been an on-going debate within the Ohio black community during the 1850s over whether blacks should emigrate to countries free from the profound racism which afflicted the United States, North as well as South.\textsuperscript{60} “Colored” conventions meeting in Columbus and Cincinnati publicly debated whether emigration was

\textsuperscript{55} Simmons places the event at this time. SIMMONS, supra note 3, at 421.

\textsuperscript{56} DICTIOANRY OF AMERICAN NEGRO BIOGRAPHY, supra note 4, at 288.

\textsuperscript{57} Id. For the sake of clarity, I will refer to Robert James Harlan as “Robert Jr.,” reserving “Robert” or “Robert Harlan” for James Harlan’s former slave.

\textsuperscript{58} Although I have found no marriage record for Robert and Josephine, there are real estate deeds dated December 1852, in which she released her dower interest in property conveyed by Robert. HAMILTON COUNTY [OHIO] DEED BOOK 181, at 284. By June 1854, Josephine no longer appeared on Robert’s deeds. HAMILTON COUNTY [OHIO] DEED BOOK 208, at 443. The Union narrative states that Josephine Harlan died within six months of the birth of Robert Jr. The absence of a release of dower in the 1855 deed seems to confirm this report. Brief Biography, supra note 6.

\textsuperscript{59} Life of Robert Harlan, CINCINNATI ENQUIRER, Sept. 22, 1897, at 6.

the best solution to the problems of free blacks in America.  

Although apparently not a direct participant in the debate, as he is not listed as a delegate to any of the conventions, Robert Harlan must certainly have been aware that this debate was taking place and have followed it with interest. In the end, the convention movement decided to concentrate on anti-slavery agitation and the struggle for black rights as American citizens, rather than upon escape. However, if Robert Harlan made another choice it would be understandable. He appears to have asserted often that he moved his family to England "to escape the prejudice existing against men of his color [in the United States]."  

The interesting question is not why Harlan left Cincinnati in 1858, but why he had chosen to settle there in 1850. The life of blacks in that city in the 1850s was precarious, if not downright dangerous. Cincinnati was a border city on the Ohio River with pervasive social and economic contacts with slaveholding Kentucky and, by means of the Ohio and Mississippi Rivers, with the deep South. It was a city with a virulent strain of racism which periodically exploded in violent outbursts directed both against blacks as individuals, and against the entire black community. Under the influence of southern Ohio delegates, the Ohio constitutional convention of 1850-51 had refused to abrogate the anti-black provisions of the Ohio Constitution. 

Passage of the federal Fugitive Slave Act of 1850 had increased the risk of kidnapping by marauding "slave catchers" and amplified the sense of insecurity already experienced by blacks because of state-imposed legal disabilities. The passage of the Fugitive Slave Act also brought anti-black feelings to the surface. One group of Cincinnati's white citizens gathered after passage of the Act to announce our Union is an Union of white people, and of States composed of white people; that the negro has never been regarded as an equal in our social or domestic life, nor in political rights; that the evil in this country is not so much slavery as the presence of a distinct black race, with whom we cannot live on terms of social or political equality; that their entire removal from us would be a great public good,

61. See Proceedings of a Convention of the Colored Men of Ohio. Held in the City of Cincinnati, on the 23rd, 24th, 25th and 26th Days of November, 1858 (Moore, Wiltach, Keys & Co. 1858). This convention resolved the question definitively against emigration. See also Folk, supra note 60, at 184-206.

62. Simmons, supra note 3, at 422.

63. See Carter G. Woodson, The Negroes of Cincinnati Prior to the Civil War, 1 J. Negro Hist. 1-22 (Jan. 1916); Folk, supra note 60, at 65-114; see also Gerber, supra note 4, at 3-24; Litwack, supra note 60, at 72-73, 100; Quillin, supra note 60, at 32.

64. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).
but to make them free in our midst would increase the evil.\textsuperscript{65}

Cincinnati must have been among the most dangerous and unpleasant places in Ohio for a free black man to live. If Harlan wanted to live in a city with a substantial black population, he could have chosen Cleveland or Columbus. Both were much freer of the taint of prejudice than was Cincinnati, and both were far enough removed from the border of slave country to discourage kidnapping.

The Ohio black laws prevented blacks from giving evidence in cases in which whites were parties. This was, of course, always the case when allegations of fugitive status were made.\textsuperscript{66} Even those blacks, like Robert Harlan, who had proof of their own legal status as free persons, must have suffered recurring panics when there was publicity about the "capture" or "kidnapping" of alleged fugitives in the city. This was a common occurrence in the period from 1850 to 1858.\textsuperscript{67}

Harlan's choice to live in Cincinnati seems even stranger if he wanted to forget his slave past. He was more likely to encounter people from that past in Cincinnati than in other northern cities. People from the central Bluegrass of Kentucky, from Lexington and Frankfort—including James Harlan—traded with and visited the city.

Perhaps Robert Harlan chose to live in Cincinnati because it seemed less alien to him than the cities further north, or because it had a large free black population. It seems more likely, however, that he settled in Cincinnati in order to be near his "old haunts," horse racing, and, perhaps, the Kentucky Harlans who were now living in Frankfort, some eighty miles away up the Kentucky River, and easily accessible by steamboat.

Perhaps it was the emotional impact of the United States Supreme Court's infamous \textit{Dred Scott} decision, issued in 1857, that

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\item \textsuperscript{65} Lyle Koehler, Cincinnati's Black Peoples: A Chronology and Bibliography, 1787-1982, at 48 (1986) (unpublished manuscript, available in the University of Cincinnati Library) (quoting \textsc{Cincinnati Commercial}, Nov. 18, 1850).

It would leave the picture of Cincinnati in these years incomplete if no mention is made of the activity of abolitionists in the city in these years. Salmon Chase, "the attorney general for runaway slaves," was living and working in the city in these years and, along with others, tried to protect blacks. Harriet Beecher Stowe, a former resident of Cincinnati, published her emotional attack on slavery, \textit{Uncle Tom's Cabin}, in 1852. There were also important efforts at self-help within the black community. \textit{See} Folk, \textit{supra} note 60, at 152-62; \textit{see also} Koehler, \textit{supra}, at 45-53.

\item \textsuperscript{66} For the legal disabilities suffered by blacks in antebellum Ohio, see Betty M. Culpepper, The Negro and the Black Laws of Ohio, 1803-1860 (1965) (unpublished M.A. thesis, Kent State University).

\item \textsuperscript{67} \textit{See} Folk, \textit{supra} note 60, at 304-56.
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prompted Harlan to give up on the United States. This decision validated federal protection for the South’s “peculiar institution” and sketched, in unmistakably bleak terms, the withered prospects for American blacks, North or South, slave or free.\textsuperscript{68} It might have been, instead, the raising and then dashing of hope nearer home which finally convinced Robert Harlan that he had no future in his own country. In 1857, in apparent reaction to the \textit{Dred Scott} decision, the Ohio legislature—under Republican leadership—enacted three new statutes granting blacks important rights.\textsuperscript{69} This must have taken some of the sting out of the Supreme Court opinion and the federal commitment to the apprehension of fugitive slaves. However, the next year, the Republican Party lost control of both houses of the Ohio legislature. The new Democratic majority quickly repealed all three of the 1857 acts, and passed a “visible admixture” law which made it a criminal offense for election officials to allow people with a “visible admixture of Negro blood” to vote.\textsuperscript{70} For Harlan, who was seven-eighths white, this must have seemed a burning, personal affront since it disenfranchised him.

Robert Harlan lived abroad for ten years, from late 1858 or early 1859, until 1869. He missed most of the turbulent decade of the 1860s, returning to Cincinnati in 1869, having lost most of his financial resources due to the dislocation of his investments during the Civil War. His financial decline was almost certainly exacerbated by gambling losses and the failure of his horse racing ventures in Great Britain.\textsuperscript{71} It is possible that the passage of a bill granting suffrage to Ohio

\begin{thebibliography}{9}
\bibitem{68} Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
\bibitem{69} See Culpepper, \textit{supra} note 66, at 161-65 (texts of Act of Apr. 16, 1851 (prohibiting the confinement of fugitives from slavery in the jails of Ohio); Act of Apr. 17, 1857 (preventing slaveholding and kidnapping in Ohio); Act of Apr. 17, 1857 (preventing kidnapping)).
\bibitem{70} Culpepper, \textit{supra} note 66, at 88.
\bibitem{71} Simmons made no mention of Harlan’s financial reverses, which is somewhat curious, but Harlan’s obituary in the \textit{Cleveland Gazette} noted them, stating that the war “depreciated his holdings” and that he returned to Cincinnati “minus his fortune.” \textit{Colonel Robert Harlan}, \textit{CLEVELAND GAZETTE}, Oct. 2, 1897. The \textit{Cincinnati Enquirer} noted that Harlan owned horses which “raced throughout England for 10 years,” and that he made substantial wagers on races. \textit{Life of Robert Harlan}, \textit{CINCINNATI ENQUIRER}, Sept. 22, 1897, at 6. It too attributed his financial decline to the effects of the war, reporting, strangely, that the “overthrow of the Confederacy rendered [his American securities] valueless.” \textit{Id.} Had he invested in Confederate securities? The \textit{Cincinnati Union} attributed Harlan’s financial collapse to the effects of the war but also hinted at the imprudent consumption of capital. Because of the outbreak of the Civil War in 1861, “[b]anks in the U.S. failed, Stocks depreciated in value, dividends were no longer paid. The source of Harlan’s income began to dry up, the principal being sacrificed. In 1868 he returned to the U.S. with only a small remnant of the fortune . . . .” \textit{Brief Biography, supra}, note 6. That failure of his racing ventures contributed to his financial difficulties is hinted at by the comment that the English climate “affect[ed] the horses unfavorably.” \textit{Id.}
\end{thebibliography}
blacks in 1869 played a part in inducing Robert to return to Cincinnati.\footnote{72}{BLACKS IN OHIO HISTORY: A CONFERENCE TO COMMEMORATE THE BICENTENNIAL OF THE AMERICAN REVOLUTION 18 (Ruben F. Weston ed., n.d.). I would like to thank the National Afro-American Museum and Cultural Center of Wilberforce, Ohio, for providing me with a copy of this material.}

Robert Harlan returned to Cincinnati with little money. His remaining capital was insufficient to permit him again to attempt real estate speculation, although it appears that enough remained to permit him time to survey the landscape in search of promising opportunities. His name reappears in the Cincinnati city directory for 1870, with no indication of occupation, and it lists him as boarding at a house at 39 Harrison Street, in that city. This made him a resident of the First Ward in Cincinnati at the time of the 1870 census.\footnote{73}{ATLAS OF CINCINNATI AND HAMILTON COUNTY, OHIO, 1869, Part V, Embracing 1st & 3d Wards (in the collection of the Cincinnati Historical Society). The public records now create some ambiguity. The United States Census taken in 1870 lists two Robert Harlans in Cincinnati living in close proximity. One lived in the Thirteenth Ward and one in the First. The Thirteenth Ward Robert, who was a 52 year-old mulatto, lived with a 50 year-old mulatto woman named Mary Harlan. He was listed as a "Hostler"—one who keeps horses for hire—and Mary was keeping house. Robert's enumeration listed neither real nor personal property, but Mary had realty valued at $7000 and personalty valued at $300. This Robert's place of birth was listed as Kentucky, while this Mary's place of birth was Tennessee.}

Whatever prompted his return to the United States in 1869, Cin-
cincinnati, at that time, offered to talented, ambitious black men opportunities that had never before been available. The triumph of the North in the Civil War, the ratification of the Fifteenth Amendment guaranteeing northern blacks the vote, and the partisan interests of the Republican Party, combined to open apparently breath-taking opportunities for prominent blacks. All they need do was to attach the new black voters to the Republican electoral machine—attach them to the party, not integrate them into it. Robert Harlan recognized these possibilities and, in early 1870, threw himself into politics as a vocation. He set about making himself useful to the white Republican leadership of the city and the state, and quickly became a thoroughgoing party man.

By 1871, Robert was deeply involved in Republican politics in Ohio. He was given serious consideration as a candidate for the state legislature from Cincinnati in 1871, and acquired substantial support before being defeated in the county convention. He met President Grant in the summer of 1871, and became one of Grant's most important adherents in the Ohio black community. In 1872, Harlan was one of two representatives from Cincinnati elected to the Republican State Central Committee, becoming the second black man ever to serve in this capacity. Also in 1872, he attended the national Republican convention held in Philadelphia, as one of six Ohio alternates at-

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74. For a description of the life-style of the layers of the black community in Ohio, including the black upper class to which Robert Harlan belonged, see Gerber, supra note 4, at 93-139. Gerber uses Robert Harlan as an example of the light-skinned, black upper class. Id. at 117-24. For an excellent treatment of the black upper class nationally, see Gatewood, supra note 4.

75. See Cincinnati Commercial, Sept. 6, 1871, at 4; Cincinnati Commercial, Sept. 7, 1871, at 4; Cincinnati Commercial, Sept. 8, 1871, at 4, 8.

76. Robert Harlan loyally clung to the Republican Party, even when other influential blacks expressed dismay at the party's refusal to share patronage with its black adherents and to nominate black candidates for office. See Gerber, supra note 4, at 209-44. Gerber calls Harlan "the Grant administration's leading black officeholder in Ohio." Id. at 221. Gerber's book offers a lucid and complete treatment of black life in Ohio. His discussion of politics is especially enlightening. From Gerber's treatment, it is clear that Robert Harlan was an extremely important black politician in the 1870s and 1880s. Of particular interest was Harlan's determined support for Grant in August and September 1873, when part of the black community was in revolt against the Republican Party's complacency toward its black supporters. Id. at 213-23; see also The Colored Convention at Chillicothe, Cincinnati Commercial, Aug. 23, 1873 (published newspaper report of the exchanges Gerber describes). Robert Harlan also gave a speech praising Grant in 1874 at a community celebration commemorating the founding of the African Methodist Episcopal Church. See Proceedings of the Semi-Centenary of the African Methodist Episcopal Church, supra note 35, at 107-09, in which his speech is printed in full.

77. Simmons, supra note 3, at 422.
large. In this delegation, as a delegate-at-large, was future President Rutherford B. Hayes. In the presidential election of that year, Robert worked hard for Grant’s re-election.

For his efforts on behalf of the party, Harlan received the first significant federal patronage position given to an Ohio black man. He was appointed in 1873, Special Inspector of the United States Post Office at Cincinnati. The 1873 register of federal employees lists Harlan as a Special Agent for “mail depredations.” The postal laws and regulations that were in effect in 1873, fixed a special agent’s salary at $1600 per year, and a Post Office Register entry for 1873 lists Harlan’s compensation in this amount. The regulations also provided for the payment of five dollars per day “for travelling and incidental expenses, while actually employed in the service.” Robert had found in politics the additional income he needed to again enjoy “the good

78. Id.
80. In these years the Republican Party in Kentucky depended heavily on the Cincinnati Republican newspaper, the Cincinnati Commercial, for the dissemination of the Republican point of view in the central, eastern, and northern sections of Kentucky. The struggling Republican Louisville Commercial simply could not cover the whole state. Cincinnati’s geographic position on the Ohio River across from the populous northern Kentucky counties made the Republican Party in Southern Ohio an important resource for Kentucky Republicans operating statewide. This suggests that there would have been regular contact between the Republican leaders of Kentucky and prominent Republicans in Cincinnati.

It seems extremely likely that Robert Harlan, the most prominent black Republican in Cincinnati, and John Marshall Harlan, one of the most important leaders of the Republican Party in Kentucky—a party for which black electoral support was critical to any short-term strategy for success—re-encountered one another at this time. Certainly, John Harlan would have been aware of Robert Harlan’s political importance and Robert would have been following John’s political successes in the Cincinnati Republican press. Each man would have been situated to help the other. John could benefit from Robert’s support among Kentucky blacks, and Robert could benefit from John’s connections (patronage and otherwise) in Ohio and national white Republican circles.

81. REGISTER OF THE OFFICERS AND AGENTS, CIVIL, MILITARY, AND NAVAL, IN THE SERVICE OF THE UNITED STATES, ON THE THIRTIETH OF SEPTEMBER, 1873.
82. Id. at 438.
83. UNITED STATES POST OFFICE DEP’T., THE POSTAL LAWS AND REGULATIONS 85 (William H. Ireland ed., Washington, D.C., Government Printing Office 1873). Harlan’s name does not appear in the 1871 register or in those for 1875-85. REGISTER, supra note 81 (1871, 1875-85). Entries in the Post Office Arrest Book under Ohio for 1873-74, show that Harlan made arrests in Cincinnati in March 1873, on July 7, 1873, July 29, 1873, and February 23, 1874. He also made an arrest on June 25, 1873, at Haydenville, Ohio. Post Office Arrest Book, Ohio (1873-74) (copies on file with author). I would like to thank Aloha P. South, of the National Archives reference branch, for providing me with copies of these records.
life.” But, his good fortune was short-lived. It appears that he was removed from office in January or February 1875.84

Part of Robert Harlan’s importance was fortuitous. Ohio was a critically important state in any national campaign in the 1870s and 1880s. This was reflected in the Republican presidential candidacies of Hayes and James A. Garfield in 1876 and 1880 respectively. Because Ohio was so important, and because it was evenly balanced between the Republican and Democratic parties during this period, the importance of the state’s black vote was magnified. Robert Harlan was the right man in the right place at the right time. He was lucky, but he was astute in his seizure of the opportunity presented by this state of affairs.

Unfortunately, it is impossible to reconstruct the trail that led to Harlan’s appointment to this patronage “plum.” The National Archives preserves no file containing an application for the post, or letters recommending Harlan for the appointment. It is possible that Grant himself was responsible for the appointment, for he had met with Harlan on more than one occasion.85 Harlan was active in the East End Grant Club in Cincinnati—an organization representing black voters in the First Ward of that city. It is also possible that Robert received support from local Republican leaders, although that they would push hard for his appointment to such a lucrative position, while excluding blacks from even menial local patronage jobs, seems unlikely.

Did Robert seek John Harlan’s support in the pursuit of a federal patronage appointment? This is an intriguing question given John’s importance in Republican circles after his noisy gubernatorial race in 1871. John Harlan’s papers show that he was exchanging letters with Robert at least as early as June 1873. The earliest surviving letter

84. The Cincinnati Commercial published a note in February 1875 in which the editor commented,

We are pleased to see that Colonel Harlan’s patriotism survives even the indignity put upon him by the heartlessness and recklessness of the Administration. Harlan was removed not because he was inefficient or loquacious, but because there was a relative of the President inadvertently legislated out of office, and it was necessary to make a place for him. Harlan’s place was chosen . . . . Ninety-nine persons out of a hundred, in Colonel Harlan’s circumstances, would have become [sic] Democratic within six weeks. But the illustrious Colonel remains faithful to the old creed and true to the old flag.

CINCINNATI COMMERCIAL, Feb. 14, 1875, at 4. See also CINCINNATI COMMERCIAL, Nov. 21, 1875, where the editor describes the factional fighting which led to Harlan’s removal.

85. See Interview with Colonel Harlan, CINCINNATI COMMERCIAL, Aug. 26, 1871, at 10, for a report of Harlan’s first extended meeting with President Grant, and for Harlan’s impressions of the President.
from Robert to John is marked "confidential." In it Robert conveys information about Post Office patronage. Its style and content suggest that John and Robert had been in ongoing communication and that their relationship was one of trust.⁸⁶ Would Robert have missed the opportunity of adding John Harlan’s influence to that of his other friends? This seems unlikely.

Robert grew in importance as blacks began to grumble about their exclusion as candidates and from patronage appointments in Ohio. In 1873, some disgruntled black leaders held a convention in Chillicothe, Ohio, in order to register their discontent with the treatment blacks were receiving from the Republican Party in the state. They expressed disaffection and resentment for their exclusion from the fruits of Republican victories to which the black vote had contributed. Robert Harlan tried to defend the party and its white leaders on the floor, only to be shouted down. He then went home to Cincinnati and rallied the regular party forces to reject the convention’s actions.⁸⁷

In these years Robert also saw to the education and support of his son, Robert Jr. He sent him to Woodward High School—a white school—where William Howard Taft was a classmate.⁸⁸ Robert Jr. attended the Cincinnati Law College,⁸⁹ and worked as a clerk from 1872 until 1878, when the younger man was appointed a deputy United States internal revenue collector. In 1887, Robert Jr.'s occupation was listed for the first time as "attorney" in the Cincinnati directory, and he was listed in the same way in the directories for 1890 and 1891.

Meanwhile, Robert attended Ohio state Republican conventions

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⁸⁷. For reports of the Chillicothe Convention and Harlan's attempted interference in its deliberations and his success upon returning to Cincinnati, see The Colored Convention at Chillicothe, CINCINNATI COMMERCIAL, Aug. 23, 1873; CINCINNATI COMMERCIAL, Aug. 26, 1873. For a fuller discussion of the context of the convention, the currents it reflected, and Robert Harlan's importance, see GERBER, supra note 4, at 209-44.


throughout the 1870s and 1880s. He also attended the national Republican conventions held in 1884 and 1888 in Chicago, serving in the Ohio delegations with future President William McKinley, Jr., in 1884, and with Governor, later United States Senator, Joseph B. Foraker, in 1888. In the late 1870s, Robert Harlan aligned himself with the Garfield forces in Ohio and nationally. In the 1880s, after President Garfield's assassination, he supported Joseph Foraker, defending him against charges that Foraker was cool in his support of black rights.

After nearly winning a seat in the state legislature from Cincinnati in 1880, Robert succeeded in obtaining a second federal patronage job in 1882, when he was appointed Special United States Customs Inspector at Cincinnati by President Chester A. Arthur. Harlan's application and recommendation file has survived and opens a small window into his political life. Applying originally for reappointment to the position as special postal agent that he had held under Grant, Harlan solicited and received letters of support from many important Republican politicians.

Robert was able to obtain letters of recommendation from former President Grant as well as from prominent local and state Ohio Republicans. Grant's letter, dated December 6, 1881, states, "I know the Colonel very well. . . . I think him in every way well qualified for the place." In addition to Grant, Harlan's application file contains letters from William Lawrence, who calls Harlan "my friend" and writes,

[h]is long service as a Republican, his capacity for usefulness and the fact that he is a representative man of his race give him strong claims which I hope you can find it practical to recognize—His
many friends, of whom I am one would be gratified if this can be done. 96

Both Cincinnati Republican Congressmen, Thomas L. Young and Benjamin Butterworth, supported Harlan’s appointment, as did Ohio United States Senator George H. Pendleton, of Cincinnati, and eleven other Ohio congressmen. Butterworth pressed repeatedly and hard for Harlan’s appointment. All of these men commented upon Harlan’s service and usefulness to the Republican party. A number noted the importance of appointing a black man to office. 97 Halstead, the long-time editor and publisher of the Cincinnati Commercial, the leading Republican newspaper in southern Ohio, wrote in support of Harlan’s appointment, as did Alphonso Taft, the father of future President and Chief Justice, William Howard Taft. 98

The list of references is remarkable and demonstrates both Harlan’s sophistication about who controlled federal patronage in Ohio, and his ability to obtain support from southern Ohio’s most important Republican officials. There is no reference from John Marshall Harlan in the file, but given Robert’s clout in Ohio Republican circles by this time, this fact is less surprising than it would have been in 1873. By now, Robert Harlan had a long political reach of his own. In 1877, when John Harlan’s name was being suggested for appointment to the Supreme Court, John apparently asked Robert to support his nomination among Robert’s Ohio contacts. Robert made overtures to his friends (who were friends of President Hayes) and wrote to John to reassure him that his name would be submitted. 99 Robert had less reason to appeal to John for help now than he had in 1873, and

96. Letter from William Lawrence to Chester A. Arthur (Dec. 3, 1881) (in Record Group 56, Special Agents Applications and Recommendations File for Robert J. Harlan (available in General Records of the Treasury Department, National Archives)).
97. See Record Group 56, supra note 94.
98. Id.
99. “[A]s regards your matter I spoke to John W. Heron about it. He informed me that he and others had spoke [sic] to the President while here in your favor, and that he had no doubt that you would be appointed.” Letter from Robert Harlan to John Marshall Harlan (Oct. 10, 1877) (available in John Marshall Harlan Papers, Library of Congress). Robert may have been one of the first people to write to John about the younger man’s appointment to the high court. In a letter written in early March 1877, Robert reported, Mr. Halstead [the editor/publisher of the Republican Cincinnati Commercial] said to me this afternoon that Hayes told him that you were on his Slate for anything you wanted—he further said that he could not understand it in way [sic] others worry that Hayes intended to offer you Judge Davis’s [sic] place on the bench.
John may well have been less well-placed to provide written assistance of this kind once he took his place on the United States Supreme Court in 1877. Certainly, he did not have the same private connection to the Arthur administration that Bristow at first had provided him to Grant.

In 1886, after fifteen years of effort, Robert Harlan won a seat in the Ohio legislature. He was the second black man elected to one of the Cincinnati seats—the first being attorney George Washington Williams in 1880—and the fourth black man ever elected to the state House of Representatives. Harlan listed his occupation as “Horseman.”

Throughout this period, Robert retained his position as a special inspector in the United States customs service, serving until 1892. In these years, he was also able to obtain patronage appointments for his son. Robert Jr., who had been trained as a lawyer, served as a surveyor in the Cincinnati City Water Works in 1889. He was appointed a license deputy in the City Auditor’s office in 1892, and a deputy in the County Treasurer’s office in 1893, a position which he seems to have held at least until the late 1890s. This suggests that Robert was also well-connected to the Republican city administration of George B. Cox—“Boss” Cox of Cincinnati.

In his final years, Robert was less visible politically, and it is not certain that he maintained his importance in the Republican Party. What seems clear is that he continued to struggle to promote the interests of his son, Robert Jr., as long as he was able, attempting to pass to him whatever resources he commanded. Most of these were political rather than financial. After being ejected from his third wife’s home on Harrison Street in 1895, and after living alone for a year, Robert Harlan moved into his son’s house on Baymiller Street. He died there, two months short of his eighty-first birthday, on the morning of

100. BLACKS IN OHIO HISTORY, supra note 72, at 19.

101. The Cincinnati Directory for the year 1880 through the 1890s lists both Robert Harlan and his son, Robert Jr., along with their occupations. WILLIAMS, supra note 52 (1880-99).

102. For a tour of the city in the 1880s and 1890s, and an elucidation of the forces which drove its politics, see ZANE L. MILLER, BOSS COX’S CINCINNATI: URBAN POLITICS IN THE PROGRESSIVE ERA (1968). Miller explains that the source of Cox’s power was his ability to “pyramid” party factions “with the cement of personal favors and party loyalty. He had not created an organization, rather he pasted it together from pre-existing elements. As leader then, he managed a diverse coalition, serving each of its interests.” MILLER, supra, at 92-93. Robert Harlan supported the Republican Party machine in the city, and, as was the usual practice, received some patronage in return.

103. Brief Biography, supra note 6.
September 19, 1897. No will was probated and no dying statements concerning his paternity were reported. Most of Cincinnati’s prominent black citizens attended his funeral.

Robert Harlan had struggled his entire life to obtain a shadow of the opportunities presented to John Harlan at birth. Robert had been forced to swim against the current of racism in both Kentucky and Cincinnati. He learned what was necessary in order to maximize the limited autonomy Kentucky society permitted blacks, and he succeeded in finding a niche in the power structure of Cincinnati. He seized opportunities whenever they presented themselves both for himself and for his son, Robert Jr. Robert was strong enough to make a reasonably good life for himself and his family, but he also suffered from the personal flaws that were produced in him by lifelong oppression. As an illegitimate son, he craved recognition, and sought the respect of people who would never give it to a black man. He suffered racist abuse even from his Republican allies in Cincinnati, receiving the message over and over again that he was important not as an individual, but as an instrument. Even in post-war Ohio, he was not a person, but a thing.

He lived by his wits, and when necessary did so at the expense of others. His success was a reflection of his intelligence and his willingness to seize the main chance. His restlessness is apparent from the range of his wanderings. He seems to have been a man who never quite got what he wanted, though he often came close. His influence depended on his ability to be useful. He surely must have experienced the insecurity that awareness of this would bring.

He was as courageous, in his own way, as James or John Harlan. Despite the fact that he was white enough to “pass,” he seems never to have made the attempt. His position throughout his life enabled him to see far across the color line. He knew the possibilities of life on the white side of that line and yet throughout his life he chose to remain “black” and struggle against the prejudices and handicaps he could have left behind. In all of his contacts with white politicians, he seems to have emphasized his black status, and to have appealed to them as a representative of the black community. For a relatively brief period, in the 1870s, his skin color became an asset instead of an

104. See Interview with Colonel Robert Harlan, CLEVELAND GAZETTE, Oct. 2, 1897; Life of Robert Harlan, CINCINNATI ENQUIRER, Sept. 22, 1897, at 6. There is some question about Robert’s date of birth, since the September 22nd edition of the Cincinnati Enquirer puts it at “yesterday.” Life of Robert Harlan, supra.

105. It is possible that his time in England was an exception to this statement but I have found no evidence to prove this.
unmitigated liability. Thereafter, he was trapped in the role when the circumstances of the country changed in the last two decades of the nineteenth century. The national Republican Party shifted its focus from race to economics, and the country reverted to its ante-bellum racist consensus. As a result, Robert’s influence waned. He was unable to transfer that influence intact to his son, who found that the strategies that had worked for his father in the 1870s, worked no longer.106

II. WHO WAS ROBERT HARLAN’S FATHER?

A. Miscegenation in the Antebellum Upper South: A Pattern of Conduct

Robert Harlan was born into a biracial Southern world in which whites owned human beings and blacks were forced to submit to nearly absolute white authority or die. It was a society in which the races were separated by a strict caste line that was supported by profound social, economic, and ideological differences between the races. But it was also a society in which blacks and whites were constantly brought into intimate contact with each other by the slave system.

The racial intimacy required by the slave system in the South and the profound vulnerability of blacks when presented with demands from white masters and satellite whites, produced common, if disapproved, interracial sexual encounters. These encounters in turn produced large numbers of mulatto offspring. Robert Harlan was one of these children. If Robert Harlan’s mother was one-quarter black, a

106. Robert Jr. was able to obtain a job at the Treasury in Washington in the early 1900s, but holding onto his position appears to have been a constant struggle. He also retained some aura of importance because of his ability to call upon influential white politicians like Foraker and Taft for help. He is, for example, listed among the guests at a banquet in Washington, D.C., on December 15, 1911, in honor of Booker T. Washington. Papers of Booker T. Washington, in 11 BOOKER T. WASHINGTON PAPERS, 1911-12, at 419 (Louis R. Harlan et al. eds., 1981). Washington, the great black successor to Frederick Douglass as national spokesman for his race, had a low opinion of Robert Jr. In a confidential letter to Charles Hilles, dated March 20, 1912, recommending the appointment of another man to be Assistant Register of the Treasury—a position for which Robert Jr. was competing and in pursuit of which he sought Taft’s assistance—Washington wrote the following:

I understand there are two other candidates for the position—one a clerk by the name of Harlan, who is now connected with the Treasury Department. The appointment of Harlan will not only be of no service to the President, but will really hurt, for the reason that he is nothing but a clerk and has no influence. Besides, he has the reputation of trying to pass for white whenever he can.

Id. at 487-88.
"quadroon," and his father was a white man, Robert was one-eighth black, an "octoroon"—he had one black great grandparent—like Plessy in the famous "separate but equal" case, *Plessy v. Ferguson*. Perhaps it was more than coincidence that led John Marshall Harlan to write one of his most famous and impassioned dissents in defense of the civil rights of black Americans on Plessy's behalf. Because of the character of Robert's birth and the scarcity of historical records on slave births, we will never know the names of his parents with certainty.

There were never extensive records kept concerning slaves. Even records for whites in early nineteenth century Kentucky are relatively rare. References to slaves do appear in some plantation records where these records have survived but, unfortunately, I have located none for Harlan Station. The emancipation record cited at the beginning of

107. The word "mulatto" was generally used to describe anyone with a visible mixture of white and black blood. See JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOS IN THE UNITED STATES xii (1980). A "quadroon" was a person with one black grandparent.

References to Robert Harlan frequently described him as blue-eyed and very light-skinned. Various accounts commented on Robert's "whiteness" and observed that it was hard to distinguish him from a white man. Some people questioned his right to represent blacks because he was so white in appearance. See, e.g., CINCINNATI COMMERCIAL, Sept. 7, 1871, at 4. One of these compared Robert Harlan to a white political rival and commented that there was no detectable difference in their skin color. Ulysses S. Grant made a similar observation about Robert's white appearance in 1881 when he wrote, "I know the Colonel very well. He is an intelligent colored man (although you would probably not discover that unless your attention was called to the fact) . . . ." Letter from Ulysses S. Grant to Charles J. Folger (Dec. 6, 1881), Record Group 56, *supra* note 94.

Published sketches of Robert Harlan show that he had straight hair and white features. See, e.g., "Colonel" Robert Harlan, CLEVELAND GAZETTE, Oct. 2, 1897, at 1 (obituary); Honorable Robert Harlan, CINCINNATI GAZETTE, May 1, 1886 (detailed etching); Life of Robert Harlan, CINCINNATI ENQUIRER, Sept. 22, 1897, at 6 (obituary). See *infra* text accompanying notes 184-91 for further discussion of Robert Harlan's physical characteristics.

108. 163 U.S. 537 (1896).

109. The breadth of this problem is well-illustrated by the examples of the two most prominent mulattos in nineteenth century America. Neither Frederick Douglass, the great black abolitionist orator, nor Booker T. Washington, the founder of Tuskegee Institute and Douglass' successor as spokesman for black America, ever identified their white fathers. In both of these cases, neither man seems to have known who his father was, and there is no existing evidence which would permit biographers to fill in this important blank. The problem becomes obviously even more pronounced when one seeks information about less prominent mulattos. *But see* GATEWOOD, *supra* note 4, at 171-72. Gatewood reports that "'[f]or aristocrats of color, like other Americans who claimed high status, a knowledge of family history was important. Most . . . [dealt] 'heavily in family trees.' . . . Rather than attempt to obscure the existence of white ancestors, most aristocrats of color referred to them openly and often with affection and pride.'" *Id.* Gatewood concludes that "the black Harlans of Cincinnati were fully aware of their relationship to the white Harlans of Kentucky." *Id.* The source for the part of this statement touching the Harlans is not given.
this Article survives only because state law required the acknowledgment and recording of deeds of emancipation in the county court where the slaveholder resided.\textsuperscript{110} Births and deaths of ordinary people were recorded in family bibles or in church records. Slave births occasionally appear in such records where they survive. I have been unable to locate any of these records.\textsuperscript{111} Absent an acknowledgment of paternity by the white father of these mulatto children, evidence of blood relationship is almost invariably circumstantial and conclusions rest on inference. This is true of the details of Robert Harlan’s birth.

The United States Census for 1850 was the first to report the race of enumerated persons.\textsuperscript{112} It counted 406,000 mulattoes in the United States. In a total black population of 3,639,000, 11.2\% were visibly of mixed blood. One-third of all mulattoes living in the South were living in Kentucky and Virginia.\textsuperscript{113} Robert was therefore born into what one scholar has labeled the “heartland of mulattoness in America”—the upper South.\textsuperscript{114}

Who were the parents of these mulatto children? Many of these children were fathered by lower-class whites, especially in the eighteenth century when there was much mixing between indentured whites and black slaves. However, Kenneth Stampp, one of the foremost historians of slavery, concluded that “[u]nmarried slaveholders and the young males who grew up in slaveholding families, . . . played a major role. Indeed, given their easy access to female slaves, it seems probable that miscegenation was more common among them than among the members of any other group.”\textsuperscript{115} The mother was often “a mulatto slave woman engaged in domestic service” and the father was often the slaveholder himself, his son, or a near relative.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{110} An Act to Reduce into One the Several Acts Respecting Slaves, Free Negroes, Mulattoes, and Indians, ch. 54, § 27, 1798 KY. ACTS 105, 112, amended by ch. 49, 1800 KY. ACTS 74.
\item \textsuperscript{111} I have searched for, but failed to find any church records for the Danville or Harrodsburg Presbyterian churches for the years 1815, 1816, and 1817. The local churches have no records that are so old, and neither of the national Presbyterian depositories in Philadelphia, Pennsylvania and Montreat, North Carolina, holds records for these churches for the period before 1827. This means that the records which may have reported Robert’s birth or baptism, if it occurred in either community, are unavailable. Vital statistics were not kept in Kentucky until mid-century, and I have been unable to locate a Harlan family bible or records from the Harlan Station farm, either of which might have references to Robert that could have provided useful evidence of his paternity.
\item \textsuperscript{112} WILLIAMSON, supra note 107, at 25.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 355 (1956).
\item \textsuperscript{116} WILLIAMSON, supra note 107, at 42.
\end{itemize}
these sexual contacts were the result of the "casual adventures of adolescents engaged in sexual experimentation." 117

When these liaisons produced a child, the white father often felt remorse and made special provisions for the protection of such children, when the fathers themselves came of age. "When relations of affection existed between the white father and his mulatto children, such fathers were often inclined to consider their offspring not as Negroes but as persons of their blood .... " 118 These fathers frequently arranged for their slave children to receive an education and made provision for their emancipation when they came of age. 119 The most common pattern that emerges from the documentary record is emancipation by will. The father would order the child supported until adulthood and then transported to and settled in a free state. Emigration from the slave state was almost always a precondition of effective emancipation, especially after the 1830s. This was not true in Kentucky until 1850, when the new state constitution ordered the legislature to pass a statute providing for the removal of emancipated slaves from the state. 120

Waiting until death to emancipate offspring, however, was risky. It was not easy to give legal effect to fatherly feelings where mulatto children were concerned. Slave state society frowned upon the immorality and social deviance these children symbolized, and interracial relationships provoked anguish in the families of the whites involved. 121 Attempts to emancipate slaves at the death of the white father were often frustrated by estate creditors who could enforce collection of the deceased's debts against his slave property. Even where creditors could not defeat the deceased father's intention, other family members often did. Attempts to make provision of property to these children by will often resulted in contests and embarrassing intra-family battles. Perversely, acknowledgment of mulatto children, especially when accompanied by the settlement of property upon them, could make their lives harder rather than easier. Angry or disappointed relations of the deceased were often in a position to revenge the decedent's transgression by punishing his slave offspring. The public humiliation that accompanied the formal acknowledgment of

117. STAMPP, supra note 115, at 355.
118. JAMES H. JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776-1860, at 293 (1970); see also GENOVESE, supra note 31, at 413-31.
119. WILLIAMSON, supra note 107, at 43.
121. STAMPP, supra note 115, at 356-57.
the interracial offspring must often have further incited survivors to take revenge.

As a prominent lawyer, James Harlan would have been well aware of the difficulties that attempted testamentary emancipations could create. It was safer for both the father and the child if the father freed his mulatto offspring during his own lifetime, or made provision for such children informally and without legal acknowledgment. Since emancipations accomplished during the lifetime of the father only rarely resulted in the messy litigation generated by testamentary manumission, proof of paternity in these cases is infinitely more difficult. Legal conflicts generated a public trail connecting the father to his mulatto children. Without litigation, there was rarely much direct evidence of blood relationship.

Despite the frequent presence of a testamentary emancipation pattern in the surviving records, it is possible that they give a distorted view of the fathers' behavior. Records involving testamentary disposition of property are among the public records most likely to have survived from slavery days. Indeed, with the exception of those inter vivos manumissions recorded in local court records, other methods of emancipation were much less likely to leave a permanent trail. Despite the number of cases of miscegenation that can be uncovered in probate and court records, most of the interracial liaisons that produced mulatto children have left no unambiguous evidence in the historical records. In fact, where these children were the product of casual or short-term affairs with mulatto maids, it seems more reasonable to suppose that they usually did not leave tracks at all unless the father acknowledged his offspring before a court.

Hostility toward mulattoes was already pronounced in the upper South by the time of Robert Harlan's birth in 1816, but in the years preceding the Civil War, the South grew even more uneasy about mu-

122. Before he formally emancipated Robert, James Harlan had represented slaves in litigation to enforce testamentary emancipations in six appellate cases over a period of 18 years. He knew from his own professional experience that such emancipations bred publicity and litigation, and produced unpredictable results. See John v. Walker, 47 Ky. (8 B. Mon.) 605 (1848); Stephen v. Walker, 47 Ky. (8 B. Mon.) 600 (1848); John or Jake v. Moreman, 47 Ky. (8 B. Mon.) 100 (1847); Allison v. Bates, 45 Ky. (6 B. Mon.) 79 (1845); Boyce v. Nancy, 34 Ky. (4 Dana) 236 (1836); Young v. Slaughter, 32 Ky. (2 Dana) 384 (1834). James also handled a case on appeal in 1846 that would have educated him about the pitfalls of lifetime emancipations delayed until the master's old age. See James v. Langdon, 46 Ky. (7 B. Mon.) 193 (1846) (inter vivos emancipation and property provision for the emancipated slaves challenged on mental capacity grounds after the elderly grantor's death). It is worth noting that in all of these cases James Harlan was on the side of freedom for blacks who were seeking to enforce their manumission.

123. WILLIAMSON, supra note 107, at 47; see also JOHNSTON, supra note 118, at 1.
Lattoes. "In the [Old South's] organic society everything had its place. . . . Opposites were held in tight tension . . . slavery was set against freedom, white against black, and men were strenuously balanced by women. Increasingly, the South grew furiously intolerant of anything that was not distinctly slave or free, black or white . . . ."124 This increasing reaction against lattoes reflected the rising disgust of Southern society for race-mixing and probably made it increasingly difficult for white fathers—at least, for those occupying places of public prominence and entertaining political ambitions—to "come out" on interracial paternity. Admissions of this sort must have been extremely damaging, especially for "gentlemen" with political and social standing in the community, or those in positions of moral leadership in their churches, and thus extremely rare.

Both the political toll and the embarrassment that acknowledgment of a latto child would have entailed would also have risen as the nineteenth century progressed. These acknowledgements could also be mortifying to the spouse and legitimate offspring of the father's white marriage. This meant that emancipation and provision for latto children became more and more difficult as the middle of the nineteenth century approached. If James Harlan wanted to free Robert Harlan, he would have been aware of factors that would encourage him to do so by deed rather than by will, and if he was Robert's father, he would have been less and less likely to accompany such emancipation with a formal acknowledgment of paternity.

Of course, there were still competing considerations which would prompt provision for one's slave children. Besides emotional attachment and the imperative to protect one's children from the horrors of full-blown slavery, personal integrity must have propelled many otherwise decent men to take responsibility for the consequences of their own immature acts. Surely, there must have been many fathers who were willing to go far to right their own previous wrongs, although unwilling to pay the personal price of full, formal, legal acknowledgment of their illegitimate latto offspring. Even without acknowledgment of paternity by the father, the slave children must often have received the name of their fathers from their mothers. Many others must have guessed at the truth even when they dared not speak it.125

124. WILLIAMSON, supra note 107, at 74.
125. See JOHNSTON, supra note 118, at 299 (quoting Paxton, Letters on Slavery, Addressed to the Cumberland Congregation (1833)).
B. Accounts of Robert Harlan's Birth

The available sources differ as to the place of Robert Harlan's birth. All accounts of Robert's birth published during his lifetime, or shortly after his death, state that he was born in Mecklenburg County, Virginia, not in Kentucky. If Robert was born in Virginia, it is unlikely that James Harlan was his father. However, two accounts published after Robert's death place his birth in Kentucky. Any discussion of the possibility that James Harlan was Robert Harlan’s father must begin by addressing the discrepancy between the earlier accounts and the later ones.

First to be addressed should be the accounts that are contemporaneous with Robert Harlan’s life, which place his birth in Virginia. Normally a contemporary account deserves more weight than one written years after the subject’s death. This presumption is reinforced if the contemporary source has a reputation for reliability, and if at least some of the facts set out in it can be independently verified. By this standard, Simmons’ *Men of Mark*, placing Robert’s birthplace in Virginia, is entitled to much weight. Simmons' statements about Robert Harlan which can be tested against other sources, including public records, appear generally accurate. Simmons' only clear error involves the date of Robert’s emancipation.

Unfortunately, public records cannot serve to corroborate or discredit Simmons as to the accuracy of his statement regarding Robert’s birthplace. The antebellum county tax records for Mercer County (where James and his father were living at the time of Robert’s birth) list slaves owned in two categories. In one column the schedule reports “Blacks over 16” and in the other, “Total Blacks.” If the tax records show that there were no slaves in James Harlan’s household from its establishment, this would suggest that Robert was not James’ son. This is so because it is likely that James would have taken Robert with him when he established his own home. If Robert Harlan came into James Harlan’s household at the age of eight, this fact should also

127. Brief Biography, supra note 6; DICTIONARY OF AMERICAN NEGRO BIOGRAPHY, supra note 4, at 287-88.
128. SIMMONS, supra note 3, at 421.
129. Id. Simmons places Robert’s emancipation in 1854. It actually occurred in 1848. See FRANKLIN COUNTY COURT ORDER BOOK, supra note 1, at 3.
130. MERCER COUNTY [KENTUCKY] TAX RECORDS (1815-25).
appear in James' tax records for the years 1816 through 1825. Robert should increase the number of young slaves in the Harlan household in 1825.

Although I have been unable to find James in the Mercer County tax lists for every one of these years, I did find him in some. He first appears independently in the tax records in 1818—he would have been eighteen at the time.\textsuperscript{131} This suggests that he established his own household in that year. The records for 1818 indicate that he owned two slaves, both of whom were under sixteen.\textsuperscript{132} His 1819 listing shows that he owned two slaves and indicates that they were both over sixteen.\textsuperscript{133} James' 1820 tax listing shows that he owned two slaves, but again gives their ages as under sixteen.\textsuperscript{134} It is possible that James sold the young slaves he owned in 1818, acquired two new slaves over sixteen in 1819 and then sold them, acquiring two more young slaves in 1820. However, it seems more reasonable to assume that the deputy who made the 1819 record, mistakenly entered a two in the column indicating slaves over sixteen. If James owned two slaves under sixteen in 1818, one of them could have been Robert.

I could not locate James in the tax list for 1821 and the entry for 1822 is illegible.\textsuperscript{135} James' entry for 1823 reports that he owned two slaves, both under sixteen, and the entry for 1824 reports that James owned four slaves, two of whom were over sixteen.\textsuperscript{136} It does appear that James acquired two new slaves in 1824 but it seems likely that both slaves added to his household in that year were over sixteen. James married his wife, Eliza Davenport, in December 1822. It is possible, since Eliza had her first child in October 1823, that these two slaves were purchased to assist her in her household responsibilities.

The records for the year 1825 show that James had acquired three more slaves between the 1824 tax enumeration and that for 1825. In 1825, he was listed as owning seven slaves, of whom three were over sixteen.\textsuperscript{137} Thus, James acquired two additional slaves under sixteen in 1825. In 1826, James still had seven slaves, but four of them were over sixteen.\textsuperscript{138} If these seven listed in 1826 were the same slaves that had been listed in 1825, then of the three slaves added to the house-

\begin{itemize}
\item \textsuperscript{131} Id. (1818).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id. (1819).
\item \textsuperscript{134} Id. (1820).
\item \textsuperscript{135} Id. (1821-22).
\item \textsuperscript{136} Id. (1823-24).
\item \textsuperscript{137} Id. (1825).
\item \textsuperscript{138} Id. (1826).
\end{itemize}
hold in 1825, one was over sixteen, one was probably fifteen, and one was under fifteen. The one under fifteen could have been Robert coming into the household at age eight as Simmons claimed. Unfortunately, the county tax lists do not indicate the sex of slaves.

The tax records show that James Harlan had young blacks in his household from its establishment in 1818, and that he may have acquired an eight year-old slave in 1825. Robert could have been in James' household as early as 1818 or could have come in 1825. Examination of the tax lists for Mercer County in these years does not resolve the question of the date of Robert's appearance in James Harlan's household. Instead, they appear to be consistent with either possibility.

The only other aspect of Simmons' description of Harlan that gives one reason to doubt his accuracy is his apparent determination to mask the less admirable—by conventional middle-class standards—features of Harlan's character, such as his fondness for horse racing and gambling, and his avoidance of conventional work. However, since Simmons' purpose was to offer suitable role models to other American blacks of his time, the distortion involved in these lapses is understandable. Furthermore, his introductory disclaimer of "scholarship" also is disarming. By admitting his intention to "eulogize" the men about whom he wrote, he displayed a self-critical awareness and honesty toward the reader. These qualities are also a factor in rating a source's reliability. In other respects, his account of Harlan rings true.

A second biography published during Robert's lifetime states that he was born in Mecklenburg County, Virginia in 1816, and was brought to Kentucky at the age of eight and raised in James Harlan's household. This piece, published by the Cleveland Gazette in 1886, when Harlan was a member of the Ohio House of Representatives, offers more information about his early life. This account agreed with Simmons in many particulars. It commented in very similar language about Harlan's early education, and observed "like many of the intelligent slaves of Kentucky, he was allowed to hire his own time and to go and come as occasion required." It agreed that Robert was trained as a barber and opened his own barber shop in Harrodsburg, but reported the place of his training as Lexington, rather than,
as Simmons reported, Louisville. The Gazette, like Simmons, stated that Harlan went to California while still a slave, and then returned to Kentucky for formal manumission. It is possible, given the similarity of their presentation and language, that the Gazette and Simmons were working from a common source, or that one account was based upon the other. It seems more likely, however, given their dates of publication, that their resemblance resulted from the fact that this was how Robert Harlan and his son, Robert Jr., told Robert's story.

Two obituaries recounting Robert's life were published within days of his death. The first appeared in the Cincinnati Enquirer and again placed his birthplace as Virginia. The Enquirer was no friend of Harlan's, and has been described as a rabidly racist paper. The obituary runs a full column and includes a picture. That the editor gave the item so much space indicates that Harlan was an important man in Cincinnati. Given the editor's bias against blacks, the generally respectful tone of the article is surprising and suggests that Harlan was a man of stature in the community. One of the headlines on the column reads, "The Noted Colored Leader, Politician and Turfman." One of the internal headings reads, "A Character To Be Admired." This article may have relied partly on Simmons, but there are distinct points of disagreement and much supplementary detail, especially on Harlan's life-long interest in horse racing.

The Enquirer obituary, although reporting that Robert was born in Mecklenburg County, Virginia, states that he was brought to Harrodsburg, Kentucky, at the age of three, not eight. This account also emphasizes the special treatment Robert received at James' hands, but refers to James as Judge James Harlan. James Harlan was never a judge, although one of his sons—his namesake, James (1831-1897)—did serve as Judge of Chancery in Louisville in the 1870s. It seems likely that the editor drew upon his own knowledge of Robert Harlan's career in Cincinnati, but depended upon the accounts of Harlan's associates or his son, Robert Jr., for the information about Harlan's early years in Kentucky and California. The fact that Robert's birth was again placed in Virginia, suggests that Robert himself had claimed that state as the place of his birth. It is interesting that he

143. Id.; cf. SIMMONS, supra note 3, at 421.
144. Honorable Robert Harlan, CLEVELAND GAZETTE, May 1, 1886.
148. Id.
is placed in Kentucky at a younger age in this account than that ascribed to him by accounts published during his lifetime. Perhaps Robert Jr. was becoming convinced that his father had been more than a favored slave in James Harlan's household and, consciously or unconsciously, was pushing back the age at which his father came to Harrodsburg.

It seems likely that if the editor of the Enquirer (surely no friend of the staunchly Republican Justice John Harlan) had known of any information upon which to base a charge of race-mixing against James, he would have printed it. On the other hand, besmirching the long-dead James Harlan by publishing mere rumors to that effect, might have been against the editor's sense of propriety, or simply dangerous. There is one other factor that may have colored the editorial decisions of the Enquirer. The editor, John R. McLean, was trying to position himself to run for the Ohio Senate in 1897, and in that cause had begun to court the black vote.149

The other obituary, published by the respected black newspaper, the Cleveland Gazette, should have been accurate. The editor had known Robert Harlan personally and had occasionally published stories about him during his lifetime. This included a narrative of his life in 1886. The obituary ran on page one, again indicating Harlan's prominence. The picture of Harlan accompanying the obituary, had been presented to the editor by Robert himself, "some months ago."150 The Gazette account added personal touches to the outline of Harlan's life. The editor wrote nothing of Harlan's origin or time in slavery, and is the only source that puts the date of Robert's first residence in Cincinnati at 1835.151 Although, this may have been true—since I cannot account, with certainty, for Harlan's whereabouts until he appears in Lexington in 1840—it was probably incorrect. Harlan would have been nineteen years old in 1835, and almost certainly possessed of no resources to support the move. The Cincinnati city directories for the years 1836-37, 1840-46, and 1849-50, the only ones available to me for the period 1835 to 1850, fail to list him as residing in the city.152 Unfortunately, many of the local Cincinnati records—including tax and local census records—for this period, were destroyed in a courthouse fire in 1884, and are thus unavailable. The Gazette obituary,153 like that in the Enquirer,154 offers very little information about

149. See Gerber, supra note 4, at 358.
151. Id.
152. WILLIAMS, supra note 52 (1836-37, 1840-46, 1849-50).
Harlan's time in Kentucky.

The fact that the newspaper accounts of his emancipation matched that given by Simmons, although not matching the date in the county court record, suggests that this was the version which Robert had, himself, related to others. It is possible that his recollection of the timing of his formal manumission was faulty, but, given the significance of the court appearance, and the importance of his trip to California, it seems more likely that the transposition of the dates was intentional. By recounting the events in this way, Robert's integrity was magnified—he did what he need not have done since James would not have sought his return as a fugitive. He returned to slave territory, risking re-enslavement, in order to vindicate the trust James had put in him by permitting him such freedom of movement. This suggests that Robert may have remembered his past selectively or even intentionally distorted it when useful.

Two accounts of Robert's life put his birth in Kentucky. The older of these was printed in 1934 in the *Cincinnati Union*, a black newspaper published by Wendell Phillips Dabney (1865-1952), a man who knew Robert Harlan in the 1880s and 1890s. The other source is a sketch about Robert Harlan contained in the *Dictionary of American Negro Biography*, published in 1983. This sketch states that Robert Harlan was born in Harrodsburg, Kentucky, “the son of Judge James Harlan and a mulatto mother.” The biography published in 1934 by the *Cincinnati Union* appears to have been the main source, supplemented with Simmons, for the Harlan sketch in the *Dictionary of American Negro Biography*. Where the *Union* and Simmons diverge, the author appears to have preferred the *Union* account over Simmons.

The most important example of this preference concerns the place

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155. In addition to publishing the *Cincinnati Union*, a black newspaper, Dabney was an amateur historian and is well known in Cincinnati as the author of *Cincinnati's Colored Citizens*, a retrospective and contemporary account of the Cincinnati black community written in the 1920s. This book represents the best existing source of information about black life in the city in the late nineteenth and early twentieth century. *Wendell P. Dabney, Cincinnati's Colored Citizens: Historical, Sociological and Biographical* (1925). Because of the reliability of Dabney's book, and because he was in a better position to hear whispered stories than anyone else in the black community, we must take seriously his newspaper's claim, that Robert was born in Harrodsburg, Kentucky. *See Brief Biography, supra* note 6.
157. *Id.* at 287.
159. *Simmons, supra* note 3.
of Robert’s birth. The *Union* article begins with the statement, “Robert Harlan was born in Harrodsburg, Kentucky, the son of Hon. James Harlan a prominent lawyer, Judge, and Vice-Chancellor of the State of Kentucky.” As noted above, Simmons, and both obituaries to which I have referred, state that Robert Harlan was born in Virginia and came to Kentucky and into James Harlan’s household as a young child. Thus, the *Union* version appears to be inconsistent with Robert’s own public representations, which, in addition to those already cited, include the place of birth recorded for Harlan in the 1870 United States census, the only census in which I have found him listed. The population schedules there report Virginia as the state of his birth.  

Is it possible that Robert knew or suspected that he had a Harlan father and chose to conceal this fact from the public during his lifetime? If he had claimed his patrimony publicly, at any time, the claim would have been doubted in the absence of acknowledgment by James or some other member of the white Harlan family. It seems likely that Robert was genuinely grateful to James for his humane treatment, and that there were bonds of affection between these men that prevented the younger man from publicly proclaiming their blood tie. Affection and gratitude for James is suggested by Robert’s naming his only son after his former master. Affection also comes through occasionally in Robert’s letters to John. When John agreed to serve on the Louisiana election commission in April 1877, Robert wrote him:

> I beg to repeat to you the words of an old colored man that formerly belonged to your father—they were do-do-take care.  
> I do not care which way you may decide the Louisiana question your [sic] bound to make enemies—especially if you take a leading part in the matter.

Disclosure would certainly have embarrassed James and John, and deeply hurt their family. It also would have damaged James’ own political prospects and those of his legitimate son, John. It is possible that there were conditions attached to James’ generosity toward, and

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160. *Brief Biography*, supra note 6. I obtained a copy of this article from the Howard University library, after Paul McStallworth, the author of the Harlan sketch in the *Dictionary of American Negro Biography*, informed me that he had found the *Union* article at Howard. I am grateful to Dr. McStallworth for his kindness in giving me this information, and to William Bennett, Howard University reference librarian, for sending me a photocopy of the article.

161. 1870 CENSUS, supra note 73.

sponsorship of Robert—one condition being that Robert never publicly claim the blood relationship. It is possible that any secret assistance Robert may have received from John Harlan later, was given upon the same terms. All of these possibilities rest on speculation, but the point is that there may have been reasons for Robert to consistently maintain a lie about the circumstances of his birth. There is a reference in one of Robert’s letters to John that suggests that some of Robert’s political associates in Cincinnati were aware of some connection between Robert and John. In a letter dated October 4, 1873, Robert invited John to make a campaign speech in Cincinnati in support of Republican candidates. In the letter Robert explained, “The campaign committee requested me to write you thinking I might have more influence with you than they had.”

In weighing these possibilities, it is useful to consider whether there is any evidence that Robert ever privately claimed a blood tie to the Kentucky Harlan family. There is no such claim in Robert’s surviving letters to John, although it is possible that some of his letters have been lost or destroyed. If John or his descendants ever culled his papers, any letter in John’s possession from Robert which referred to so sensitive a subject would undoubtedly have been destroyed. It would be most useful to find Robert Harlan’s living descendants, if any, and ask them about family tradition or privately held correspondence which might shed light upon this subject. Unfortunately, I have been unable to locate any of Robert’s descendants. His son Robert Jr., left Cincinnati in 1899 and settled in Washington, D.C., where he served first as a clerk in the office of the Surgeon General (1899-1902), and then as a clerk in the office of Register of the Treasury (1902-03, 1904-24). During all of these years, Robert Jr. appears to have re-

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164. 2 BOOKER T. WASHINGTON PAPERS, supra note 106 at 488 n.1. The editors appear not to have known that Robert Jr. had resigned his Treasury appointment on August 31, 1903 and was reappointed on August 23, 1904. See Letter from Franklin MacNeagh, Secretary to the Secretary of the Treasury, to President Taft (Mar. 9, 1909) (available in Robert J. Harlan Promotion File, William Howard Taft Papers, Library of Congress). It appears that President Taft intervened on Robert’s behalf after Robert wrote to him seeking promotion. Memorandum by Robert J. Harlan (Mar. 8, 1909) (available in William Howard Taft Papers, Library of Congress). See also Letter from Robert J. Harlan to Frederick Carpenter, Secretary to President Taft (Mar. 10, 1909). Harlan wrote concerning his qualifications for promotion after “[t]he Auditor for this Dept, informed me
mained in Washington, occasionally seeking help and patronage spon­
sorship from Senator Joseph Foraker and William Howard Taft.165
After completing a number of years of public service, he opened a law
practice in Washington in the mid-1920s.166

The Union article167 discussed above, stated that in 1934 Robert
Jr. was still living in Washington. That article highlighted Robert Jr.,
by writing about his mother, Josephine, and noting his birth in 1853,
while not even mentioning the names of his father's other wives or of
his daughters.168 The account also has a first-hand quality about it,
including remembered details like Harlan's fear of being killed in San
Francisco after amassing a large quantity of gold, and of his carrying
that gold back to New York in a trunk.169 Other details are given,
such as the name of the ship upon which Harlan and his family sailed
for England in 1859, and the names of the jockey and horse trainer
who accompanied them.170 These features suggest the source of the
story was someone who had heard it told over and over, or who had
experienced some of these adventures himself. It seems unlikely that
Dabney would have been the source for these elements of the story.
The tale also has an almost epic quality about it. It describes a man
who seems larger than life, the way a son might remember a deceased
father. If Robert Jr. was the source behind this article, either his fa­
ter had privately communicated to him the true facts of his Ken­
tucky birth, had misrepresented the facts to his son, or Robert Jr.
published his own suppositions about his father's paternity as fact.

Of course, it is possible that Robert was unsure of his origin and
chose to believe in his old age—and to communicate this belief to his
son, Robert Jr.—that he was James Harlan's illegitimate son. The

that he had been called up from the Secretary's Office and inquiry made in regard to my
qualifications, record etc." Id.
165. See, e.g., Letters from Robert J. Harlan to William Howard Taft (July 1, 1913)
("The lightning is striking around me . . . . A letter from you to Secretary Wm. G. McAdoo
. . . pressing the hope that I may be retained in my present position at my present salary
will give me immunity in the future and be gratefully appreciated"); (July 3, 1913); (July
14, 1913) (available in William Howard Taft Papers, Library of Congress) and Taft's re­
plies, Letters from William Howard Taft to Robert Harlan (July 3, 1913); (July 10, 1913)
(available in William Howard Taft Papers, Library of Congress).
166. Two of Robert J. Harlan's letters to Taft are on stationery bearing the letter­
head, Robt. J. Harlan, Attorney at Law. See Letters from Robert J. Harlan to William
Howard Taft (July 12, 1927); (Sept. 13, 1927) (available in William Howard Taft Papers,
Library of Congress).
168. Id.
169. Id.
170. Id.
idea would have appealed to Robert. Besides connecting him to a prominent Kentucky family and giving him a past, it also would have allowed him to claim John Marshall Harlan—an Associate Justice of the United States Supreme Court, and the author of the famous race dissents—as a brother.

There is one other ambiguous piece of evidence which suggests that Robert Jr. had some opinions about his father's origin that were at odds with his father's public claims. Robert Jr. had sought and apparently received William Howard Taft's help on patronage matters in the 1900s. In 1913 and again in 1917, Harlan sought Taft's protection against reduction of his salary at the Treasury Department. In 1913, he wrote Taft, "I am seeking shelter under cover of your friendship with the feeling that owing my present position to you, and being under civil service, a word in my behalf will prevent a possible reduction in salary." In 1917, Robert Jr. wrote a frantic letter to Taft, pleading for his help in reversing a decision to reduce his salary from $1800 to $1600 per annum. In this letter, Harlan wrote,

You can understand how hurtful it is to me to be reduced when on every side, salaries are being increased and having a clean record, and a high rating for efficiency makes it more humiliating because I was sent on detail by Mr. John Skelton Williams from the Registers Office where I was Acting as Asst. Register and in charge of a Division, because of a moral lapse made by my Grandfather—Why should I pay a vicarious atonement?

This cryptic reference, which falls out of the blue sky, suggests that Robert Jr. knew more about his white grandfather than we will ever now know with certainty. More interesting still is the assumption which Robert Jr. seems to have made that Taft would understand the reference. This is particularly interesting because William Howard Taft, having sustained contact with both men, bridged the gap between Robert Harlan and John Marshall Harlan.

William Howard Taft had practically been suckled on Republican politics growing up in his father's house in Cincinnati. Since Robert was an important feature of the Cincinnati Republican landscape in 1880, when William Howard Taft first entered politics in his own

171. Letters from Robert J. Harlan to William Howard Taft (July 1, 1913); (July 14, 1913); (July 3, 1917) (available in William Howard Taft Papers, Library of Congress).
right,\textsuperscript{174} he and Taft would have known each other. Furthermore, Taft's father, Alphonso Taft, had helped Robert Harlan secure his appointment as United States customs inspector in 1882.\textsuperscript{175} It was Governor Joseph Foraker, Robert Harlan's ally,\textsuperscript{176} who first appointed William Howard Taft to the bench, placing him on the Cincinnati Superior Court in 1887.\textsuperscript{177} That there was some connection between Robert Jr. and Taft is apparent from Robert Jr.'s letters to Taft and Taft's willingness to offer him assistance.\textsuperscript{178}

In 1889, William Howard Taft was appointed Solicitor General by President Benjamin Harrison. He served in that capacity in 1890 and 1891.\textsuperscript{179} In 1892, Taft was appointed to the United States Court of Appeals for the Sixth Circuit which sat in Cincinnati. He served on that court from 1892 until 1900.\textsuperscript{180} Taft probably came to know Justice John Marshall Harlan during Taft's two years in Washington in the early 1890s when Taft was arguing cases before the Supreme Court. If not then, he must have come to know the Associate Justice during the eight years Taft sat in Cincinnati, as Justice Harlan had an office in the United States Courthouse in Cincinnati, as the Supreme Court Justice assigned to the Sixth Circuit.

Although we can only speculate about Taft and John Harlan's professional encounters, we know that they became social friends when both men spent summers at Pointe-au-Pic, Quebec—a summer retreat the Harlans called Murray Bay—after 1897. From Malvina Harlan's unpublished memoirs, it appears that the Tafts and the Harlans became good friends in Canada, if not before.\textsuperscript{181} Since golf was the "chief diversion" for men at Murray Bay, and since Taft and John Harlan both loved the game, it seems likely that they were at times golf partners.\textsuperscript{182} During these same years, Taft was correspond-

\textsuperscript{174} See supra notes 75-80 and accompanying text.
\textsuperscript{175} See Record Group 56, supra note 94.
\textsuperscript{176} See supra note 93 and accompanying text.
\textsuperscript{177} See David H. Burton, William Howard Taft in the Public Service (1986).
\textsuperscript{178} See supra note 165.
\textsuperscript{179} Burton, supra note 177, at 18.
\textsuperscript{180} Id. at 20-21.
\textsuperscript{181} M. Harlan, supra note 18, at 148-49. See also Loren P. Beth, Justice Harlan and the Chief Justiceship, Y.B. Ann. Sup. Ct. Hist. Soc'y 73, 74-77 (1983) (stating that Taft and Harlan were good friends). At least as early as March 1899, Taft and John Harlan were on very friendly terms. See Letter from William Howard Taft to John Marshall Harlan (Mar. 8, 1899) (available in John Marshall Harlan Papers, University of Louisville Law School) ("I sincerely hope you are going to Murray Bay this summer and not to Europe.").
\textsuperscript{182} See Letter from William Howard Taft to John Marshall Harlan (Mar. 8, 1899)
ing with Robert J. Harlan, and assisting him in patronage matters. There is no way to be sure whether or not John ever told Taft about the connection between the black Harlans of Cincinnati and the white Harlans of Kentucky, or asked Taft to assist Robert Jr. It is possible that Taft already knew a good deal about that connection through his father, Alphonso Taft, or from his own Cincinnati sources. Given all of these possible sources of information, and Taft's repeated assistance to Robert Jr. at a time when Taft had close social ties to John Harlan, Robert Jr.'s letter raises some intriguing possibilities.

C. Was James Harlan Robert Harlan's Father: Physical Characteristics?

Even if Robert Harlan was born at Harlan Station, Kentucky, on the Salt River near Harrodsburg in 1816, this does not make James his father. It is possible that a male outside of the Harlan family, a neighbor or an overseer for instance, was Robert's father. Female slaves could not easily say no to the sexual attentions of any white man, whether he was her master or not.

Although by no means conclusive, Robert's size and physical resemblance to the "Big Red"\(^{183}\) branch of the Harlan family argues strongly against the paternity of a stranger to that clan. Robert Harlan was a big man. He stood over six feet tall and weighed more than 200 pounds.\(^{184}\) He had blue-grey eyes, light skin, and black, straight hair. He was physically vigorous and healthy his whole life and travelled extensively. When Robert died in 1897, at age eighty, the average life-expectancy for a black man was thirty-two years. That of white males was only forty-eight. Robert Harlan's son, Robert Jr., also lived at least into his late seventies. Both men were long-lived, and modern mortality studies indicate that heredity is an important factor in family longevity.

There are a number of portraits of Robert Harlan that were pub-

\(^{183}\) See infra text accompanying note 189.

\(^{184}\) "Colonel" Robert Harlan, CLEVELAND GAZETTE, Oct. 2, 1897, at 1. See also the physical description of Robert contained in his emancipation record. FRANKLIN COUNTY COURT ORDER BOOK, supra note 1.
lished during his lifetime. The best of these appeared in 1886 in the *Cleveland Gazette*. In this detailed etching, which is captioned "Col. Robert Harlan, Member of the Ohio Legislature," Harlan’s fine features stare out in a right full-face profile. His most prominent features are a rounded pate with a high, full forehead crowned by a receding hairline of short, straight hair which has reached the peak of his head. He has large ears with full earlobes and a firm, well-defined jawline. A large, full mustache sitting below a straight, slightly bulbous nose, dominates the face and covers the mouth, preventing any view of the lips. The smooth skin of the face—it is remarkably wrinkle-free given his age—ends in a pointed chin. Heavy brows cover narrow eyes which turn down at the outside, imparting almost a squinting expression. The entire face is lean and shows strength.

When I first saw this picture, I was struck by the similarity it bore to a famous picture of Justice John Marshall Harlan taken while he was a member of the Supreme Court. In that picture, John Harlan’s rounded dome of a head with its crowning fringe of hair, displays, it seems to me, a number of the same features. The shape of the head is similar. The large forehead is similar. The receding hairline, the short, straight hair (which had been red in his youth), and the large ears are there, as is the large earlobe and the strong jaw. The nose is the same, though fuller and more bulbous. The smooth skin, the heavy brows, the squinting eyes—they too were blue—and the pointed chin, are all there. The wide mouth, with its narrow lips and distinctive scowl, made me long for the look behind Robert Harlan’s mustache that I will never have. Although John Harlan’s face is fuller—John was overweight in his later years—I thought, they could be brothers. Of course, my “perception” may have been affected by my knowledge that Robert had grown up in James Harlan’s household.

The only portrait of James Harlan, John’s father, with which I am familiar is an oil painting by an unknown artist, in the collection of the Kentucky State Historical Society’s museum at the Old Statehouse in Frankfort, Kentucky. That portrait shows a middle-aged man with a high forehead and thinning straight red hair, with the familiar Harlan nose and strong jawline. His eyes appear to be grey or hazel, although it is difficult to tell what color was intended by the artist. They look out from behind wire-rimmed antique glasses and heavy

185. See supra note 107.
186. *Honorable Robert Harlan*, *CINCINNATI GAZETTE*, May 1, 1886.
187. Telephone Interview with Michael Hudson, Register of the Kentucky Historical Society (describing James Harlan’s eyes in the portrait as indefinite in color, but probably grey or hazel).
COL. ROBERT HARLAN,
Member of the Ohio Legislature.

Robert Harlan
Republican gubernatorial candidate and Supreme Court Justice John M. Harlan
James Harlan
Kentucky History Museum Collection, Kentucky Historical Society
brows. The earlobe of the left ear, which is just visible below the long hair on the side of James' head, is large. The mouth is firmly set and surrounded by thin lips. The face is ruddy, and thinner than John Harlan's—in this respect more resembling Robert's than John's—but the resemblance between father and son, between James and John, is pronounced.

Both James Harlan and John Marshall Harlan, like Robert Harlan, were big men. James was over six feet tall. John was six feet two. James probably had grey or hazel eyes. John's eyes were blue. Both men had ruddy complexions, and sandy red hair. Late in his life, in an autobiographical letter written to his son, Richard, John Harlan described the source of his large size and red hair. "I recollect in my early boyhood," he wrote,

to have heard of two tribes of Harlans—one being called the 'Big Reds' and the other the 'Little Blacks.' From all that I have heard I do not think my grandfather Harlan [James the elder (1755-1816)] was of ruddy complexion or large in body. He was of medium height, and rather dark skin. But his wife was a large, strong, healthy, woman of light sandy hair. The children of that marriage were all large, tall (my father and each of his five brothers being over six feet high) and of sandy hair and bright complexion. Hence, as I suppose, they were called 'Big Reds.'

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188. Lawyers and Lawmakers of Kentucky, the late-nineteenth century collective biography of the Kentucky bar, described James Harlan as "the huge, brawny, fair-haired, near-sighted, generous attorney general, . . . gigantic in body and mind." Lawyers and Lawmakers of Kentucky, supra note 12, at 108.

189. Unlabeled autobiographical typescript Container 49 at 6 (available in John Marshall Harlan Papers, Library of Congress). John also recalled how intimidating he and his cousins were to smaller men. When a cousin, John R. Harlan, was tried in Boyle County for killing a man in a fight in the 1850s, he needed protection against the victim's kin. When the trial began, John Marshall Harlan recalled, there was fear that the man's family—who were present in the courtroom in large numbers—would try to kill the defendant on his way into or out of the courthouse. To prevent this, 'Big Jim' [James L. Harlan, who weighed 290 pounds and stood six feet five inches in height], my cousin Wellington Harlan, and myself, were immediately around John [R.] every step, going and coming, between the jail and the court room, and at his side in the court room during the trial. Our purpose was to make it impossible for the Pitmans to get at him, without encountering his brother ['Big Jim'] and two cousins in deadly conflict. Our plan was successful. The trial resulted in John's acquittal, and he went out of the court house, free, with Big Jim, Wellington, and myself at his side. . . . I should, in candor, say that during the whole of John's trial, Big Jim, Wellington and myself were heavily armed.

Id. at 5.

One may fairly speculate whether protecting the defendant from lynching or murderous revenge was the only cause these men served by being present around the defendant throughout the trial. What would one suppose went through the minds of the jurors as
In 1885, Wellington Harlan, John's first cousin, also reported that it was their grandmother who was the source of their family body type. "Our grandmother's name was Sarah Caldwell," he wrote,

We get from her our size and complexion. . . . Father told me that she and Major Silas Harlan [(1753-1782)] were engaged to be married, and after his death she and grandfather, were married. Both Major Harlan and grandfather, as I have learned from persons who knew them, were of medium height, rather heavy set, and [had] dark eyes and hair.190

From these letters, it appears that the source of the "Harlan" body type here described—large, ruddy complexion, and light eyes, was John Harlan's grandmother, Sarah Caldwell Harlan (1762-1831), and not his grandfather, James Harlan the elder. If James Harlan the elder was "of medium height, rather heavy set, and [had] dark eyes and hair," it is unlikely that he was Robert Harlan's father—a possibility I will explore in greater detail later. The Harlan height, blue eyes, and ruddy complexion came from James Harlan's mother, not his father. This makes it likely that if someone in James Harlan the elder's family fathered Robert, the father was one of the "Big Reds"—one of the men of James Harlan the elder's line in James Harlan's generation. Robert's blue eyes, fair skin, and large size, connect him to the "Big Reds."

James Harlan died at the age of sixty-three in the winter of 1863 from what sounds, from family letters and his obituary, like pneumonia. Before this illness, James had always been vigorous and healthy, and his death was apparently unexpected. There is no way of knowing how long James Harlan would have lived had he survived the illness that killed him. It is known however, that his son, John Marshall Harlan, lived vigorously and in good health until a final sudden illness took him in 1911, in his seventy-eighth year. It should be noted that there is no pattern of longevity apparent among the brothers of James Harlan, nor among his other sons.191

The factors discussed here do not prove the existence of a blood relationship between James Harlan and Robert Harlan. Physical resemblance is a matter of opinion and the presence of blue eyes, straight

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191. See the birth and death dates given for these people in HISTORY AND GENEALOGY OF THE HARLAN FAMILY, supra note 13, at 106, 274 (listing the children of James Harlan the elder and those of James Harlan).
hair, and large size do not establish blood relationship. Their cumulative effect, as with so much else about this tale, is suggestive. When considered along with other factors, they become more so.

D. Opportunity

James Harlan was born on June 22, 1800. If he was Robert's father, James would have been fifteen years old when Robert was conceived. At the time of Robert's conception, James Harlan was living with his parents on the family homestead, Harlan Station, located on the Salt River in what was then Mercer County, now Boyle County, Kentucky. The farm was located between Danville and Harrodsburg, but closer to the former town.

James was the seventh of nine children born to James Harlan the elder and his wife Sarah Caldwell, sturdy Presbyterians. James Harlan the elder had migrated to Kentucky with his older brother, Silas, in 1774, as part of James Harrod's company. His son, James, was the sixth of seven sons, born into a close-knit pioneer family, with older brothers aged fourteen, twelve, eight, six, and three, at the time of James' birth in 1800.

James the elder died in August 1816, at the age of sixty, five months before Robert Harlan was born. The inventory of his estate, filed in court October 14, 1816, indicates that he owned female slaves of childbearing age in 1816. The inventory listed thirty-three slaves of whom nineteen were females; of these, three were listed as children. This means there were sixteen female slaves who could have been Robert's mother. There is no indication in the inventory whether any of these slaves were light-skinned or pregnant.

Thirteen of the slaves listed in the inventory appear in a unit on the first page; the remaining twenty appear on page four. The slaves listed in the first group were listed on separate lines except for mothers and children, who were entered on the same line and valued together. This suggests that those slaves who were thought of as a unit, perhaps as a family group, were entered on the same line.

In the second grouping of slaves, some appear on the same line—sometimes a male and a female, sometimes two males—though valued separately. It may be that those listed on the same line lived together.

192. See generally, supra note 12 (sources of the biographical details of James Harlan's life).
194. Id.
195. Id.
The appraisers who made the inventory probably walked from slave cabin to slave cabin listing the occupants of each cabin together. Taking the inventory in this manner would explain why two groups of slaves are clustered, yet separated. They probably lived on different parts of the farm. If this was true, it seems reasonable to infer that the slaves who were first enumerated and valued were those closest to the main house and probably included the house servants, those with whom the master's family was most often in contact, and with whom the family would feel the greatest emotional connection. 196

James Harlan the elder's will, executed on August 3, 1816, devised only four slaves by name: Betty, Fanny, Buck, and Virgin. 197 Three of these, Betty, Fanny, and Virgin, were listed in the first group on the inventory. 198 It seems likely that mentioning these three women by name indicates a closer relationship to them than to those slaves left unnamed, who were to be divided by James' sons as part of the "real estate." Of the three women named as individuals, two were the mothers of children, and the children were devised to James' wife, Sarah Harlan, along with their mothers. Buck, the only slave from the other group named in the will, was paired with Virgin. It seems likely that these women were all house slaves and that the testator was devising a "breeding pair" to his wife by attaching Buck, a male field hand, to Virgin, a female house slave.

The inventory appears to make a distinction between slaves related to age. Some females are described as "women" and some as "girls." Some males are described as "fellows" and some as "boys." All of the females listed with children are called "women." 199

James Harlan the elder is reported as owning thirty-seven slaves in the 1815 Mercer County tax list. 200 Of these, nineteen were over sixteen. This means that James the elder owned twenty-one slaves who were not yet sixteen years old the year before his death. In the 1816 tax list, James the elder claimed ownership of thirty-five slaves, of whom sixteen were over sixteen years old. 201 Since his estate inventory lists only five slaves as "children," the other eleven slaves listed there must have been under sixteen, but old enough not to be described as "children" by the estate appraisers. 202 Some of these may

196. See generally Genovese, supra note 31.
198. Inventory of James Harlan Estate, supra note 193.
199. Id.
200. Mercer County Tax Records, supra note 130 (1815).
201. Id.
202. Inventory of James Harlan Estate, supra note 193.
have been young teenagers, close to James Harlan in age.

The values placed on the males almost certainly reflect differences in age—increasing in value to a certain age and then declining—whether or not they had marketable skills or were simply laborers, and their comeliness and the lightness of their skin. Light-skinned blacks were generally more valuable themselves, and because they were more likely to produce light-skinned children whose value would also be higher. If a slave were known to be difficult, someone who had attempted to run away or who resisted white authority, he would have had his value discounted to reflect this, assuming that these facts were discovered. Females were probably valued according to the same criteria although their childbearing potential must also have been factored in.

If I am right in this analysis, house slaves—cooks or ladies' maids, for example—especially those with light skins, should have been generally more valuable than simple laborers. A young, light-skinned woman, just coming into her childbearing years, or already pregnant, should have been valuable compared to other slaves. According to the inventory of James Harlan the elder's estate, the "girl," Virgin, and another "girl" listed in the first group of slaves, Eady, were by far the most valuable female slaves in the estate. The appellation "girl" suggests they were young, their probable location near the main house suggests they were house slaves, and their relatively high value suggests, though it by no means proves, that they had light skin. In any event, the records show there were female slaves in the Harlan household with whom James may have had a liaison.

But, even if we assume, for purposes of further analysis, that Robert was a Harlan, we still must consider the possibility that his father was not James, but James' father, James the elder, or one of James' brothers. Any male member of the Harlan family could have been his father. James' later benevolence toward Robert could have been simple generosity, or the result of James' assumption of burdens that rightly belonged to his father, James the elder, or to one of his own brothers.

It seems unlikely that James the elder was Robert's father. James the elder was sixty years old in 1816. He had been married to the same woman for over thirty years and had nine children with her. All indications are that he was content in his marriage. He was a church-going Presbyterian, who seems to have taken his religion seriously, and in later life displayed none of the lust for adventure which had brought him to Kentucky in Harrod's company in 1774. In short, he
was, by 1816, the steady, stable, patriarch of a large family, for which he provided with great care during his lifetime and in his will.

James the elder's will, executed in August 1816, five months before Robert's birth, directed no special treatment for any of the female slaves on his property. The only ones referred to by name were the three women devised to his wife, Sarah. The pattern of Southern miscegenation discussed in Section II.A of this Article, suggests that if he were involved with one of his female slaves, he might have made some special provision for her and, if he knew she was pregnant, for her unborn child. It is extremely unlikely that he would have left a slave, with whom he was involved sexually, to his wife, for a wronged wife was the last person from whom such a slave could be expected to receive gentle treatment. In addition, we must remember that his children's height, light eyes, sandy hair, and ruddy complexions came not from him but from his wife, Sarah. The physical differences between James the elder and Robert—James being of medium height, stocky, with dark eyes and hair, and Robert being tall and blue-eyed—coupled with these other factors, make it unlikely that James the elder was Robert's father.

It is more difficult to dismiss the possibility that one of James' brothers was Robert's father. All of the Harlans of that generation were "Big Reds" and appear to have lived close together. It seems safe to rule out James' younger brother, Davis, as a candidate since Davis was only twelve years old in 1816. James' brother Elijah, who was twenty-six in 1816, married in September 1815, and seems unlikely to have been straying so quickly from his marriage bed.

Two of James' brothers are more likely prospects to have been Robert's father. James' brother, John, was nineteen in 1816, and unmarried. His brother, Jehu, was twenty-two in 1816, and unmarried. It is impossible to dismiss the possibility that either of these men was Robert's father. However, James' age and subsequent behavior make him a better candidate.

In March 1816, James was almost sixteen years old, an age when sexual urges are strong. Given his family's religious character, it seems more likely that the taboo against race-mixing would have been broken by a boy in the throes of these adolescent urges—perhaps while engaging in sexual experimentation with a light-skinned mulatto housemaid—than by either of his older brothers. This kind of sexual initiation was common among the sons of slaveholders, especially in rural areas where there were opportunities for little contact with white fe-

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203. See supra note 189 and accompanying text.
males their own age except in church or at well-chaperoned celebrations. If James "fell" in this way, his fall matched the conduct of many slaveholders' sons of the same age. If Robert was the product of such conduct, James Harlan's later behavior toward Robert becomes more comprehensible. As James matured, he grew into a decent man who valued his integrity highly, and who believed in atonement for sin. He became the kind of man who would have taken responsibility for his adolescent act and raised his son as well as his society would permit. This again would have been consistent with the similar acts of other men in that society.

It is interesting that when James died in 1863, he left no will. Although even prominent lawyers sometimes die intestate, that James did so is surprising. If he had left a will, would he have followed the pattern of so many other southern fathers of mulatto children and acknowledged Robert? If he felt obliged by conscience to address all of his living children in a will if he made one, might he have elected to make none rather than to ignore a son he could not bring himself to acknowledge? Is it possible that there was a will which did acknowledge Robert that was never offered for probate by James' politically prominent administrator, his son, John Marshall Harlan? What would have been the impact of such a will on James' reputation, or upon John's future political prospects, in the midst of a bloody Civil War that was especially terrible in divided, border state, Kentucky? Although the statutes of descent and distribution in Kentucky at the time of James Harlan's death assigned his widow a one-third share of his estate, John appears to have seen that almost all assets of the estate went to his mother.

E. James Harlan's Treatment of Robert Harlan

In his powerful treatment of slavery, Roll Jordan Roll, Eugene Genovese concluded that "[t]hose mulattoes who received special treatment usually were kin to their white folks." While by no means conclusive, evidence of Robert's special treatment by James is important to any consideration of the relationship between these two men.

Sometimes little things escape notice. Robert Harlan lived under that name throughout his life (as far as public records can establish this fact), and as Paul McStallworth indicated, it was no small thing

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204. Genovese, supra note 31, at 429.
for Robert to have been permitted to take the Harlan family name, and use it while still a slave.

Although it was common for freed slaves to take the family name of their former masters after the Civil War, this practice was rarer in the ante-bellum South. Perhaps this was simply because the planter families frowned upon it. Perhaps they did so for no more obscure reason than that use of the family name bestowed more humanity upon slaves than most owners found comfortable. One could call many other chattels by name, a horse or a dog, for example, but few of these “things” had two names, one of which associated it directly with the master’s family. Perhaps it was this public association, that was unacceptable, because it invited speculation and rumors that a family with self-respect and social position preferred to prevent. It was a rare thing indeed, for a slave to be permitted to use the family name while still in bondage. Such permission came very close to an informal acknowledgment of familial connection. But allowing Robert Harlan to use the Harlan family name was not the only unusual privilege which James Harlan extended to his slave, Robert.

At least as early as 1840—eight years before his formal emancipation—Robert Harlan appears in the public records of Lexington, Kentucky, with the designation “free man of color” next to his name.206 Accounts of Robert’s life state that James Harlan permitted Robert to set up in Harrodsburg as a barber in the 1830s, and as a grocer in Lexington in the 1840s. While in Harrodsburg, Robert might still have been living in James’ household. However, James moved to Frankfort in 1840 to become Secretary of State, and Robert established himself in Lexington that same year. Robert must have been living on his own in Lexington. The city tax records for Lexington support this hypothesis. The records listed heads of household and independent individuals only. Robert’s “household” appears in the records in the years 1841-1848.207 Robert lived with a free woman “of color” throughout the 1840s, and she bore him five daughters between 1842 and 1848, when Robert disappeared from the Lexington records.208

Robert’s status as a “non-slave” is especially surprising since it was illegal under the laws of Kentucky for Robert to live as a free man, working for his own account in Harrodsburg and Lexington. It

206. See Fayette County Marriage Bonds (Nov. 19, 1840), supra note 2; Lexington City Tax Records (1840), supra note 2.
207. See Lexington City Tax Records (1841-48), supra note 2.
208. Id. One of these daughters died in 1845. Lexington City Tax Records (1845), supra note 2.
was a criminal offense for James Harlan to permit him to do so and James could not have been ignorant of this fact. As Commonwealth's Attorney—the prosecuting attorney in the circuit—James Harlan had been charged with enforcing all of the penal laws of the state, including the laws restraining slave masters from permitting their slaves to go abroad, hiring themselves out as free men. As a prominent lawyer and a prominent citizen of Harrodsburg, not to mention as an "incarnate digest of the opinions of the Kentucky court of appeals," there can be little doubt that James was familiar with the law and with three Kentucky cases which dealt with the obligations of masters to restrain and supervise their human property.

In 1827, the Kentucky Court of Appeals expatiated at length about masters who permitted their slaves to go at large, trading or hiring themselves out at their own discretion, generally permitted to ramble and live beyond the reach and control of their masters. In Jarrett v. Higbee, the owner of a slave brought an action for trespass against the defendant for arresting and imprisoning the slave. The slave had a "pass" from his master, the plaintiff, when he was arrested by the defendant. The pass provided

Know all men by these presents, that I, J. Jarrett, of Livingston, and State of Kentucky, do agree that this black man Allen, do bargain and trade for himself until the first day of May next; and also for to pass and repass from Livingston county, Kentucky, to Monongalia county, State of Virginia, Morgantown, and then to return home to the same Livingston county, Kentucky, again near the mouth of Cumberland river, Smithland.

In affirming the lower court's instructions to the jury insulating the defendant from liability if he had probable cause to believe Allen was a fugitive, the Jarrett court disposed of the written consent by Jarrett with the following observation:

However well satisfied the master may have been to turn his slave loose upon society, to bargain and trade for himself and to ask soci-


212. Id. at 547.
ety to submit to it, yet it does not follow that society were bound to submit to it... [N]o paper can be such a one, which on its face is in violation of public policy and the security of society; which shews that the slave is going at large, to do that which is forbidden expressly by the statute law... That the master shall not let loose his slave, with a permit from him to violate the established order and economy prescribed by law in relation to slaves, is due society.213

Barely drawing breath and exuding outrage, Chief Justice Bibb continued,

These permissions, and such acts of the slave, are violations by master and slave, of the policy, spirit and letter of the statute of 16th December, 1802, against permitting slaves to go at large and hire themselves... Such licenses would tend to beget idle and dissolute habits in the particular slaves so indulged, as well as in others, and lead to depredations upon the property of others, and to crimes and insubordination.214

In the Chief Justice's view, the writing set out above was a species of temporary and unlawful manumission, unlawful in its purpose and duration, wanting the solemn form, sanction, authentication and safeguard, as a deed of emancipation, and by its terms and purposes, shewing that the slave was not proceeding upon the lawful business of the master, but at the will and for the purposes of the slave himself.215

In 1831, in Commonwealth v. Gilbert,216 the same court sustained an indictment against Elizabeth Gilbert, a citizen of Madison County, for permitting her slave "to go at large, and hire herself out in [the city of] Richmond."217 In reaching this result, the court cited not only the statute of 1802, referred to by the Jarrett court, but also a statute enacted in 1825.218 The 1802 act provided:

'if any person whether the owner or hirer of a slave, shall permit his or her slave to go at large and hire himself or herself out, such owner or hirer shall forfeit ten pounds to be applied towards lessening the county levy where such slave shall be found going at large and hiring himself or herself as aforesaid.'219

213. Id. at 550.
214. Id.
215. Id. at 551.
217. Id. at 184.
218. Id.
219. Id. (quoting Act of 1802).
The second statute referred to by the Gilbert court was an act of 1825 that extended special protection to the towns of Harrodsburg and Richmond.\textsuperscript{220} This act provided as follows:

\begin{quote}
[\textbf{I}]f any slave shall be found going at large in Harrodsburgh or Richmond working for himself or herself, or contracting, or dealing for himself or herself for more than one day at a time, (any colorable or pretended hiring to the contrary notwithstanding,) it shall be lawful for the trustees of said towns to cause such slave to be hired out to the highest bidder for the term of ten days, or to commit such slave to jail for ten days, and until his or her prison fees are paid by his or her owner; the money received for such hiring to go in aid of the funds of the town.\textsuperscript{221}
\end{quote}

The statute of 1825 was passed to supplement the general 1802 act, the court explained, because “the vagrancy of slaves may be peculiarly demoralizing and perilous to the society of towns.”\textsuperscript{222} The 1825 act had been enacted “at the instance of the citizens of Harrodsburg and Richmond” in order to deter slaveholders “from suffering their slaves to go at large and act for themselves,”\textsuperscript{223} or, as the court colorfully describes it, to prevent the defendant from permitting her slave to “infest the town of Richmond.”\textsuperscript{224}

Thus, James Harlan intentionally ignored settled law in the case of Robert when he permitted the younger man wide-ranging indepen-
dence while still legally a slave. James risked prosecution and public embarrassment by engaging in precisely the kind of conduct which so aggravated his Harrodsburg neighbors that they had procured special legislation to prevent it. But James Harlan was not just a citizen of Harrodsburg, he was a prominent lawyer and political figure who possibly used his influence to exempt Robert from enforcement of the law. Even if the actual financial risk to James was small, the other sanctions he risked for Robert's sake were not. Public disapproval, charges of hypocrisy, breach of trust, and misuse of power were serious indeed, given his ambitions.

Robert undoubtedly benefitted from this unusual treatment, but why did James do this remarkable favor for this particular slave? Part of the answer may well have been that James was a strong and independent soul. He was troubled by the "peculiar institution." Awareness of James' known scruples about slavery, however, does not avoid the need to explain why his treatment of Robert was so different from the treatment he afforded his other slaves.

The risks for James grew more immediate in 1847. Robert was living in Lexington and James in Frankfort, twenty miles away. James could no longer provide Robert with the informal protection that was probably possible when they both lived in Harrodsburg in the 1830s. Now too, James' visibility as a Whig leader in the state, made both men more vulnerable to James' political enemies. This point must have been driven home to James when the court of appeals handed down its decision in *Parker v. Commonwealth*, in December 1847.

In *Parker*, the court sustained a verdict against a slaveholder under an indictment that was challenged as insufficient. The slaveholder was indicted for permitting her slave, Clarissa, "to go at large and hire herself by permission of the plaintiff in error, who was her owner." Judge Simpson held that

[I]t is unnecessary under the act of 1802 . . . to allege in the indict-

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225. It might be observed that if the practices of which James was here guilty were not somewhat common, there would have been no need for the statutes touching this behavior. However, there was deep hostility and constant anxiety about blacks who were not under the immediate control and supervision of a white person. They represented a dangerous anomaly and whites feared the disruptive effect they would have on other slaves. Whites also feared that the taste of freedom would encourage slaves to run, or that unsupervised blacks might already be fugitives. Given these attitudes it is conceivable that the presence of even small numbers of these "unattended" blacks might have called forth a legislative response. This would be particularly true in Kentucky which was separated from the free states only by the Ohio River.


227. *Id.* at 30.
ment any agreement between the owner and the slave in relation to the terms upon which the permission to the slave to go at large and hire himself or herself out, has been granted. The offence consists in the act of the slave going at large, and hiring himself or herself out, with the assent and by the permission of the owner. . . . The law makes it the duty of the owner to exercise over his slave a superintending control, and not permit him to go at large, unchecked by the salutary restraint of the master, the exercise of which is so important to the protection and preservation of the rights of others. 228

It is possible that the Parker decision influenced James to convert Robert's de facto emancipation into formal, de jure manumission, in September 1848. However, it must have been Robert's decision to leave the state—and James' protection—for the California gold fields, which made legal emancipation absolutely necessary.

Ironically, six years after James finally complied with the formal manumission requirements on behalf of Robert, James argued in favor of the freedom of slaves in a case with striking parallels to his own before Robert's formal emancipation in September 1848.

In Anderson v. Crawford, 229 a slave, Milly, who may have been the daughter of her master's father, 230 was permitted to "go at large and act as a free woman" 231 although no formal deed of emancipation had ever been filed with the county court in compliance with Kentucky's manumission statute. Beginning in 1829 or 1830, at the age of eighteen, Milly left her master's house, and settled with a free man of color in an adjoining county about twenty-five miles distant from her master's home. 232 Thereafter she passed herself off and was recognized as a free woman. For almost twenty years, her master made no effort to assert his ownership over her. 233 Once when away from home Milly was jailed as a runaway slave, but, when notified of her incarceration, her master paid her jail fees and told the jailer "to let Milly go." 234 Thereafter she disappeared North across the Ohio River. After her departure, her master asserted that he had never freed her, that he "never knew where she resided, nor heard of her after she left his possession, and that he had not known or heard of her having any

228. Id.
230. The court's opinion refers to testimony to the effect that Milly believed herself "too white to serve as a slave." Id. at 271. The court also reported that "there is some intimation in the evidence that Milly was Ray's child." Id.
231. Id.
232. Id. at 269.
233. Id. at 270.
234. Id.
children” until he learned of it shortly before bringing suit to reclaim them. At issue in the Anderson case was the legal status of Milly’s three children, born to her after she began living as a free woman. Under Kentucky law, if the mother was a slave, her children were slaves and belonged to her master.

This case is interesting for purposes of this discussion because, aside from the human tragedy of the case (Milly’s children, who believed themselves free, were sent back into slavery) James Harlan represented Milly’s children, arguing in favor of their freedom. In doing so, James advanced arguments which he must have realized could as easily have been offered on behalf of Robert had Robert’s de facto free status been challenged before his formal emancipation.

Kentucky’s emancipation statute then in force provided that an owner could emancipate a slave by will or by deed, acknowledged and proved by two witnesses before the county court. Harlan argued that acquiescence by Milly’s master in her long term, apparent freedom, amounted to an abandonment of his property rights in her. He was asking the court to create by court action, another path to freedom not set out in the statute. Harlan argued,

‘When a slave, with a knowledge of his owner, has gone at large and acted as if free for any considerable length of time, a jury may be directed to presume that a deed of manumission was executed with all the required formalities; and if it would be invalid unless recorded within a certain time, that it was so recorded.’

The crux of his argument was that there was a lost document of emancipation or that the court should presume the existence of such a document due to the conduct of the parties and the passage of time. If Milly was free, Harlan reasoned, her children were free. In a telling statement, Harlan’s co-counsel succinctly described the community’s view of free blacks in Kentucky. He argued that the court should embrace Harlan’s “lost grant” fiction because it was necessary “to guard the rights of the free colored population of the state; a class which, it is admitted, are generally worthless, yet the law professes to guard their

235. Id.
236. Id. at 269-70.
237. Id. at 268.
238. Id. at 264.
239. Id. at 268.
240. Id. at 264.
241. Id. (quoting Parsons on Contracts).
242. Id.
The court rejected Harlan's argument, concluding that even if Crawford had believed his conduct sufficient to free Milly, it was not sufficient as a matter of law. "[S]o long as she remained in Kentucky," the Court concluded,

[H]is intention, or even obligation, to emancipate her, or his opinion that by allowing her to act as a free woman she had become legally free, did not, and could not, in fact, make her free, because our laws admit of emancipation by writing only. . . . [I]t can not be admitted that the illegal act of allowing a slave to act as a freeman gives of itself a title to freedom, since this would be an utter subversion of the laws and policy of the state which impose restraints upon emancipation, and of the objects and policy of that law which prohibits the permission of slaves to act as freemen. 244

The parallels between James' treatment of Robert, and Milly's treatment by her master, are quite striking. John Harlan was practicing law in his father's office in 1854. Did John work on the Anderson case? Did having the case in the office remind John of the 1848 ceremony in which his father had formally emancipated a mulatto who had been living for many years as a free man in Lexington? Would he have talked about the similarity of the cases with his father? Would James have explained to John his relationship with Robert? It was well for Robert Harlan that his own circumstances before 1848 had not been the test case for James' joust at this law.

It is possible that Robert was permitted to keep some of the money he earned in Harrodsburg and in Lexington, and that he purchased his own freedom from James Harlan. Many years after James' death, his daughter-in-law, Malvina Harlan, John Marshall Harlan's widow, recounted a story which must have been told to her by her husband, John, since she and John did not meet until 1852. James, who was unusually humane toward his slaves, gave two slaves even more unique treatment than others. She reports, that he paid two of his male slaves "wages" for several years so as to enable them to buy themselves free. "My Father-in-Law," she wrote, "with his sympathy for the unfortunate [black] race, was always quick to recognize anything like unusual ability in them. He made it possible for two of these men servants to purchase their own freedom, by giving them, each year, for several years, the money equivalent of half-a-year's

243. Id. at 265.
244. Id. at 272.
hire."\textsuperscript{245} In what is certainly a reference to Robert Harlan, she continued: "One of those [freed men] went to California in 1849, and was fortunate enough to 'strike gold' almost immediately."\textsuperscript{246}

Whether Robert purchased his freedom, as Malvina Harlan had been told, or not, this account is important evidence of ongoing contact between James and Robert. James knew that Robert had gone to California, and he knew that his former slave had struck it rich there. How would he know unless Robert had told him? If John Harlan was the source of this account, it is further evidence of lifelong contact between John and Robert. The remainder of Malvina's reference to this unnamed slave—Robert—is of even greater importance. Malvina reports that "'[Robert's] 'Young Mistress' (my sister-in-law Elizabeth Harlan) received at the time of her marriage, several years later, a fine new piano as a bridal gift from this grateful quasi-member of the household!"\textsuperscript{247}

Malvina was mistaken about the occasion and the timing of this gift. Elizabeth Harlan married James Hatchett in January 1848, before Robert left for California and so, before he could have had the money with which to purchase such an extravagant present. Given the impression such a gift from such a source would have made, it seems likely that it was made, but later than Malvina's story suggests. The gift establishes ongoing contact between James' family and Robert after Robert returned from California. It also confirms that Robert felt understandable gratitude toward James and the Harlan family.

Robert also seems to have remained in contact with John's brother James. James had practiced law with John in Louisville in the 1870s and served later as a judge in Louisville. However, James appears to have been an alcoholic and to have suffered a tragic decline. His correspondence with John about his circumstances and his need for money is agitated and moving. John apparently tried to assist James in ways which would not result in supplying his brother with liquor.\textsuperscript{248}

In some of James' letters he refers to Robert Harlan. In May 1888, James wrote John:

\begin{quote}
It is well settled beyond change that I cant [sic] stay here. I am afraid to do so. Bob Harlan has often [the word "promised" is struck through] offered to asst [sic] me but I do not wish to be
\end{quote}

\textsuperscript{245} M. Harlan, \textit{supra} note 18, at 19.
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{Id.} at 19-20.
\textsuperscript{248} \textit{See infra} text accompanying notes 249-251.
driven to the necessity of appealing to him—My position is as despic­
cable and contemptible as it can be and few have been so utterly
abandoned by fate as I have.249

In another letter, James seems almost to threaten John with an
appeal to Robert: "If you cant [sic] help me I can try others—Bob
Harlan will let me have the money if he has it . . . ."250 In July of the
same year, James' fortunes took a turn for the better, and he wrote
John a newsy letter from James' new home in the Indian (soon to be
Oklahoma) Territory. In it he told John that "Bob Harlan has for two
years been unusually kind to me, not however putting me under
obligation."251

Surely James would not have turned to Robert for money unless
he believed the older man had financial means. It is possible, of
course, that James turned to Robert not as a family member, but as a
former family slave who owed the Harlan family a great debt of grati­
tude. However, from the content of James' surviving letters to John it
appears that his appeals for financial help were directed primarily at
family or very close friends of the family, like John's former law part­
tner, Augustus Willson. The fact that James maintained contact with
Robert and looked to him for financial assistance is suggestive. The
anguish James felt when driven to ask for Robert's assistance, and his
assumption that such an appeal would discomfit John enough to wring
money from the Justice, offers support for the family connection hy­
pothesis when added to the rest of the evidence.

Although I have found no other letters referring to Robert in the
Harlan family manuscripts, these specific examples of contact at differ­
tent times, over several decades, suggest that contact between the black
Harlans of Cincinnati and the white Harlans of Kentucky was com­
mon and extended over much of John Harlan's lifetime.

F. John Marshall Harlan and Robert Harlan After the War: The
Dog That Didn't Bark

Although not the kind of evidence upon which one would choose
to put great weight, an important part of this Harlan family tale is
what did not happen. As Sherlock Holmes might observe, sometimes

249. Letter from James Harlan to John Marshall Harlan (May 10, 1888) (available
in John Marshall Harlan Papers, University of Louisville Law School).
250. Letter from James Harlan to John Marshall Harlan (May 14, 1888) (available
in John Marshall Harlan Papers, University of Louisville Law School).
251. Letter from James Harlan to John Marshall Harlan (July 27, 1888) (available in
John Marshall Harlan Papers, University of Louisville Law School).
the key to solving a mystery is the dog that does not bark when bark­ing is called for. There were a number of times in the careers of Robert Harlan and John Harlan when their paths crossed, and yet no evidence of public contact remains. Given the extent of the Harlan manuscripts collected at the Library of Congress and the University of Louisville Law School, the private correspondence between Robert and John, and between Robert and John’s brother, James, the absence of any evidence of public contact between James Harlan or his son John Harlan and Robert Harlan seems strange. 252

One example of this “non-contact” involves John Harlan’s races for Governor of Kentucky in 1871 and 1875. Although Robert and John were corresponding about political matters at least as early as the summer of 1873, 253 there is no public reference to cooperation by Robert in John’s campaigns. In fact, in 1871, Robert apparently made a trip east during the Kentucky campaign and was off the scene at the time his assistance could have been most useful to John. Given the proximity of Robert, who was living in Cincinnati in the 1870s, and the importance of the black vote to Republican success in Kentucky during those years, it is surprising that there is no surviving public record of Robert encouraging black support for the Kentucky Republican ticket.

By 1871, Robert was an important Republican operative in the Cincinnati black community. He was in contact with many prominent white Republicans in Ohio, and was working tirelessly to promote the straight Republican party line among Cincinnati blacks. It also seems probable that Robert had political contacts across the Ohio River in the neighboring cities of Covington and Newport. He also probably had ties to important blacks in Lexington and Louisville. The Cincinnati newspapers, especially the Cincinnati Commercial, reported extensively about Kentucky political gatherings in support of John Harlan’s gubernatorial campaign in all of these cities, but there is no mention of Robert Harlan being present. Since he was often mentioned by the same papers as present at Cincinnati political gatherings, his absence on the other side of the river seems noteworthy. At a time

252. The paucity of surviving letters from Robert to John in the John Marshall Harlan manuscripts may mean there was little correspondence between Robert and John. However, given the tone of the letters that do survive, it seems more likely that John discarded most of Robert’s letters or that letters which would have elucidated their relationship were selectively destroyed. The Harlan papers now in the Library of Congress were in the possession for many years of John’s son, Richard Harlan, who collected material for a biography of his father.

when visible black leaders were important to Republican success, Robert Harlan was among the most visible black party leaders in Ohio. Where was he? Since John and Robert corresponded privately, the absence of public cooperation between them requires explanation.

It is possible that John did communicate privately with Robert and that Robert made quiet contacts among Kentucky blacks in support of John’s gubernatorial candidacies, but I have seen no references suggesting this. It also seems likely that if Robert had made forays into Kentucky on behalf of John, his activities would have been noted in the Kentucky newspapers, which gave extensive coverage to political gatherings and “stump speeches.” It also seems likely that John’s Democratic enemies would have tried to use John’s connection to Robert against him.

How can we explain Robert’s absence? It is possible that given the racial dynamics of Kentucky at this time, it would have been politically counterproductive to bring a “foreign” black man into the state to campaign for the Republicans. The Republican Party that John was helping to build needed to broaden its base among white voters and live down its radical reputation. When John had joined the party in 1868, it had almost negligible white support and was so closely linked to the radicals and Lincoln’s unpopular war policies in the state, that it was extremely weak.254 Kentucky Republicans needed black support but were likely to receive it whether they openly courted it or not, and too much attention paid to the black vote would alienate potential white supporters who had to be won over if the Republicans were to have a chance of carrying statewide races. The same problems haunted the Republican Party in Ohio, a state which, unlike Kentucky, possessed an influential anti-slavery community.255 As Robert Harlan’s struggles in Ohio demonstrate, late nineteenth century racism was almost as potent a force above the Ohio as below it.

There is another possibility that fits better with the argument of this Article. It is possible that John avoided public contact with Robert because Robert was a living reminder for John and others of a painful transgression by John’s father, James. If John knew that Robert was only a former “pet” slave of his father, a slave who had received unusual favors because of James Harlan’s good will, why not exploit that connection publicly for John and Robert’s mutual political

254. See Coulter, supra note 5, at 257-311; Owen, Formative Years, supra note 24; and Owen, Pre-Court Career, supra note 21.
255. See Gerber, supra note 4, at 209-44. On racism in general in Ohio, see Hickok, supra note 60 and Quillin, supra note 60. For a general treatment of racism in the free states before the Civil War, see Litwack, supra note 60.
benefit? However, if John knew Robert was his brother or if he sus­pected it, public contact with Robert would have been politically dan­gerous. It would have been dangerous because association of any kind with Robert, given Robert's "Harlan" physical characteristics, his name, and his connection to the Harlan family, might have started people thinking about race-mixing. Worse, it might have started people talking about James and have led to a blackening—quite literally—of John's deceased father's reputation. Fallout from such speculation could potentially damage John's own prospering political career and prove embarrassing to the Republican Party.

It is understandable that for these reasons John might have avoided public contact with Robert. But what would have kept Robert from trying to use his past connection to John Harlan's family in order to further his own political—especially patronage—schemes? Whether James Harlan was Robert's father, or merely his kindly former master, sponsor, and protector, Robert knew that John Harlan was prominent in Republican circles. In fact, John was uniquely situated to be of assistance to Robert in the older man's pursuit of place. Surely, Robert would have tapped this powerful potential source of influence. The absence of letters from Robert seeking John's support is particularly strange since there is evidence that John requested Robert's help to obtain appointment to the Supreme Court.256

Each man was aware of the other's influence and of the ways in which each could be of political service to the other. Robert could follow John Harlan's career simply by reading the Cincinnati Commercial. That influential Republican newspaper was one of the two most important organs for disseminating the Republican point of view in Kentucky. It had a large circulation in Kentucky and offered extensive coverage of Kentucky politics for its readers on both sides of the Ohio River. It is also likely that John Harlan read this paper in addition to the Louisville Commercial, the most important Republican newspaper in Kentucky. If John read the Cincinnati paper, he would have noticed numerous references to Robert in its pages throughout the 1870s. Robert's political importance and his role as a Republican operative is obvious from these references.

Robert Harlan was always ambitious for office, writing directly to acquaintances who were politically situated to assist him in his pursuit of place. It would be inconsistent with this pattern of behavior for Robert to have refrained from approaching John Harlan for help of

this kind. John was in control of much of the Republican federal patronage in Kentucky in the early 1870s, with the assistance of his political friend and former law partner, Benjamin Helm Bristow.257 John often tried to help his political friends to obtain jobs.

It is possible that, with James dead, Robert called upon his connection to John Marshall Harlan for help. If Robert did write to John Harlan in this regard, no such letter survives in the John Harlan manuscripts. Such a letter would be especially useful because it would almost certainly have stated the factors that made Robert feel able to request John’s help. Perhaps Robert made such personal and important appeals to John in person rather than in writing. But if so, why? Was it to avoid leaving tracks? This is not the only peculiar omission from Robert’s surviving letters. Could letters to John from Robert or Robert’s son have been intentionally destroyed? But if the Harlan papers have been culled to destroy evidence of the blood connection between John and Robert, why not destroy all of Robert’s letters to John?

Whatever practical or personal concerns may have encouraged John to keep Robert away from John’s gubernatorial campaigns, and to avoid lending Robert formal patronage support, there is another omission that is even more peculiar. In his various autobiographical writings, John Harlan omits any mention of Robert or his father’s special treatment of Robert from his own recollections of James. This seems strange since in order to illustrate his father’s humanity and distaste for slavery, John often recounted an anecdote that made the point much less forcefully than would have stories about James’ treatment of Robert.258 Why did not John talk about Robert’s treatment in

257. Bristow served as Solicitor General from October 1870 until November 1872. WEBB, supra note 24, at 71-112. After a two year stint in private practice, Bristow returned to Grant’s administration in June 1874, as Secretary of the Treasury. Id. at 135. Until the destruction of Bristow’s Presidential bid at the Republican convention in 1876, John Harlan and Bristow were intimate political associates. Given this connection, John was well-situated to help Robert in the latter’s pursuit of federal appointive office. John Harlan led the Bristow forces at the 1876 Republican National Convention, which was held in Cincinnati. Robert, though not a delegate, almost certainly attended. See id. at 213-52. See generally Owen, Pre-Court Career, supra note 21.

258. John often recounted the story of a Sunday morning when he was on his way to church with his father in Frankfort. A “slave-driver” was herding a gang of slaves, who were chained together, down the main street of town. The white man was using his whip on his black charges and this outraged James. John reported that James went up to the man, shook his finger in the man’s face, and said, “You are a damned scoundrel. Good morning, sir.” Harlan apparently told this story to James B. Morrow, a reporter, who included it in a biographical article which ran in newspapers across the country on February 25, 1906. For copies of this article, see Scrapbook, Container 27 (John Marshall Harlan Papers, Library of Congress). Malvina Harlan recounts the same story in her
order to show James' special sensitivity about slavery? Given Malvina Harlan's references to Robert as just such an example in her unpublished memoirs composed after John's death,259 it seems unlikely that John forgot about James' special treatment of Robert. Rather, he seems to have chosen not to tell the story in public.

III. DID ROBERT HARLAN HELP TO SHAPE JOHN MARSHALL HARLAN'S VIEWS ON RACE?

Most of the scholarly writings about the first Justice Harlan offer, at best, tentative explanations for his behavior on the Supreme Court. We need more studies of the details of his life and personal relationships if we are to understand better this complex and important Justice. One of the most important enigmas about John Harlan that remains is the source of his progressive attitude concerning the legal rights of America's black citizens.

My own research has convinced me that one of the keys to understanding the sources of John Harlan's personal and judicial values is his relationship with his father, James. John Harlan loved and respected his father. Through James' relationship with Robert Harlan, and through John's own contacts with Robert, Robert was well-situated to influence John's understanding of race. John's own contacts with Robert began in childhood and continued at least until the time of John's appointment to the Supreme Court. John's experiences with Robert were different in quality from those he had with other blacks because of Robert's special relationship with James Harlan. If the blood tie I have suggested existed, and if John knew it, then Robert's effect on John would have been profound. Even if my hypothesis of a blood relationship is rejected, the duration and intensity of contacts between John, James, and Robert is certain to have had some impact on the future Justice and should be explored as fully as the surviving sources permit.

At the very least, John's connection to Robert would have made empty abstractions about race impossible for John. Robert humanized, for John, all cases involving the rights of black Americans. John knew through personal experience what the legal disabilities imposed upon blacks—the disabilities against which John Harlan raged in his

Memories. M. Harlan, supra note 18, at 18-19. She added that James appeared like "some Old Testament prophet . . . calling down Heaven's maledictions upon the whole institution of Slavery." Id. "My husband," she continued, "who was very young and was with his father on that peaceful Sabbath morning, never forgot the impression that was made upon him by his sudden indignation at the brutal and typical incident." Id. at 19.

259. M. Harlan, supra note 18.
Supreme Court opinions—meant in people's lives. At the very least, Robert put a face on the millions of human beings who were forced to live their lives in the shadow of the Supreme Court's racist opinions. Robert made John see the human beings behind the briefs. This must certainly have been true in a case like Plessy v. Ferguson, where the plaintiff was seven-eighths white—like Robert. John's devotion to his religion offers another key to understanding his behavior—a topic I hope to explore in the future. Once John Harlan could see blacks as individual human beings, his religious convictions compelled him to extend to them the rights all human beings deserved. This alone might have set John Harlan apart from his fellow Justices, for whom race was largely an abstract matter.

Robert Harlan's existence, and his early and recurrent contacts with John Harlan, also must have forced John to wrestle with his own attitudes about race long before he took his position on the bench. John's private resolution of his internal conflicts about Robert had to take into consideration James' attitudes toward blacks in general, and his relationship with Robert in particular. John's love for his father, James' treatment of Robert, and John's own intimate knowledge of this talented black man, apparently helped to propel John to a resolution of these internal conflicts which included respectful treatment for blacks and equality before the law.

During his pre-Court political career in Kentucky, John Harlan did articulate racist views. But, given the extent of his public transformation on this question, it seems appropriate to ask whether he truly believed what he was saying. Did he speak his convictions or were his racist pronouncements forced upon him by the combination of his intense political ambition and the racist realities of nineteenth century Kentucky? In this respect, it is noteworthy that his public conversion on the issue came suddenly and dramatically, when politics forced him into the Republican Party. Thereafter, racism was not a benefit to him politically, but a burden and it disappeared from his rhetoric. It was only after his appointment to the Supreme Court that John could candidly express his private views publicly, without calculation of the political gain or loss they might entail.

Through Robert, John would also have experienced, vicariously, the consequences of the color line. Robert was raised in the household of a humane slaveholder. He had money and great opportunity for a man of color in his time. Despite these "advantages," Robert was de-

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260. See supra notes 7-11 and accompanying text.
261. 163 U.S. 537 (1896).
nied all of the opportunities that were John's from birth. Through
Robert, John could experience the pain of butting doors which would
never open no matter how meritorious he might be as an individual.
In reviewing the story of Robert's life, John must have been acutely
aware of the significance of the color line. Robert's slightly brown
skin had rendered his considerable talents largely irrelevant to a
color-conscious, racist society. Indeed, this circumstance alone had
robbed Robert of the Harlan birthright which helped John to prosper
throughout his life.

If Robert Harlan helped to shape John Harlan's views about race
in any of these ways, he made a lasting contribution to John's fame.
Through John's words, Robert also left a mark on his country. He
helped to start America's eventual, painful re-examination of the as­
sumptions underlying its racist consensus. In this way, Robert left his
descendants and his country a wonderful legacy.

IV. SEPARATE, BUT NEVER EQUAL: SOME CONCLUDING
THOUGHTS

A concealing fog curls about Robert Harlan's connection to the
Harlans of Kentucky. It may be the kind of fog one occasionally finds
hiding the violation of a taboo. It is also possible that this fog is of the
ordinary variety, the kind that rises without assistance from the pas­
sage of time and the loss or deterioration of historical sources. The
critical difficulty in the case of the Harlans is to distinguish this kind of
"normal" obscurity from the other.

In the case of the Harlans, religious standing, guilt over a breach
of private morality, and over the potential destructive political power
of damaging information would have encouraged both James and John
to conceal Robert's blood tie if it existed. But genuine religious con­
viction and mature moral character would also have encouraged both
to take responsibility for ameliorating Robert's life to the extent that it
was in their power to do so. Robert might have concealed his pater­
nity out of love or gratitude, or he may not have known whether his
father was a Harlan or not. Given the character of the problem ad­
dressed and the paucity of the surviving sources, we probably can
never be certain whether or not Robert Harlan was James Harlan's
son. In my own mind, however, I am convinced that he was.

James Harlan gave all four of his acknowledged sons good educa­
tions, ultimately training them all for the bar. John attended the best
local grammar school, the best local college—Centre—and the best
law school in the West—Transylvania. James could offer no such op­
portunities to Robert. James could entertain no such plans for him.
No vocation in law or politics was possible. Just as James could not provide Robert with formal education, neither could he treat him like a son in other respects given the time and place in which they lived.

John received the benefits of being the son of a famous father, and a member of a powerful family. He received counsel from that father and James’ help in launching his political career. Robert fought through most of his life alone, illegitimate, black, and unacknowledged. Still he managed to succeed. James Harlan was a good master to his slaves and to Robert in particular. But, at best, Robert received a modest start from James. The great irony of his story is that the treatment he received was so much better than that received by so many others with “tainted” blood like Plessy’s\(^{262}\) and his own.

Even in the ranks of the party that had destroyed slavery and nationalized freedom, the disparity of treatment continued. The Republican Party could serve John Marshall Harlan’s ambitions; Robert Harlan could only serve the party. John Harlan could aspire to the governorship of his state and win the prize of a seat on the United States Supreme Court. Robert Harlan labored long and hard among black Ohioans on behalf of that same party, receiving in return two federal patronage jobs, and eventually, a contested one-term seat in the Ohio House of Representatives.

John could lead the party; Robert could only follow it. John could reshape the party; Robert was forced to shape himself to it. John was admired and lionized, while Robert was forced to suffer chronic contempt from his white allies, and the jibes of some of his own people that he was too white. John could educate his sons at the finest schools and offer them access into the best social, economic, and political circles in white America. Robert struggled his entire life to capture and hold onto minor but respectable, patronage jobs for his only son, Robert Jr., in order to prevent that son’s descent into poverty and disgrace. In short, John Harlan could aspire to and achieve his heart’s desire. Robert Harlan was forced to dream smaller dreams, swallow more bile, and content himself with a scrambling and precarious political existence.

John Harlan was a remarkable, talented, and ambitious man. He had the great good fortune to be born the son of a father who was a political leader in his native state, and to find himself on the top side of the color line. Robert was also remarkable, talented, and ambitious. It is possible that he was born the son of the same father, although at a time when James was still really a child himself and dependent upon

\(^{262}\) See supra notes 107-08 and accompanying text.
his own parents. It was Robert's misfortune to find himself on the bottom side of the color line. His disability was to be the illegitimate son of racially mixed parents in a society that empowered white slaveholders and their sons to sire mulatto children; and then cursed these children because they were constant reminders of the moral implications, for masters and slaves, of absolute human bondage. It was Robert Harlan's misfortune to have been born a slave of mixed blood and thus consigned by white society to a limbo between masters and slaves. It was his good fortune, as it was John's, to have been raised in the household of a man who, as an adult, was strong enough and moral enough to feel obligations to all of his sons.

James Harlan gave Robert all that Kentucky slave society would permit. In many ways, he even went secretly beyond what his neighbors could accept. He tried to give Robert some education, his de facto freedom, and a start in life. From these assets Robert built a relatively good life. In the process, he gave James' famous son a gift. He gave the first Justice Harlan insight. Through his contact with Robert, John Harlan developed a special way of seeing the problems involving race which came before him as a judge. It was this insight that made him unique in his understanding of the real costs, to both blacks and whites, of the color line.

One year before Robert Harlan's death, John Harlan wrote in dissent in *Plessy v. Ferguson*, "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." I wonder whether, when John Harlan penned these words, he reflected on their truth in his own life. His life, his father's life, and Robert's life had indeed been "indissolubly linked together." That link, like the country's, was forged in slavery and continued into an ambiguous twilight of freedom. Drawing upon his own experience for inspiration, John Harlan wrote of a color-blind future, and by writing about it, began the process of creating it. In a way, the writing of these words was John Marshall Harlan's greatest achievement.

Given his opportunities and the culture into which he was born and against which he had to fight every day of his life, Robert Harlan's successes were quite as remarkable as those of his half-brother, John. John Harlan proved a worthy son of a worthy father. When all is considered, so did Robert.