

# A Civil Action: Sally Hemings v. Thomas Jefferson

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## Abstract

*Allegations that Thomas Jefferson had an affair and fathered at least one child with slave Sally Hemings have been discussed for two centuries. In this Article, the authors summarize a “mock” trial defense of Jefferson, concluding that the allegations are unproved by the greater weight of the evidence.*

“All should be laid open to you without reserve, for there is not a truth existing which I fear, or would wish unknown to the whole world.”<sup>1</sup>

## Introduction

For over two hundred years, Thomas Jefferson has been accused of a sexual relationship with one of his slaves, Sally Hemings. According

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<sup>1</sup> *Introduction* to *THE JEFFERSON-HEMINGS MYTH: AN AMERICAN TRAVESTY* (Eyler Robert Coates, Sr. ed., 2001). This statement was made by Thomas Jefferson in a letter to Henry Lee on May 15, 1826, just fifty days prior to Jefferson’s death.

to DNA interpretive results conducted in 1998, it is now widely accepted that Jefferson fathered one or more of Sally's children. Are the accusations true? And if so, could they be proved in a court of law? These are the legal and historical questions that must be addressed through the rules of admissibility, authenticity, materiality, hearsay and relevance—irrespective of the passage of time.

In the following mock trial and defense of Jefferson, the authors conclude that the allegations are unproved and unprovable, by the greater weight of the evidence.

## I. History of Plaintiff's Complaint

### A. James Callender

In 1802, the sexual accusation against Jefferson first appeared in an article written by James Thomson Callender, an initial supporter of the President who later became a bitter political enemy.<sup>2</sup> Published in the *Richmond Recorder* on September 1, 1802, the article reads:

It is well known that the man, whom it delighteth the people to honor, keeps and for many years past has kept, as his concubine, one of his own slaves. Her name is SALLY. The name of her eldest son is TOM. His features are said to bear a striking although sable resemblance to those of the president himself. The boy is ten or twelve years of age. His mother went to France in the same vessel with Mr. Jefferson and his two daughters. . . . By this wench Sally, our president has had several children.<sup>3</sup>

Callender's origins and early life are a "mystery."<sup>4</sup> A Scot, Callender began his career as a writer in the 1780s.<sup>5</sup> He eventually embarked on

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<sup>2</sup> ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY 59 (1997).

<sup>3</sup> *Id.* at 61; see also Rebecca L. McMurry & James F. McMurry, Jr., *The Origins of the 'Sally' Story*, in THE JEFFERSON-HEMINGS MYTH: AN AMERICAN TRAVESTY 16 (Eyler Robert Coates, Sr. ed., 2001) [hereinafter MYTH].

<sup>4</sup> MICHAEL DUREY, WITH THE HAMMER OF TRUTH: JAMES THOMSON CALLENDER AND AMERICA'S EARLY NATIONAL HEROES 1 (1990).

<sup>5</sup> See *id.* at 4.

writing political pamphlets, leading to *The Political Progress of Britain*, which criticized powerful British politicians.<sup>6</sup> Jefferson had apparently read it.<sup>7</sup> Callender, hearing rumors of his imminent arrest for his seditious writings, fled Britain in 1793.<sup>8</sup> He escaped to the new world, leaving his wife and child behind.<sup>9</sup>

Callender was arrested on May 27, 1800, (similarly, for attacking the Federalists and John Adams) and tried in Richmond under the Sedition Act.<sup>10</sup> Having learned of the indictment, Jefferson wrote to President Monroe: “I think it essentially just and necessary that Callendar [sic] should be substantially defended.”<sup>11</sup> In June of 1800, Judge Samuel Chase fined Callender two hundred dollars and sentenced him to nine months in jail.<sup>12</sup>

When Jefferson became President, he pardoned Callender, allowing him to claim compensation for his fine.<sup>13</sup> Callender began a campaign for compensation and a Presidential appointment to postmaster of Richmond.<sup>14</sup> He complained to James Madison that “Jefferson has not returned one shilling of my fine. I now begin to know what Ingratitude is.”<sup>15</sup>

Jefferson denied Callender the appointment, concluding that he was “unworthy.”<sup>16</sup> Callender then turned to Monroe, who tried to “tranquilize his mind”<sup>17</sup> but began to suspect that Callender would attack the “Execu-

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<sup>6</sup> See *id.* at 29.

<sup>7</sup> REBECCA L. MCMURRY & JAMES F. MCMURRY, JR., *ANATOMY OF A SCANDAL: THOMAS JEFFERSON AND THE SALLY STORY* 76 (2002).

<sup>8</sup> See DUREY, *supra* note 4, at 46-47, 50-51.

<sup>9</sup> See *id.* at 51.

<sup>10</sup> See *id.* at 123, 126-27, 129.

<sup>11</sup> Letter from Thomas Jefferson to James Monroe (May 26, 1800), *in* 31 *THE PAPERS OF THOMAS JEFFERSON, 1800-1801*, at 590 (Barbara B. Oberg ed., 2005).

<sup>12</sup> DUREY, *supra* note 4, at 135.

<sup>13</sup> *Id.* at 145.

<sup>14</sup> See *id.* at 146.

<sup>15</sup> Letter from James Callender to James Madison (Apr. 27, 1801), *in* 1 *THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES, 1800-1801*, at 117 (2005).

<sup>16</sup> See DUREY, *supra* note 4, at 146-47 (quoting Meriwether Jones).

<sup>17</sup> Letter from James Monroe to James Madison (June 6, 1801), *in* 1 *THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES, 1800-1801*, at 265 (2005).

tive.”<sup>18</sup> Madison informed Monroe: “It had been my lot to bear the burden of receiving and repelling [Callender’s] claims. . . . [I]t is impossible to reason concerning a man, whose imagination and passions have been so fermented.”<sup>19</sup>

As Jefferson moved to the political center, Callender remained on the radical fringe. In May 1800, Jefferson sent Callender fifty dollars, a paltry sum that incensed Callender as “hush money.”<sup>20</sup> Jefferson, in turn, became insulted by Callender’s “base ingratitude” and denied any close relationship with him.<sup>21</sup>

Callender retaliated by publishing Jefferson’s friendly letters and payments to him.<sup>22</sup> In fact, Jefferson had not only paid for copies of Callender’s pamphlets, but had given him money to sustain him—“charity,” Jefferson had claimed.<sup>23</sup> Callender, in turn, excoriated Jefferson in the journal *The Richmond Recorder*, a publication that Callender edited.<sup>24</sup>

Callender’s motive and bias against Jefferson is clear. In August 1802, one of Jefferson’s partisans accused Callender, in print, of causing his wife’s death from a venereal disease.<sup>25</sup> Callender counterattacked and accused Jefferson of keeping a slave “concubine.”<sup>26</sup> He denigrated Sally Hemings as a “[s]lut common as the pavement,” who was “romping with half a dozen black fellows,” and having “fifteen, or thirty gallants of all colours.”<sup>27</sup> At one point, Callender boasted that he had done more harm to Jefferson’s reputation in five months than all of Jefferson’s critics in ten years.<sup>28</sup>

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<sup>18</sup> *Id.* at 222-23, 265-66.

<sup>19</sup> *Id.* at 244-45.

<sup>20</sup> WILLIARD S. RANDALL, THOMAS JEFFERSON: A LIFE 556 (1993); McMURRY & McMURRY, *supra* note 7, at 73.

<sup>21</sup> McMURRY & McMURRY, *supra* note 7, at 69, 75-76.

<sup>22</sup> MYTH, *supra* note 3, at 19.

<sup>23</sup> See McMURRY & McMURRY, *supra* note 7, at 75-76.

<sup>24</sup> See MYTH, *supra* note 3, at 19.

<sup>25</sup> See RANDALL, *supra* note 20, at 556.

<sup>26</sup> *Id.*

<sup>27</sup> McMURRY & McMURRY, *supra* note 7, at 70.

<sup>28</sup> *Id.* at 68.

Callender himself was a racist. He believed that accusing Jefferson of miscegenation would fatally ruin his career.<sup>29</sup> As one authority commented, “Jefferson’s offense was held to be mixture of the races, and Callender and his fellow scandalmongers strummed the theme until it was dead tired.”<sup>30</sup>

Two potential sources for Callender’s hearsay also had a clear bias against Jefferson: David Meade Randolph and his wife Mary (Molly),<sup>31</sup> disaffected, distant cousins. Both would have to admit that before the appearance of Callender’s articles, Randolph had been fired by Jefferson as federal marshal in Richmond, allegedly for rigging the Callender jury.<sup>32</sup> Randolph’s dismissal outraged him.<sup>33</sup> The couple’s grandiose life style disintegrated.<sup>34</sup> They became outspoken enemies of Jefferson and fed hearsay and gossip to Callender, as well as others.<sup>35</sup>

Callender died several years later, drowning in three feet of water in the James River, apparently in a drunken suicide.<sup>36</sup>

## B. The Plaintiff: Sally Hemings

Sally is a historical enigma. She was born in 1773, according to Jefferson’s own “business” records.<sup>37</sup> Her mother was Elizabeth “Betty” Hemings, a “chattel” of John Wayles, the father of Martha Wayles Skelton, a widow who married Jefferson in 1772.<sup>38</sup> Wayles was a well-known businessman representing a Bristol English firm, a lawyer and occasional

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<sup>29</sup> See GORDON-REED, *supra* note 2, at 61-62.

<sup>30</sup> WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 464-69 (1968).

<sup>31</sup> See JONATHAN DANIELS, *THE RANDOLPHS OF VIRGINIA 200-01* (1972).

<sup>32</sup> See *id.* at 200; see also GORDON-REED, *supra* note 2, at 74.

<sup>33</sup> CYNTHIA BURTON, *JEFFERSON VINDICATED: FALLACIES, OMISSIONS AND CONTRADICTIONS IN THE HEMINGS GENEALOGICAL SEARCH* 33 (2005); MCMURRY & MCMURRY, *supra* note 7, at 66-67.

<sup>34</sup> BURTON, *supra* note 33, at 33.

<sup>35</sup> *Id.* at 9; MCMURRY & MCMURRY, *supra* note 7, at 66-67.

<sup>36</sup> MYTH, *supra* note 3, at 19; DUREY, *supra* note 4, at 171.

<sup>37</sup> THOMAS JEFFERSON’S *FARM BOOK, 1774-1826*, at 18, 130 (Edwin Morris Betts ed., 1987) [hereinafter *FARM BOOK*].

<sup>38</sup> Douglass Adair, *The Jefferson Scandals*, in *FAME AND THE FOUNDING FATHERS* 172 (Trevor Colburn ed., 1974).

slave trader for a British supplier.<sup>39</sup> It was rumored that Wayles took his slave, Betty Hemings (Sally's mother), as his "concubine."<sup>40</sup>

A Monticello slave described Betty as "as a bright mulatto women."<sup>41</sup> The list of her family, as recorded later by Jefferson, included several children, some fathered by someone other than Wayles.<sup>42</sup> The oldest child was Mary, born in 1753, Nance born in 1761 and the youngest of this group, Bob, born in 1762. Betty's other children were born in the year John Wayles died, including Sally, born in 1773 (month unknown).<sup>43</sup>

In 1773 Jefferson inherited, on his wife's behalf, all of Betty Hemings's family (including Sally as an infant)<sup>44</sup> as well as several large parcels of land and one hundred and thirty five slaves. Most of the Hemings, including Betty, became house servants at Monticello,<sup>45</sup> which seemed to confirm their special status due to the relationship of Wayles to Sally's mother, Betty.

One can only speculate as to the relationship of Sally to the Jefferson family. There is no record evidence to suggest that it was hostile. A reasonable inference would conclude that Sally must have left Monticello after it was sold. Her name is on the list of slaves in the inventory created at the time of the slave auction in 1827.<sup>46</sup> By 1830, she was living with her sons, Madison and Eston, in or around Charlottesville.<sup>47</sup> It is interesting to note that in one census Sally was listed as free, and in another she was designated "white."<sup>48</sup>

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<sup>39</sup> BURTON, *supra* note 33, at 134-36.

<sup>40</sup> Isaac Jefferson, *Memoirs of a Monticello Slave*, in JEFFERSON AT MONTICELLO 3, 4 (James A. Bear, Jr. ed., 1967); BURTON, *supra* note 33, at 134-36.

<sup>41</sup> Jefferson, *supra* note 40, at 4.

<sup>42</sup> FARM BOOK, *supra* note 37, at 18, 24 (listing Betty Hemings's children, some of whom were born subsequent to John Wayles's death in 1773).

<sup>43</sup> *See id.* at 18. John Wayles died in May 1773. Sally's birth date is noted with no month. *Id.* at 18, 130.

<sup>44</sup> DUMAS MALONE, JEFFERSON THE VIRGINIAN 162-63, 444 (1948).

<sup>45</sup> Hamilton W. Pierson, *Jefferson at Monticello: The Private Life of Thomas Jefferson*, in JEFFERSON AT MONTICELLO, *supra* note 40, at 25, 99.

<sup>46</sup> *See* Lucia Stanton, *From Monticello to Main Street: The Hemings Family and Charlottesville*, 55 THE MAGAZINE OF ALBEMARLE COUNTY HISTORY 95, 107 (1997)

<sup>47</sup> GORDON-REED, *supra* note 2, at 209.

<sup>48</sup> *Id.* (noting that Sally Hemings was listed as white); THOMAS JEFFERSON MEM'L FOUND., STATEMENT ON THE TJMF COMMITTEE REPORT ON THOMAS JEFFERSON AND

Sally died in 1835 or 1836, at age sixty-two.<sup>49</sup> There is no record evidence that she ever addressed her relationship, if any, with Thomas Jefferson. Nor is there any record evidence about her activities in the post-Monticello period. If, as the plaintiff contends, Sally was Jefferson's sexual partner, there is no record evidence that she was approached by anyone on this subject.

### C. Madison Hemings

The plaintiff's first witness would be Sally's son, Madison. His lack of credibility, bias, motive and faulty memory would be evident to a modern day jury. In fact, most, if not all, of his testimony is hearsay and would be excluded by the court.

Madison was Sally's second son, born in 1805 at Monticello.<sup>50</sup> He lived there until Jefferson's death in 1826.<sup>51</sup> Both Madison and his younger brother, Eston, were freed by Jefferson's will.<sup>52</sup> According to the terms of the will, both were apprenticed to their uncle, John Hemings, as cabinetmakers until they reached age twenty-one.<sup>53</sup>

Madison's courtroom testimony would be derived from his interview in the *Pike County (Ohio) Republican* on March 13, 1873, under the title "Life Among the Lowly, No. 1"<sup>54</sup> (Harriet Beecher Stowe's subtitle to her book, *Uncle Tom's Cabin*). His testimony could be impeached on several points.

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SALLY HEMINGS 30 (Jan. 2000), [http://www.monticello.org/plantation/hemingscontro/jefferson-hemings\\_report.pdf](http://www.monticello.org/plantation/hemingscontro/jefferson-hemings_report.pdf) [hereinafter, REPORT] (noting that Sally Hemings was listed as a "free person of color").

<sup>49</sup> GORDON-REED, *supra* note 2, at 209, 240.

<sup>50</sup> FARM BOOK, *supra* note 37, at 130.

<sup>51</sup> Adair, *supra* note 38, at 160, 165.

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*; GORDON-REED, *supra* note 2, at 22.

<sup>54</sup> *Life Among the Lowly, No. 1*, PIKE COUNTY (OHIO) REPUBLICAN, Mar. 13, 1873, at 4 reprinted in MYTH, *supra* note 3, at 182 app. 2. Herbert Barger, Jefferson Family Historian, states "that the use of an identical title was owned by Harriet Beecher, and possible copyright infringement. If so, then she and Wetmore must have been partners in this smear. We know they were both great abolitionists." Interview with Herbert Barger, Jefferson Family Historian, in Charlottesville, Va., and Washington, D.C. (Apr. and June 2007).

First, Betty Hemings died when Madison was quite young.<sup>55</sup> Moreover, Madison's recollection, at age sixty-eight, reflects a defective memory. Madison would testify that during Sally's stay in Paris she became Jefferson's "concubine"—the very same word used by Callender seventy years earlier.<sup>56</sup> Madison would further testify that when Jefferson returned to Virginia from Paris, Sally was "enceinte" (French, for pregnant).<sup>57</sup> "Soon after their arrival, she gave birth to a child, of whom Thomas Jefferson was the father. It lived but a short time. She gave birth to four others, and Jefferson was the father of all of them."<sup>58</sup>

Through cross-examination, Madison's testimony could be impeached. For example, Sally gave birth to six children after her return from Paris, but two died.<sup>59</sup> Madison's account also revealed a new tangent—Sally refused to return with Jefferson without some *quid pro quo*. When Jefferson returned to the United States and brought Sally (and her brother, John Hemings) back to Monticello, she "demurred" according to Madison.<sup>60</sup> He would testify that Sally began to learn the French language, and in Paris she was free, while in Virginia she wouj36.4800 0.0000 TD(rg1600 416.5TD(m)Tj11.00

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<sup>55</sup> *Life Among the Lowly*, *supra* note 54, at 185.

<sup>56</sup> MYTH, *supra* note 3, at 184.

<sup>57</sup> *Life Among the Lowly*, *supra* note 54, at 184.

<sup>58</sup> *Id.*

<sup>59</sup> REPORT, *supra* note 48, at 40-47; *see also* GORDON-REED, *supra* note 2, at 239-240, 246; FARM BOOK, *supra* note 37, at 31, 57, 128. Harriet was born in 1795, and died in December 1797. REPORT, *supra* note 48, at 40. Thenia was born in December 1799. *Id.* at 41.

<sup>60</sup> *Life Among the Lowly*, *supra* note 54, at 184.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

when Harriet and Beverly “ran away,” implying they were freed with Jefferson’s acquiescence. More telling is the fact that Madison is the only one of Sally’s children to commit his memories to record. None of Madison’s brothers or sisters ever made any claim against Jefferson. Indeed, none spoke or wrote for the record. Neither did Sally.

The defense would attempt to prove that Madison’s interview was heavily edited, if not ghost written altogether by the editor, S.F. Wetmore. An example is the extraordinary vocabulary used by a former slave who “induc[ed]” the white children to teach him his “letters.”<sup>64</sup> The interview included specific words such as “demurred,” “compunctions of conscience,” “aristocratic,” “interment” and so forth.<sup>65</sup> The punctuation included “viz.”<sup>66</sup> Madison alleged that, “[u]nlike Washington[, Jefferson] had but little taste or care for agricultural pursuits.”<sup>67</sup> This is monumentally wrong, as Jefferson’s voluminous *Garden Book* would attest,<sup>68</sup> and it would be admitted as a business record. According to Madison, one of Martha’s sons, George Wythe Randolph, was “Jeff Davis,’ first secretary of War in the late ‘unpleasantness.’”<sup>69</sup> In fact, Leroy Pope Walker was the first Confederate Secretary of War.<sup>70</sup>

Cross-examination would prove that the *Pike County (Ohio) Republican* had a specific bias against Jeffersonian Democrats and was edited by a political activist from New England.<sup>71</sup> Following the gains made by Jeffersonian Democrats in the elections of November 1872, Wetmore published a series of reminiscences, reminding his readers of the shame of slavery, as practiced by Jefferson, the founder of the Republican-Democrats.<sup>72</sup> Madison Hemings was ideal for Wetmore’s purpose. In

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<sup>64</sup> *Id.* at 185.

<sup>65</sup> *Id.* at 183-84.

<sup>66</sup> *Id.* at 183.

<sup>67</sup> *Id.* at 185.

<sup>68</sup> THOMAS JEFFERSON’S GARDEN BOOK (Edwin Morris Betts ed., 1953).

<sup>69</sup> *Life Among the Lowly*, *supra* note 54, at 184; *see also* GORDON-REED, *supra* note 2, at 247.

<sup>70</sup> Ludwell H. Johnson, *Fort Sumter and Confederate Diplomacy*, 26 J. S. HIST. 441, 444 (1960).

<sup>71</sup> VIRGINIUS DABNEY, *THE JEFFERSON SCANDALS: A REBUTTAL* 48-49 (1981).

<sup>72</sup> *See id.* at 48.

fact, Wetmore may have known about Madison, since Wetmore was a census taker.<sup>73</sup> In the 1870 census there is a notation (not by Wetmore) opposite Madison's name: "This man is the son of Thomas Jefferson."<sup>74</sup> The defense would suggest that Wetmore sought out Madison to make a political case against Jefferson—clear evidence of bias and motive.

Wetmore's editing is suggested by specific phrases. For example, Madison's sister married a white man, but she was never suspected of being "tainted with African blood."<sup>75</sup> Beverly's daughter was never suspected of having any "colored blood coursing in her veins."<sup>76</sup> In fact, the interview is laced with racial commentary. Madison asserted that white slave masters had no "compunctions of conscience [against] parting mother and child".<sup>77</sup> He asserted that "like many [false] promises of white folks to the slaves," his alleged namesake, Dolly Madison, promised but never gave his mother any gift.<sup>78</sup> Finally, his testimony could be impeached due to his use of the French phrase "enciente," or pregnant. Sally

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<sup>73</sup> GORDON-REED, *supra* note 2, at 9.

<sup>74</sup> *Id.*

<sup>75</sup> *Life Among the Lowly*, *supra* note 54, at 184.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 183.

<sup>78</sup> *Id.* According to Herbert Barger, Jefferson Family Historian:

The most glaring Madison/Wetmore lie is that Madison claims that he was named for James Madison by Dolley Madison on the date of his birth, January 19, 1805 while she was visiting Monticello. The Madison Papers indicate that the Madisons never left Washington for Virginia during the winter. Just imagine this scenario: Dolley announces to her Secretary of State husband, Mr. Madison, and to Mr. Jefferson, for whom she acts as Hostess that she has heard that a "male" slave is to be born (never mind that this was well before the sex of a child could be determined), to one of Mr. Jefferson's slaves and she must be present to name him after her husband. Never mind the hazardous winter route without support of these two important people left back in Washington. For extra measure Madison says she reneges on a promised present to his mother, thus fanning the flames of further resentment between the races. NOTE: This Pike County article was used by Annette Gordon-Reed and the Monticello in-house Jefferson-Hemings DNA Study to cite "truthful and believable" information from a son of Sally Hemings. We cannot believe anything gained from this article. The article was "torn apart" by the competing newspaper, *The Waverly Watchman* just five days later. Among other things stated in the article was, "The fact that Hemings claims to be the natural son of Jefferson does not convince the world of its truthfulness."

Interview with Herbert Barger, Jefferson Family Historian, *supra* note 54 (quoting John A. Jones, Editorial, *WAVERLY WATCHMAN*, March 18, 1873).

may well have learned French during her stay in Paris, but the specific word is misspelled, more likely the fault of the editor than Madison.

Thus, the defense would prove the following: Madison never claimed that he learned the identity of his father from Sally. In fact, Sally is virtually absent from his interview. Madison's brother, Eston, never spoke of his relationship with Jefferson, perhaps, because when he settled in Wisconsin he and his family were regarded as white. In fact, Eston's oral tradition suggested his family was related to one of Jefferson's uncles, but they "never heard of Sally Hemings."<sup>79</sup> Jefferson's younger brother, Randolph, was known as "Uncle Randolph."<sup>80</sup> This oral tradition is highly suggestive as to Eston's likely father: Randolph Jefferson (whose male line descendants were never tested for DNA). Eston is a Randolph family name, not common among the Jeffersons.

In short, all of Madison's testimony is rank hearsay and would not fall within an exception to the hearsay rule.

#### **D. Jefferson in Paris**

Madison's testimony that Sally became Jefferson's "concubine" in Paris would not be corroborated by any other record evidence or witness. Indeed, the reasonable inferences contradict this allegation. Given the size and layout of the residence in Paris (the Hotel de Langeac), scant opportunity existed for a sexual liaison.<sup>81</sup> The house functioned as the "equivalent of an embassy, flowing over with visitors, guests, tutors, and servants,"<sup>82</sup> none of whom left a single piece of record evidence of an affair.

Moreover, the residence was relatively small with only two bedrooms and a larger oval office, plus a bedroom that Jefferson occupied on the

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<sup>79</sup> BURTON, *supra* note 33, at 155; *see also* Lucia Stanton & Diane Swann-Wright, *Bonds of Memory: Identity and the Hemings Family*, in SALLY HEMINGS AND THOMAS JEFFERSON 161 (Jan Lewis & Peter S. Onuff eds., 1999).

<sup>80</sup> BURTON, *supra* note 33, at 153-56; *see also* Eyer Robert Coates, Sr., *Research Report on the Jefferson-Hemings Controversy: A Critical Analysis*, in MYTH, *supra* note 3, at 93-94.

<sup>81</sup> *See* WILLIAM HOWARD ADAMS, *THE PARIS YEARS OF THOMAS JEFFERSON* 222 (1997).

<sup>82</sup> *See id.*

second floor.<sup>83</sup> William Short, his secretary, lived in one bedroom, leaving only one room for guests.<sup>84</sup> After April 1789, Polly and Patsy (Jefferson's daughters) returned from school and lived at home with no spare bedroom. James Hemings lived in a servant's quarter.<sup>85</sup> And the record is vague where Sally actually resided.

There is no record evidence or testimony that any of Jefferson's friends in Paris, nor anyone on his staff, ever mentioned a liaison with Sally. One might expect such gossip to be found in the diary of either the Parisians or expatriate Americans, who knew Jefferson. Nor did two men in a position to observe Jefferson in close quarters, William Short, or his major-domo Adrien Petit, ever advance such testimony.<sup>86</sup>

The defense would introduce Jefferson's business records. The President kept meticulous records of his plantation, but there is no record of any child born to Sally in 1790.<sup>87</sup> Jefferson left for New York to assume his duties as Washington's Secretary of State on March 1, 1790.<sup>88</sup> Sally's delivery could have come after Jefferson traveled to New York. But neither Polly nor the Eppes family ever alluded to it.

One mystery surrounds Sally's alleged Paris pregnancy. Callender charged that Jefferson fathered a son with Sally, who resembled Jefferson.<sup>89</sup> Callender referred to the boy as "President Tom"; he later wrote that the boy circulated and put on airs in Charlottesville.<sup>90</sup> Callender admitted that he never saw or met "Tom."<sup>91</sup> The defense would contend that a slave named Thomas Woodson might have been the young boy Callender referred to as "President Tom."

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; see also MARIE KIMBALL, THOMAS JEFFERSON: THE SCENE OF EUROPE 110-11 (1950).

<sup>86</sup> ADAMS, *supra* note 81, at 222.

<sup>87</sup> 1 JEFFERSON'S MEMORANDUM BOOKS: ACCOUNTS, WITH LEGAL RECORD AND MISCELLANY, 1767-1826, at 749-71 (James A. Bear, Jr. & Lucia Stanton eds., 1997) [hereinafter MEMORANDUM BOOKS].

<sup>88</sup> *Id.* at 750 n.8.

<sup>89</sup> GORDON-REED, *supra* note 2, at 61.

<sup>90</sup> REPORT, *supra* note 48, at 53.

<sup>91</sup> See DABNEY, *supra* note 71, at 47.

The plaintiff would contend that Thomas Woodson was in fact the child of Sally and Jefferson, conceived in Paris. The defense rebuttal to this contention would be six-fold: (1) The 1998 DNA results eliminated Thomas Jefferson as Woodson's father; (2) Woodson is not attributed to Sally in any of Jefferson records; (3) nor is "Tom's" existence even recorded in the 1790s; (4) his Woodson name was adopted later, so if he was a slave at Monticello born in 1790-92, under what name was he listed?<sup>92</sup>; (5) there is no "Tom" in any list of slaves; and (6) no child, other than those well known, were associated with Sally in such lists.<sup>93</sup>

Nevertheless, the Woodson family has adamantly claimed Jefferson as "Tom's" father.<sup>94</sup> According to their oral history, Thomas Woodson was the son Sally conceived in Paris (contrary to Madison's account that the infant died soon after Sally returned home).<sup>95</sup> The Woodsons claimed that Thomas was "banished" from Monticello after Callender's accusations became public in 1802.<sup>96</sup> He was supposedly sent to the farm of John Woodson.<sup>97</sup> The family moved to Greenbrier, Virginia and eventually settled in Ohio, not far from the locale of Madison and Eston Hemings.<sup>98</sup> Did they know each other? Is this how Woodson was influenced to claim Jefferson's paternity, or vice versa? Strangely, Madison Hemings never mentioned him.

The defense could advance the following argument to the jury: the Woodson oral history, as well as the DNA, are both correct. Taken together, the reasonable inference from this evidence suggests that a man other than Jefferson impregnated Sally in Paris. This could explain why Sally invented her story that she became Jefferson's concubine. Moreover, she had a certain freedom in Paris. Sally lived in proximity to Adrien Petit, as well as William Short, Jefferson's secretary, and several

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<sup>92</sup> FARM BOOK, *supra* note 37, at 128, 130 (listing of all slaves that does not contain an entry for Thomas Woodson)

<sup>93</sup> *Id.*

<sup>94</sup> REBECCA L. McMURRAY & JAMES F. McMURRY, JR., JEFFERSON, CALLENDER & THE SALLY STORY 12 (2000); *see* REPORT, *supra* note 48, at app. K.

<sup>95</sup> John H. Works, *Foreword* to MYTH, *supra* note 3, at 11; REPORT, *supra* note 48, at app. K.

<sup>96</sup> *See* REPORT, *supra* note 48, at app. K.

<sup>97</sup> *Id.*

<sup>98</sup> REPORT, *supra* note 48, at app. K.

other male servants.<sup>99</sup> The DNA findings that excluded Jefferson as Woodson's father cannot scientifically be used to determine his relationship to Sally.

What of Madison's testimony that Sally refused to return to Virginia with Jefferson? The defense would contend this is simply not plausible. Is it likely that a young girl of sixteen, living in a foreign country for only two years would rebel and insist on staying there? Where would she live? How would she survive? Sally did not possess any special trade or skills to support herself. She learned the French language, but was scarcely fluent and had no special friends or protectors in Paris.<sup>100</sup>

In fact, there is little evidence of Sally's life in Paris. According to Jefferson's records, Sally was inoculated against small pox.<sup>101</sup> Again, a reasonable inference suggests this was no special favor, but a prudent precaution. A cryptic reference in Jefferson's account books—admissible through the business records exception to hearsay—recorded a payment on April 22, 1789 to “Dupre 5 weeks board of Sally washing &c” for Sally's board and washing.<sup>102</sup> Nothing substantive is known of this note. Did Sally board away from the Jefferson home after Martha and Polly were withdrawn from school and lived at Monticello, or was this for Sally's services at their school?

Sally's refusal to return to the United States, if true, was instigated by her brother, James. His history may have been the backdrop for Sally's rebellion and Jefferson's alleged inducements. James trained as a chef, studied French with a tutor, and desired to remain in Paris.<sup>103</sup> However, some years later, he was given his freedom as a result of a written agreement signed by Jefferson.<sup>104</sup> It is possible that James negotiated his freedom before returning to Virginia. This could have led Sally to request concessions from Jefferson—that her children would be freed at age twenty-one.

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<sup>99</sup> ADAMS, *supra* note 81, at 222; KIMBALL, *supra* note 85, at 110-11.

<sup>100</sup> See ADAMS, *supra* note 81, at 221.

<sup>101</sup> *Id.*; see also 1 MEMORANDUM BOOKS, *supra* note 87, at 685, 729 (showing that a Dr. Sutton was paid for inoculating Sally).

<sup>102</sup> FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 233 (1974).

<sup>103</sup> *Id.* at 235.

<sup>104</sup> See ADAMS, *supra* note 81, at 20.

The plaintiff would try to make a persuasive case for Sally's "treaty" with Jefferson, evidenced by Sally's children being freed by Jefferson, though not exactly at age twenty-one. In fact, both Beverly and Harriet actually "ran away," a term suggesting they left with Jefferson's acquiescence.<sup>105</sup> Edmund Bacon, Jefferson's overseer, would testify that he gave Harriet a ticket to Philadelphia and some money when she departed. The law in Virginia, at the time, required a freed slave to move out of the state.<sup>106</sup> According to Madison Hemings, Harriet and Beverly disappeared into the white community.<sup>107</sup> Madison and Eston obtained their freedom at age twenty-one, as provided by Jefferson's will.<sup>108</sup>

Although the freeing of the Hemings children provides substance to Madison's version of a "treaty," no other source, including Jefferson's daughters, alludes to this bargain between Jefferson and Sally. In fact, they suggested other reasons for freeing the Hemings.<sup>109</sup>

The plaintiff would rely on another slave at Monticello, Israel Jefferson, who also resided in Ohio and supported Madison's claim concerning paternity. Israel's interview was the second installment of a series published in the *Pike County (Ohio) Republican*.<sup>110</sup> Yet, his support of Madison is oddly phrased:

I also know that [Jefferson's] servant, Sally Hemings, (mother to my old friend and former companion at Monticello, Madison Hemings) was employed as his chamber-maid, and that Mr. Jefferson was on the most intimate terms: that, in fact, she was his concubine. This I know from my intimacy with both parties, and when Madison Hemings declares he is a natural son of Thomas Jefferson, the author of the Declaration of Independence, and that his brothers Beverly and Eston and sister Harriet are of the same parentage,

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<sup>105</sup> BRODIE, *supra* note 102, at 292, 435; FARM BOOK, *supra* note 37, at 130.

<sup>106</sup> BRODIE, *supra* note 102, at 422.

<sup>107</sup> *See id.* at 473.

<sup>108</sup> *See id.* at 475; *see also Last Will of Thomas Jefferson*, in MYTH, *supra* note 3, at 192.

<sup>109</sup> Richard E. Dixon, *The Case Against Thomas Jefferson: A Trial Analysis of the Evidence on Paternity*, in MYTH, *supra* note 3, at 151.

<sup>110</sup> BRODIE, *supra* note 102, at 477 (referencing *Life Among the Lowly*, *supra* note 54).

I can conscientiously confirm his statement as any other fact which I believe from circumstances but do not positively know.<sup>111</sup>

Israel's testimony can be easily impeached for its many errors. His own testimony—"do not positively know"<sup>112</sup>—is telling. His phraseology was suspiciously similar to Madison's—"concubine," "demurred," "piercing eye," "balancing in his mind"—strongly suggesting the hand of the editor, S.F. Wetmore.<sup>113</sup> Under cross-examination, it would be demonstrated that Israel had no first hand knowledge or observation of the relationship between Jefferson and Sally, except inadmissible hearsay.

Israel claimed he was born in 1797 (Monticello records indicate his actual date of birth was 1800) and was only eight years old when Madison, his "old friend and former companion, was born."<sup>114</sup> Israel claimed in his interview that he remembered the "exciting" preparations for Jefferson's departure to assume the Presidency.<sup>115</sup> Yet, he was only four at the time.<sup>116</sup> His interview includes bitter remarks about Jefferson's grandson, Jefferson Randolph, who he claims to have encountered after the Civil War.<sup>117</sup> He found the "proud and haughty Randolph in poverty, at Edge Hill" in 1868.<sup>118</sup> This is the same Jefferson Randolph that Madison said presided over the Republican convention of 1872.

The defense would undoubtedly call Jefferson Randolph to the stand. Randolph would testify that he learned of Israel's interview and was incensed. He wrote a stinging rebuttal to the newspaper—"Israel is made to revive and confirm of his own knowledge a calumny generated in the hot bed of party malice."<sup>119</sup> Randolph would further testify that other

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<sup>111</sup> *Id.* at 481-82.

<sup>112</sup> *Id.* at 482.

<sup>113</sup> See DABNEY, *supra* note 71, at 52; see also BRODIE, *supra* note 102, at 438.

<sup>114</sup> DABNEY, *supra* note 71, at 53; BRODIE, *supra* note 102, at 481.

<sup>115</sup> DABNEY, *supra* note 71, at 53.

<sup>116</sup> See *id.*

<sup>117</sup> BRODIE, *supra* note 102, at 480.

<sup>118</sup> *Id.*

<sup>119</sup> Letter from Thomas Jefferson Randolph, Thomas Jefferson's grandson, to the editor of the Pike County Republican (1874) (on file at Univ. of Va. Library, special collections), available at <http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/cron/1873randolph.html>.

slaves were bitterly jealous of the Hemingses and sought to explain their privileged position for any reason other than the truth—that being “very superior intelligence capacity and fidelity to trusts.”<sup>120</sup> In his rebuttal, Jeff, as Randolph was known, exclaimed that the purpose of reviving the calumnies against his family was motivated by “pondering [sic] to a ferocious hate of the southern white man.”<sup>121</sup>

## II. Timing: Conception

The plaintiff would rely heavily on the sketchy, circumstantial evidence of the birth records of Sally Hemings’s children to prove that Jefferson was present at Monticello during Sally’s conceived pregnancies. The defense could easily rebut this evidence.

According to Jefferson’s own business records, Sally gave birth to six children in Virginia, four of whom survived: Harriet, Beverly, Madison and Eston; the other two children died in infancy.<sup>122</sup> The plaintiff would allege that during the period that Sally’s children were conceived, Jefferson was at his residence at Monticello.

One fundamental problem would taint this evidence. All of the birth dates of Sally’s children are taken from Jefferson’s *Farm Book*,<sup>123</sup> yet precisely when he entered each date is completely unknown, since he was not present for all the births. This is a critical fact because the birth dates are the controlling factor in estimating the dates of conception.<sup>124</sup>

Leaving aside the possible birth of a child conceived in France, Sally’s first birth, (probably at Monticello), was a girl named Harriet, born October 5, 1795.<sup>125</sup> She died within two years.<sup>126</sup> The date of her con-

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> DABNEY, *supra* note 71, at 27-28.

<sup>123</sup> *Id.* (citing FARM BOOK, *supra* note 37).

<sup>124</sup> See Fraser D. Neiman, *Coincidence or Casual Connection? The Relationship Between Thomas Jefferson’s Visits to Monticello and Sally Hemings’s Conceptions*, 57 WM. & MARY Q. 198, 205 (2000); see also REPORT, *supra* note 48, at app. H.

<sup>125</sup> REPORT, *supra* note 48, at app. H.

<sup>126</sup> *Id.*

ception is calculated on January 11, 1795.<sup>127</sup> Jefferson resided at Monticello from January 1794, after he resigned as Secretary of State, through early March 1797 when he was sworn in as Vice-President in Philadelphia.<sup>128</sup> However, the defense would demonstrate that this period—from the time he left to become Secretary of State in 1790 to Harriet’s conception—consumed almost five years. Jefferson visited Monticello during this period, but if there were sexual liaisons with Sally, they did not bear fruit.<sup>129</sup> Indeed, Jefferson was in residence at Monticello for almost a year before Sally is believed to have conceived Harriet.<sup>130</sup> These long intervals cast severe doubt on claims of a sexual affair.

Moreover, Polly, Jefferson’s daughter, lived at Monticello during this period,<sup>131</sup> which certainly would have dissuaded any intimacy between Jefferson and Sally. Most important, perhaps, is the fact that Sally’s physical presence at Monticello is unknown by any record evidence.<sup>132</sup>

Sally’s next child, Beverly (a boy), offers a more complicated case. He was born in April 1798, probably on April 1.<sup>133</sup> Beverly’s conception is dated to July 8, 1797.<sup>134</sup> Jefferson had been in Philadelphia since May of that year.<sup>135</sup> The record shows that he left Philadelphia the morning of July 6 and arrived at Monticello on the morning of July 11.<sup>136</sup> The reasonable inference from this evidence is that he was not present when Sally conceived Beverly.

During this time period at Monticello, Maria (Polly) Jefferson was married to John Wayles Eppes on October 13, 1797.<sup>137</sup> Well before

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<sup>127</sup> Neiman, *supra* note 124, at 205.

<sup>128</sup> *Id.* at 202 (referencing table derived from 2 MEMORANDUM BOOKS, *supra* note 87).

<sup>129</sup> See Eyler Robert Coates, Sr., *Research Report on the Jefferson-Hemings Controversy: A Critical Analysis*, in MYTH, *supra* note 3, at 100.

<sup>130</sup> *See id.*

<sup>131</sup> BURTON, *supra* note 33, at 29, 79-80, 166.

<sup>132</sup> *See id.* at 119.

<sup>133</sup> FARM BOOK, *supra* note 37, at 128; Neiman, *supra* note 124, at 205.

<sup>134</sup> Neiman, *supra* note 124, at 205.

<sup>135</sup> 2 MEMORANDUM BOOKS, *supra* note 87, at 960.

<sup>136</sup> *Id.* at 965-66.

<sup>137</sup> *Id.* at 972.

Beverly was born, however, Jefferson departed for Philadelphia on December 4, 1797.<sup>138</sup> The first record of Beverly's birth appears in a list recorded by Jefferson for the years 1798 and 1799.<sup>139</sup>

For many years it was assumed that Sally's next birth was the second Harriet (II).<sup>140</sup> It was discovered from a letter written by Jefferson on December 21, 1799 to his son-in-law, John Wayles Eppes, that "Maria's maid produced a daughter about a fortnight ago [and] is doing well."<sup>141</sup> This child, possibly named Thena or Thenia, lived only a few years.<sup>142</sup> Her birth was on or about December 7, 1799, and her conception period was mid-March 1799.<sup>143</sup> The plaintiff would suggest there is a window of sexual opportunity here, but a very narrow one. Jefferson arrived at Monticello on March 8, 1799,<sup>144</sup> barely within the potential conception period, more likely too late. In fact, the existence of this child was not discovered for years.<sup>145</sup> The plaintiff's scholars attribute this child to Sally Hemings, on the assumption that she was "Maria's maid."<sup>146</sup> Yet Thena's name is listed with Sally's, but then crossed out.<sup>147</sup> But this reference raises the interesting question of where Sally was living at this time with Polly at Eppington, and not at Monticello.

Two years later, in May 1801, shortly after Jefferson became President, Sally gave birth to her next child, Harriet (II), (Jefferson's *Farm Book*, recorded later (bumped) by 69.0000 080000 Jefferson (dist) Tj411.5200 0.0000 TDinct().)Tj3517.7

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<sup>138</sup> *Id.* at 974.

<sup>139</sup> *FARM BOOK*, *supra* note 37, at 57.

<sup>140</sup> *REPORT*, *supra* note 48, at app. H.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Neiman, *supra* note 124, at 205.

<sup>144</sup> 2 *MEMORANDUM BOOKS*, *supra* note 87, at 999.

<sup>145</sup> *GORDON-REED*, *supra* note 2, at 73.

<sup>146</sup> *REPORT*, *supra* note 48, at app. H.

<sup>147</sup> *Id.*

<sup>148</sup> *REPORT*, *supra* note 48, at 24 (citing *FARM BOOK*, *supra* note 37, at 130).

<sup>149</sup> Neiman, *supra* note 124, at 202 (citing *MEMORANDUM BOOKS*, *supra* note 87).

abouts in August through early September cannot be confirmed. This was a crucial election period for Jefferson. When he was at Monticello, he often traveled to his other plantations or to nearby neighbors.<sup>150</sup> His records suggest that he was in Charlottesville, Albemarle Old Courthouse (now Scottsville), Lynchburg and probably his second home at Poplar Forest.<sup>151</sup>

Once again, the records prove that Jefferson was not present for the birth of Harriet, who was later described as “very handsome” by the slave Isaac Jefferson.<sup>152</sup> Harriet eventually “ran away” (freed with acquiescence) to Philadelphia in 1822 and apparently lived there as “white.”<sup>153</sup>

Following Harriet’s birth, a three-year interval ensued with no known births by Sally. In January 1805, she gave birth to Madison Hemings (the source of the interview in 1873).<sup>154</sup> A major discrepancy exists with the correlation between Madison’s conception date and Jefferson’s physical presence. Madison was conceived on or about April 27, 1804.<sup>155</sup> It is well known that Jefferson was at Monticello for some weeks before the death of his daughter Maria (Polly) on the morning of April 17.<sup>156</sup> It seems improbable that during Maria’s final illness and funeral, with a number of people gathered at Monticello, that Jefferson summoned Sally for a sexual liaison. The record indicates that he left Monticello on May 11—shortly after Sally’s alleged conception—and, once again, was not present for Madison’s birth.<sup>157</sup>

The circumstances—Maria’s illness and death—raise serious questions about Jefferson’s likely behavior at this time. Madison’s birth date, January 19, 1805, is asserted by Madison himself. In Jefferson’s record book, however, only the year is noted.<sup>158</sup>

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<sup>150</sup> See 2 MEMORANDUM BOOKS, *supra* note 87, at 1028-29.

<sup>151</sup> See *id.*

<sup>152</sup> Jefferson, *supra* note 40, at 4.

<sup>153</sup> See REPORT, *supra* note 48, at app. H.

<sup>154</sup> FARM BOOK, *supra* note 37, at 130.

<sup>155</sup> Neiman, *supra* note 124, at 205.

<sup>156</sup> BRODIE, *supra* note 102, at 380-81.

<sup>157</sup> Neiman, *supra* note 124, at 202, 205.

<sup>158</sup> FARM BOOK, *supra* note 37, at 130.

Over three years passed before Sally's last known child, Eston, was born on May 21, 1808.<sup>159</sup> Eston was probably conceived in late August 1807.<sup>160</sup> The record indicates Jefferson arrived at Monticello briefly in April or May, departed, and returned again in early August 1807. He remained at Monticello until October 1, 1807.<sup>161</sup> He left in October and did not return until the following May, shortly before Eston was born.<sup>162</sup>

In essence, the defense cross-examination would call into doubt the rank speculation that Jefferson was present when Sally conceived each child. The birth dates are taken from entries in Jefferson's own *Farm Book*. Yet he was present for only two births. In some cases, his notations are illegible or inexact and are recorded years later. A reasonable inference is that he obtained this information from his overseer, Edmund Bacon, or from Sally. The entry for Sally's last child, Eston, is the only clear and precise notation. One birth was revealed in a letter, rather than a note in the *Farm Book*.<sup>163</sup> Thus, the births of Beverly, Thena, Harriet (II) and Madison raise monumental doubts about Jefferson's presence at Monticello during the conception dates.

More telling is the fact that when Jefferson ended his second Presidential term and returned to Monticello permanently, Sally had no more children (at least not recorded). Why? After all, Jefferson was allegedly present for Eston's conception in 1807 and returned to Monticello permanently on March 15, 1809.<sup>164</sup> At the time, Jefferson was sixty-six years old. Sally would have been in her prime, at age thirty-five.

In fact, Sally's physical whereabouts would be further defense evidence. The plaintiff could not prove that Sally was simultaneously present at Monticello with Jefferson at the time of alleged conceptions.

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<sup>159</sup> REPORT, *supra* note 48, at app. H.

<sup>160</sup> Neiman, *supra* note 124, at 205.

<sup>161</sup> *Id.* at 202 (citing 1 MEMORANDUM BOOKS, *supra* note 87).

<sup>162</sup> *See id.*

<sup>163</sup> REPORT, *supra* note 48, at app. H. "One must wonder at the insistence of Sally to name a child, Harriet (1795 & 1801), what would be the fascination? It should be remembered that David Meade Randolph had children, Eston, Beverly and Harriet . . . what is the connection? Earlier he was named as a suspect for much of Callender's lies." Interview with Herbert Barger, *supra* note 54.

<sup>164</sup> 2 MEMORANDUM BOOKS, *supra* note 87, at 1243.

The defense would contend that it is probable Sally served elsewhere, other than Monticello. For example, when Martha Randolph reported the death of “poor little Harriot”<sup>165</sup> to Jefferson, she wrote her letter from Bellmont.<sup>166</sup> Was Sally there as well, perhaps as Martha’s maid? When Jefferson wrote in 1799 about the birth of a daughter to “Polly’s maid,” apparently meaning Sally, was Sally living with Polly? If so, where? Eppington?

In 1801, Polly wrote to her father reporting that she had “borrow’d Crita,”<sup>167</sup> the slave who was Sally’s older sister. Jefferson approved, noting there was not much for her to do in his absence. The same would apply to Sally. Thus, it cannot be assumed, as the plaintiff alleges, that Sally was consistently present at Monticello.<sup>168</sup>

### III. Plaintiff Witnesses

The principal witness would be James Callender. Through cross-examination, it could be proven that Callender had a bias and motive against Jefferson, and his testimony amounts to little more than rank hearsay. Callender would defend himself by claiming that the charge (sexual relationship with Sally) was well known among “Virginia gentry.”<sup>169</sup>

#### A. “Light Horse” Harry Lee

One of these gentlemen was probably “Light Horse” Harry Lee, a Federalist and dedicated opponent of Jefferson. Lee was a friend to John and Betsey Walker, and the assumed source of Callender’s accusations against Jefferson in the “Walker affair.”<sup>170</sup> A genuine Revolutionary War

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<sup>165</sup> EDWIN MORRIS BETTS & JAMES A. BEAR, JR., *THE FAMILY LETTERS OF THOMAS JEFFERSON* 153 (1966).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 211.

<sup>168</sup> See Eyler Robert Coates, Sr., *Research Report on the Jefferson-Hemings Controversy: A Critical Analysis*, in MYTH, *supra* note 3, at 100.

<sup>169</sup> GORDON-REED, *supra* note 2, at 63.

<sup>170</sup> See MALONE, *supra* note 44, at 447-48, 450 n.8.

hero, Lee would be an impressive witness. But he would not have first hand knowledge of the Jefferson-Hemings relationship, and his testimony would be excludable hearsay.

## B. John Hartwell Cocke

The plaintiff could call John Hartwell Cocke to the stand as another Virginia gentleman aware of the Sally-Jefferson allegation. Cocke served on the governing board of the University of Virginia,<sup>171</sup> and was a well-respected, wealthy Virginia gentleman residing at “Bremo” in Fluvanna County. He became a general in the War of 1812 and, in his later years, was a radical anti-slavery agitator.<sup>172</sup>

Cocke would testify, from his diary entries recorded in 1853, that Jefferson was a “notorious” example of white masters cohabiting with slaves.<sup>173</sup> In 1859, he wrote that Jefferson was an “example” of the “damnable practice” of keeping a slave as a “substitute for a wife.”<sup>174</sup> Cocke’s testimony, however, can be impugned on several grounds: (1) he did not have first hand information or observations, other than inadmissible hearsay; (2) his diary entry was unreliable, recorded more than thirty years after his service with Jefferson; and finally (3) by this time, he had become a radical abolitionist.

The plaintiff may also call two women to testify as to Jefferson’s pattern of sexual behavior: Mrs. John Walker, known as Betsey, and Maria Cosway.

## C. Betsey Walker

Betsey would testify that young Jefferson, before he was married, made amorous advances to her when her husband, John Walker, was absent. Callender revealed this story, a tangled and complicated situation.<sup>175</sup>

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<sup>171</sup> GORDON-REED, *supra* note 2, at 119.

<sup>172</sup> *See id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; *see infra* Appendix E.

<sup>175</sup> DABNEY, *supra* note 71, at 9.

John Walker and Jefferson were boyhood schoolmates and friends at William and Mary. Walker married Betsey in 1764.<sup>176</sup> A few years later, Jefferson made “improper” advances toward Betsey.<sup>177</sup> According to a document dictated by Walker to “Light Horse” Harry Lee in 1805,<sup>178</sup> Jefferson’s advances continued. Betsey remained silent and did not inform her husband for over a decade. She finally confessed to Walker when Jefferson was in France.<sup>179</sup> When Jefferson returned, Walker demanded satisfaction.<sup>180</sup> Harry Lee acted as the mediator, and Jefferson offered to settle the affair by publicly exonerating Betsey from any blame.<sup>181</sup>

The defense could point out that the Walker affair is the one charge that, after it became public, Jefferson admitted was a youthful indiscretion. He never admitted or directly addressed the Sally accusation.

#### D. Maria Cosway

The plaintiff would also call Maria Cosway, whom Jefferson met in Paris in 1786.<sup>182</sup> Maria was the wife of a British portrait painter, then residing in Europe.<sup>183</sup> The artist John Trumbull introduced Jefferson to her.<sup>184</sup> Jefferson became infatuated with Maria, spending time with her exploring the environs of Paris.<sup>185</sup> How far this relationship progressed is unknown, but it seems to have stopped short of a sexual affair. Jefferson was ambivalent when he wrote his famous essay, *Dialogue Between the Head and the Heart*.<sup>186</sup> Maria returned to London, but

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<sup>176</sup> MALONE, *supra* note 44, at 449.

<sup>177</sup> *Id.*; DABNEY, *supra* note 71, at 9.

<sup>178</sup> MALONE, *supra* note 44, at 448-50 & n.8.

<sup>179</sup> *Id.* at 447.

<sup>180</sup> *Id.* at 448.

<sup>181</sup> *Id.*

<sup>182</sup> DABNEY, *supra* note 71, at 41.

<sup>183</sup> *Id.* at 40; KIMBALL, *supra* note 85, at 160.

<sup>184</sup> *See* KIMBALL, *supra* note 85, at 161.

<sup>185</sup> *See id.*

<sup>186</sup> *See id.* at 162.

eventually came back to Paris.<sup>187</sup> Their relationship wound down, and by the winter of 1787 it was over.<sup>188</sup> Jefferson formed another friendship with Alexander Hamilton's sister-in-law, Angelica Church; but that too seems to have remained platonic.<sup>189</sup>

The plaintiff would contend this testimony is relevant and proves that Jefferson, the man, was not immune to sexual attraction. Secondly, the plaintiff suggests that Sally's arrival in Paris coincided with Jefferson's termination of relations with Maria. The defense can rebut this testimony with the following argument: what deterred Jefferson and limited these romantic forays was the shadow of his wife, Martha, who had just died.<sup>190</sup> Maria Cosway, for example, will admit under cross-examination, that she sensed this limit to their relationship.<sup>191</sup> As to Jefferson's alleged vulnerability to Sally, the opposite was closer to the truth. The restraints on his relationships with Maria and Angelica would apply more strictly to any temptation for Sally.

## IV. DNA Results

### A. *Daubert* Challenge

The Jefferson DNA analysis would certainly be subject to a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>192</sup> but that is beyond the scope of this trial memorandum. A vigorous cross-examination would challenge some, if not all, of the DNA results as well as its alleged "scientific" methodology. In fact, the entire DNA analysis would not survive a legal challenge.

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<sup>187</sup> DABNEY, *supra* note 71, at 41, 45.

<sup>188</sup> *See id.* at 45.

<sup>189</sup> KIMBALL, *supra* note 85, at 160-83.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> 509 U.S. 579 (1993). Although it is true that the Virginia Supreme Court has not adopted all the features of *Daubert* as the controlling test in Virginia, the court has noted that "[p]rior to *Daubert* . . . [it] discussed the trial court's role in making a threshold finding of scientific reliability when unfamiliar scientific evidence is offered." *John v. Im*, 559 S.E.2d 694, 698 n.3 (Va. 2002) (citations omitted).

Assuming *arguendo* the court allowed the DNA results into evidence, serious questions would be raised concerning the chain of custody and the “methodology” employed by the plaintiff’s experts.<sup>193</sup> Here, the trial would undoubtedly turn on expert testimony. The defense would call an array of leading scientific and medical experts, as well as noted historians to castigate the DNA conclusions.

Briefly, the DNA Project was conducted primarily by Dr. Eugene A. Foster, a retired pathologist working at the University of Virginia Hospital.<sup>194</sup> Foster would testify that he was urged to undertake the DNA investigation by a “friend” (later revealed through cross-examination to be a writer). After some study, Foster embarked on a search for male candidates for testing.<sup>195</sup>

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<sup>193</sup> Admissibility is but one of several hurdles:

[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored.

*Barefoot v. Estelle*, 463 U.S. 880, 898 (1983). Thus, the Court further explained, the parties’ “differences in opinion” as to the reliability of the scientific evidence, “go to the weight of the evidence and not the admissibility of such [evidence].” *Id.* at 902. Likewise, expert testimony that demonstrates the “expert has not considered all variables bearing on the inferences to be drawn from the facts presented” is inadmissible. *Forbes v. Rapp*, 611 S.E.2d 592, 596 (Va. 2005). The trial judge has no discretion to admit unreliable evidence and leave to the jury the decision how much weight to accord it. *See id.* The trial judge’s failure “to strike such testimony upon a motion timely made is error subject to reversal on appeal.” *Vasquez v. Mabini*, 606 S.E.2d 809, 811 (Va. 2005) (citations omitted).

<sup>194</sup> Eugene A. Foster et al., *Jefferson Fathered Slave’s Last Child*, 396 NATURE 27 (1998). As an aside, Dr. Foster’s wife was a “Randolph” and descended from the aforementioned David Mead Randolph, one of the believed sources for Callender’s allegations. *Id.*

<sup>195</sup> *Id.* “After several months of research I was able to locate and identify a second Hemings DNA source, William Hemings, a son of Madison Hemings, in a Veteran’s Cemetery in Leavenworth, Kansas. I notified the Hemings family, gave them forms and urged them to permit a gathering of that valuable DNA. At the same time I advised Monticello President, Dan Jordan, and suggested he urge the Hemings to permit the gathering of a second Hemings DNA. He refused to contact them, suggested that I contact them, but cautioned me against undue pressure. All eight Hemings family members refused to permit the test and their spokesperson, Shay Banks-Young informed me

Thomas Jefferson had no male descendants, so Foster turned to five male-line descendants of Jefferson's uncle, Field Jefferson.<sup>196</sup> With the assistance of a Jefferson family historian, Herbert Barger, Foster located the pertinent sources and, as a precaution, included the appropriate descendants of the Carr and Woodson families:<sup>197</sup> three male-line descendants of Samuel and Peter Carr (Jefferson's nephews),<sup>198</sup> and five male-line descendants of Thomas Woodson.<sup>199</sup>

When contacted, the Woodsons were wary. They later wrote, and would testify, that they found Dr. Foster "befuddled."<sup>200</sup> Finally, one male-line descendant of Eston Hemings, Sally's youngest child, was located and agreed to be tested.<sup>201</sup> Madison Hemings's male descendants were all dead or had passed into obscurity.<sup>202</sup> The other male possibility, Beverly Hemings (Sally's son), had disappeared in the 1820s.<sup>203</sup> Blood samples were also obtained from several white descendants of Jefferson's neighbors, raising the possibility that a neighbor might have been Sally's partner.<sup>204</sup>

At the University of Virginia, DNA was extracted from the blood samples, and the extracts were then flown to England (creating a chain of custody issue) by Foster in December 1997.<sup>205</sup> Foster testified that he took a bus from Heathrow airport to Oxford and handed over his samples to a researcher, who stored them in a refrigerator, after which the two "toddled" off to a pub.<sup>206</sup> Three laboratories at Oxford performed the

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that they are happy with their oral family history and will never give permission." Interview with Herbert Barger, *supra* note 54.

<sup>196</sup> John H. Works, Jr., *A Primer on Jefferson DNA*, in MYTH, *supra* note 3, at 47.

<sup>197</sup> *Id.* at 25-26.

<sup>198</sup> *Id.* at 47-48.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 35-36.

<sup>201</sup> *Id.* at 28.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 48.

<sup>205</sup> *Id.* at 28.

<sup>206</sup> *Frontline: Jefferson's Blood* (PBS television broadcast May 2, 2000) (transcript on file at <http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/etc/script.html>).

analysis, and some tests were performed as far away as Belgium and the Netherlands.<sup>207</sup> The results were completed in June 1998 and published in *Nature* magazine on November 5, 1998.<sup>208</sup>

The plaintiff, through Foster's testimony, claims the results are three-fold: (1) no match was found between the DNA of the Carr and Hemings descendants—thus, exonerating the Carr brothers, Peter and Samuel, as the father of Eston; (2) the analysis found no match between the DNA of Field Jefferson's descendants and Thomas Woodson's descendants—thus, Woodson was not fathered by any Jefferson; and (3) most importantly, the Y-chromosome “haplotypes” of the descendants of Field Jefferson and Eston Hemings did match, implicating Thomas Jefferson as the probable father of Eston Hemings.<sup>209</sup>

## B. Bias, Motive of Panel

The misleading headline of the *Nature* article read: “Jefferson fathered slave's last child.”<sup>210</sup> Under cross-examination it will be shown that this study only established the high probability that “some male . . . Jefferson” was the father of Eston.<sup>211</sup> In fact, there are at least eight other male Jeffersons who are candidates for the DNA match.<sup>212</sup>

The *Nature* article was signed by Dr. Foster and six other scientists, none of them United States board-certified doctors or scientists. Foster testified that he was embarrassed by the blatant spin of the *Nature* article, but later admitted (under cross examination) that he had negotiated the text with the magazine, including the headline: “Jefferson fathered slave's last child.” In a letter to the *New York Times*,<sup>213</sup> Foster felt compelled to disavow this headline, but stood by his analysis.

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<sup>207</sup> Herbert Barger, *The Jefferson-Hemings DNA Study*, in MYTH, *supra* note 3, at 29.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 30.

<sup>210</sup> See Foster et al., *supra* note 194, at 27.

<sup>211</sup> See Herbert Barger, *The Jefferson-Hemings DNA Study*, in MYTH, *supra* note 3, at 27.

<sup>212</sup> *Id.* at 48-49.

<sup>213</sup> Eugene A. Foster, *In Jefferson-Hemings Tie, a Family's Pride; Tenable Conclusions*, N.Y. TIMES, Nov. 9, 1998, at A24.

Foster's behavior is puzzling and fertile grounds for impeachment. For example, his letter included a strange sounding caveat: "There are many possible explanations for our findings, and it may turn out that some highly complicated and improbable theories are true."<sup>214</sup>

Please explain to the jury, Doctor, what are these other possible explanations?

The President of the Thomas Jefferson Memorial Foundation appointed a Research Committee to evaluate Foster's conclusion.<sup>215</sup> The defense would call expert witnesses to confirm Appendix (J) of that study, which posited that a stronger case could be made for Randolph Jefferson (Jefferson's younger brother) as Sally's sexual partner, rather than Jefferson. The Committee concluded that "no one familiar with Monticello suggested that Sally Hemings was promiscuous or that her children had multiple fathers."<sup>216</sup> This is flatly contradicted by Edmund Bacon, Jefferson's overseer at Monticello, who was surely "familiar" with Monticello.<sup>217</sup>

Dr. Foster would be subjected to a thorough cross-examination. Some important questions would have to be definitively answered. For example, what was the chain of custody of the blood samples from Charlottesville, Virginia, while traveling through international airports to Oxford, England? Where and how were the samples stored? At what temperature were they stored? Was there any security to prevent tampering? On a transatlantic trip, how would atmospheric radiation degrade the samples? Why was a laboratory in England and not the United States selected? How were the DNA extracts transported there? Were they examined and passed through customs? What was the chain of custody at the laboratories? Were the samples X-rayed at the airport and, if so, what effect did that have on the integrity of the samples? Where are the samples now? What independent controls were used to conduct the tests? Were the results "peer" reviewed? And finally, how was the entire project financed and by whom? What was their bias or motivation?

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<sup>214</sup> *Id.*

<sup>215</sup> White McKenzie Wallenborn, *A Committee Insider's Viewpoint*, in MYTH, *supra* note 3, at 55.

<sup>216</sup> REPORT, *supra* note 48, at app. J.

<sup>217</sup> See DABNEY, *supra* note 71, at 79-81.

The Woodson family, if called to testify, would be particularly critical of Foster. They would allege that he rejected their requests for certain assurances. They wanted the blood samples to be independently tested, and their own geneticist to review the tests for accuracy.<sup>218</sup> Apparently, Foster circumvented their Family Association and found people who claimed they were male-line descendants of Thomas Jefferson through Thomas Woodson.<sup>219</sup>

### 1. Eight Other Jeffersons

“This DNA study of the Y chromosome found that there was a link between Eston and some Jefferson, but not necessarily Thomas.”<sup>220</sup> The DNA tests indicated that any one of eight Jeffersons could have been the father of Eston.<sup>221</sup> The eight possibilities identified are: “Thomas [Jefferson], Randolph (T. Jefferson’s brother), Randolph’s five sons, and a cousin George.”<sup>222</sup> “Since no one has ever denied that ‘some’ Jefferson fathered [at least one of Sally’s] children, these . . . DNA tests only provide more certainty” to what the defense already knew.<sup>223</sup> Since the only available DNA evidence comes from direct male descendants of persons who have descended from a common male line with Thomas Jefferson (father, grandfather, etc.), the test is inherently nonspecific. The same Y chromosome existed in Mr. Jefferson’s brother, Randolph, who lived twenty miles from Monticello, and in five of Randolph’s sons, who were in their teens or twenties when Sally began having children.<sup>224</sup>

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<sup>218</sup> Eyler Roberts Coates, Sr., *Research Report on the Jefferson-Hemings Controversy: A Critical Analysis*, in MYTH, *supra* note 3, at 88-89.

<sup>219</sup> *Id.* at 90.

<sup>220</sup> John H. Works, Jr., *A Primer on Jefferson DNA*, in MYTH, *supra* note 3, at 48.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 48-49.

<sup>223</sup> *Id.* at 49.

<sup>224</sup> *Id.*

Another possibility which may have been overlooked is that Jefferson inherited several mulatto slaves from his father, Peter, and some of them may have come down from earlier Jefferson ancestors. One was a mulatto named Sandy (denoting reddish, brown hair, a Jefferson trait). Let us suppose that if one of those inherited

## 2. Carr Brothers and Thomas Jefferson Randolph

As the DNA revelations unfolded, some interesting nuances emerged. For example, Mr. Barger, the noted historian, urged Foster to examine the descendants of Randolph Jefferson and his sons as DNA candidates.<sup>225</sup> Foster thanked Barger for the information and did nothing.<sup>226</sup> Barger also located the burial site of Madison Hemings's son in Kansas, but the family refused to permit an exhumation.<sup>227</sup>

Assuming DNA was admitted as evidence, what conclusions may be drawn? In contrast to an indictment of Jefferson, a strict interpretation would be: (1) Eston Hemings was probably the son of "some male" Jefferson; this would embrace at least eight males known to be related to Thomas Jefferson; (2) the DNA cleared the Carr brothers only of the paternity of Eston Hemings, and leaves open the paternity of Sally's other children; (3) DNA establishing the paternity of Eston Hemings could not scientifically be used as proof of the paternity of Sally's other children; and (4) the DNA failed to shed light on the paternity of Thomas Woodson, but absolutely ruled out Jefferson.

Moreover, the record clearly shows that other males, including relatives of Jefferson, were physically present at Monticello during these conception years. His brother Randolph, for example, visited Monticello many times.<sup>228</sup> A reasonable defense inference would be that Sally

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mulattos, possibly carrying the Jefferson DNA, had fathered a son who was then in a position to father Sally's children. He may have not been significant enough to bring attention to who the father of Sally's children actually were.

Interview with Herbert Barger, *supra* note 54.

<sup>225</sup> Herbert Barger, *The Jefferson-Hemings DNA Study*, in MYTH, *supra* note 3, at 29.

<sup>226</sup> *Id.* at 29-31.

<sup>227</sup> *Id.* at 35.

<sup>228</sup> Interview with Herbert Barger, *supra* note 54 (stating "Thomas writes brother Randolph, living about 20 miles away from Monticello, on August 12, 1807" (exactly nine months prior to Eston's birth May 21, 1808, quoting THOMAS JEFFERSON AND HIS UNKNOWN BROTHER 21 (Bernard Mayo & James A. Bear, Jr. eds., 1981) [hereinafter UNKNOWN BROTHER] ("our sister Marks arrived here last night and we shall be happy to see you also."))) Furthermore, Mrs. Marks was Randolph's twin sister Anna Scott. We must remember that Eston's family believed they descended from "uncle."

conceived Harriet in mid-August 1800. A letter from Jefferson to Randolph suggests he was invited to Monticello at that time.<sup>229</sup>

The record, as well as defense witnesses, would strongly suggest that Randolph was a much more likely candidate than Jefferson for Sally's partner. The Jefferson brothers were not close, but Randolph did visit on occasion. According to the former Monticello slave, Isaac Jefferson, "Old Master's brother, Mass Randall, was a mighty simple man: used to come out among black people, play the fiddle and dance half the night; hadn't much more sense than Isaac."<sup>230</sup>

Randolph also had teen-age sons who visited Monticello from time to time.<sup>231</sup> They were sixteen or seventeen years old at the time. Sally would have been twenty-seven.<sup>232</sup> In fact, Thomas Jefferson, Jr. was schooled at Monticello both in 1799 and from 1800 to 1801.<sup>233</sup>

### C. Conflicting Expert Testimony

The defense would call expert witness Dr. White McKenzie Wallenborn, M.D. to the stand. Dr. Wallenborn would testify that while the majority report "enhanced" the possibility that Jefferson was the father of one of Sally's children, "the findings do not prove that Thomas Jefferson was the father of Eston. This is a very important difference."<sup>234</sup> Dr. Wallenborn did not contest the statistical correlation of Jefferson's

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<sup>229</sup> Letter from Thomas Jefferson to Randolph Jefferson (Jan. 11, 1789), in UNKNOWN BROTHER, *supra* note 228, at 13.

<sup>230</sup> Jefferson, *supra* note 40, at 22 (referring to himself in the first person).

<sup>231</sup> BURTON, *supra* note 33, at 61-66, 166.

<sup>232</sup> UNKNOWN BROTHER, *supra* note 228, at 8-9.

<sup>233</sup> Interview with Herbert Barger, *supra* note 54 ("[T]he official Thomas Jefferson Foundation Monticello Report lists Randolph Jefferson's sons and specifically Thomas Jefferson, Jr. as being schooled at Monticello in 1799, 1800 and possibly in 1801 (all three dates coincide with Sally's three children conceptions). However . . . the study group's assessment was that these Jefferson boys, at ages 16, 17, and 20 were too young.").

<sup>234</sup> REPORT, *supra* note 48, at Minority Report; *see also* White McKenzie Wallenborn, *A Committee Insider's Viewpoint*, in MYTH, *supra* note 3, at 55-67 (discussing committee insider Daniel P. Jordan's viewpoint of creating the minority report and the disagreement that arose).

presence and Sally's conception, but he emphasized that the vital third element of evidence was missing—Sally's presence at Monticello. Also missing was evidence concerning the presence of other males with the Jefferson haplotypes.

The defense would introduce further evidence questioning the DNA findings. A competitive institution, The Thomas Jefferson Heritage Society, sponsored another Scholars Commission Report.<sup>235</sup> Unlike the Jefferson Memorial Foundation, this Commission included prominent American historians, who the defense would call as expert witnesses, including: Lance Banning, Robert H. Ferrell and Forrest MacDonald. In sum, the historians will testify:

In the end, after roughly one year of examining the issues, we find the question of whether Thomas Jefferson fathered one or more children by his slave Sally Hemings to be one about which honorable people can and do disagree. However, it is our unanimous view that the allegation is by no means proven; and we find it regrettable that public confusion about the 1998 DNA testing and other evidence has misled many people into believing the issue is closed. With the exception of one [dissent], . . . our individual conclusions range from serious skepticism about the charge to a conviction that it is almost certainly untrue.<sup>236</sup>

One scientist from MIT, Dr. David Page, would testify for the defense and would delineate the problems of the degradation of the DNA y-chromosome over many decades.<sup>237</sup> Dr. Page would also testify that it was more of a problem in interpreting “non-matches” (*i.e.*, the Carr and Woodson samples) than in matches (Jefferson's and Hemings'). Moreover, he opined there was a problem of accurate bookkeeping, including the danger of mixing samples. Dr. Page suggested drawing more blood from the Eston Hemings's descendant and retyping it (which was never done).<sup>238</sup>

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<sup>235</sup> See REPORT, *supra* note 48, at app. B.

<sup>236</sup> JEFFERSON-HEMINGS SCHOLARS COMMISSION, REPORT ON THE JEFFERSON-HEMINGS MATTER 33 (Apr. 12, 2001), *available at* <http://www.tjheritage.org/documents/SCReport1.pdf>.

<sup>237</sup> REPORT, *supra* note 48, at app. B.

<sup>238</sup> *Id.*

Another scientist from Yale, Dr. Kenneth Kidd, would testify as to the intriguing similarity between the Woodson DNA sample and the Carr sample.<sup>239</sup> In his opinion, it would not take many mutations to convert one into the other. Could this mean that one of the Carr brothers was Woodson's father? In fact, Dr. Foster conducted a second analysis of the Woodson samples and the results were the same: a non-match with the Jefferson samples.

In the final analysis, the DNA results and methodology would be severely impeached, if not entirely discredited and excluded at trial.

## V. Defense Witnesses

### A. Abigail Adams

The defense would certainly call to the stand, Abigail Adams, the wife of future President John Adams, who could testify to direct, personal observations of Sally. Abigail, already in London, received Jefferson's daughter, Polly, and Sally, on their way to Paris. Abigail was in a unique position to observe both Jefferson and Sally. In fact, she would record in a letter to Jefferson:

[T]he Girl who is with her is quite a child, and [the ship's] Captain Ramsey is of the opinion will be of so little Service that he had better carry her back with him. But of this you will be a judge. She [Sally] seems fond of the child and appears good naturd [sic].<sup>240</sup>

Nevertheless, in her next letter, Abigail wrote: "The Girl she has with her, wants more care than the child, and is wholly incapable of looking properly after her, without some superiour [sic] to direct her."<sup>241</sup>

This is a unique, first-hand observation of young Sally. The jury would find Abigail a persuasive defense witness, altogether an intelligent,

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<sup>239</sup> *Id.*

<sup>240</sup> Letter from Abigail Adams to Thomas Jefferson (June 27, 1787), in *THE ADAMS-JEFFERSON LETTERS*, at 179 (Lester J. Cappon ed., 1959).

<sup>241</sup> Letter from Abigail Adams to Thomas Jefferson (July 6, 1787), in *THE ADAMS-JEFFERSON LETTERS*, at 183 (Lester J. Cappon ed., 1959).

shrewd observer. Her personal observations and opinions would carry great weight. Mrs. Adams would testify that Sally could not care for Polly (Jefferson's daughter) without adult supervision. Abigail's testimony does not suggest the alluring young "wench," as Callender charged, or the portrait of a sultry Sally in novels and movies. Nor does her direct testimony bear out the plaintiff's theory that she seduced Jefferson or provoked his carnal lust in Paris.

## B. Robert Smith

Another defense witness will be Robert Smith, Secretary of the Navy under President Jefferson. Jefferson wrote to Smith in 1805, in response to a letter from a Virginia "gentleman" of "respectable character" named "Thomas Turner," a pseudonym.<sup>242</sup> This letter revived the charge that Jefferson had made improper advances to Betsey Walker, and continued after Jefferson was married.<sup>243</sup> The letter was published in Boston and taken over by a Washington Federalist newspaper in June 1805.<sup>244</sup> As a footnote to his letter, "Turner" also revived the accusation that Jefferson had a slave mistress named Sally—"the affair of black (or rather mulatto) Sally is unquestionably true."<sup>245</sup>

The defense would submit that the true author of the Turner letter was "Light Horse" Harry Lee, a close friend of Walker's. When the affair resurfaced, via publication of the so-called "Turner" letter, Jefferson confronted the issue. He wrote to his Attorney General, Levi Lincoln, by way of a covering letter to Robert Smith.<sup>246</sup> In the Smith letter, however, Jefferson acknowledged the allegations about his conduct toward Betsey Walker, but insisted that it was the only accusation "founded in truth."<sup>247</sup> In other words, this letter constituted a tacit denial of the accusations by Callender and "Turner" concerning Sally.

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<sup>242</sup> MCMURRY & MCMURRY, *supra* note 7, at 85-97, 142; BURTON, *supra* note 33, at 31-34.

<sup>243</sup> MCMURRY & MCMURRY, *supra* note 7, at 87.

<sup>244</sup> *Id.* at 90.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 91.

The plaintiff would contend that Jefferson's language was not an explicit denial of an affair with Sally. However, the defense could introduce several letters and statements explaining why Jefferson publicly refused to answer specific accusations: "I have determined to contradict none," he once wrote to James Monroe.<sup>248</sup>

The defense would also call three family

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<sup>248</sup> MERRILL PETERSON, THOMAS JEFFERSON AND THE NEW NATION 711 (1970).

<sup>249</sup> DABNEY, *supra* note 71, at 85.

<sup>250</sup> *Id.*

<sup>251</sup> See DUMAS MALONE, THOMAS JEFFERSON: THE SAGE OF MONTICELLO 156 (1981).

<sup>252</sup> *Id.* at 156-57.

<sup>253</sup> Eyler Robert Coates, Sr., *Research Report on the Jefferson-Hemings Controversy: A Critical Analysis*, in MYTH, *supra* note 3, at 83-84.

<sup>254</sup> BURTON, *supra* note 33, at 80-81.

<sup>255</sup> *Id.*

<sup>256</sup> Letter from Ellen Coolidge to Joseph Coolidge (Oct. 24, 1858), in MYTH, *supra* note 3, at 193-96.

Col. Jefferson Randolph also related Martha's testimony to the historian Henry Randall, who claimed that he too verified Martha's version in Jefferson's business records.<sup>257</sup> Martha was apparently referring to Eston Hemings's birth in May 1808.<sup>258</sup> Thus, her testimony that Jefferson was apart from Sally for fifteen months before Eston's birth would exclude the time of Sally's conception in late August.

Martha's persuasive testimony is an eyewitness account. She had extensive, first hand knowledge of life at Monticello and knew Sally both in Paris and in Virginia. Of all the defense and plaintiff witnesses, she would be in the best position to know the truth.

#### D. Ellen Coolidge

Next, the defense will call Jefferson's granddaughter, Ellen Randolph Coolidge (1796-1876). Her testimony will be valuable because she lived, intermittently, at Monticello. She was close to Sally before Ellen married Joseph Coolidge and moved to Boston in 1825.<sup>259</sup> The crux of her testimony can be found in a letter written at Edgehill to her husband on October 24, 1858.<sup>260</sup> In the letter, she recounted her talk with her brother, Jeff, on the subject of the "yellow children."<sup>261</sup> Ellen would testify that all of Sally's children were the children of "Col. Carr"<sup>262</sup> (meaning Samuel Carr, Jefferson's nephew). She noted that Jefferson was surrounded by his grandchildren and enjoyed the freest and most affectionate relationship with them: "How comes it that his immoralities were never suspected by his own family—that his daughter and her children rejected with horror and contempt the charges brought against him?"<sup>263</sup>

Ellen continued:

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<sup>257</sup> BRODIE, *supra* note 102, at 496.

<sup>258</sup> See Letter from Ellen Coolidge to Joseph Coolidge (Oct. 24, 1858), in MYTH, *supra* note 3, at 195-96, 199.

<sup>259</sup> BURTON, *supra* note 33, at 83-86; DABNEY, *supra* note 71, at 78-79, 94-95.

<sup>260</sup> Letter from Ellen Coolidge to Joseph Coolidge (Oct. 24, 1858), in MYTH, *supra* note 3, at 193-196.

<sup>261</sup> *Id.* at 193.

<sup>262</sup> *Id.* at 196.

<sup>263</sup> *Id.* at 194.

That my brother, then a young man certain to know all that was going on behind the scenes, positively declares his indignant disbelief in the imputations and solemnly affirms that he never saw or heard the smallest thing which could lead him to suspect that his grandfather's life was other than perfectly pure. His [Jefferson's] apartment had no private entrance not perfectly accessible and visible to all the household. No female domestic ever entered his chambers except at hours when he was known not to be there and none could have entered without being exposed to the public gaze.<sup>264</sup>

The phrase “none could have entered without being exposed to the public gaze”<sup>265</sup> would be crucial testimony. (As a sidebar, the plaintiff's expert witness, Annette Gordon-Reed, would have to explain under cross-examination why this key phrase was omitted from the version of this letter published in her book, *Sally Hemings and Thomas Jefferson: An American Controversy*.<sup>266</sup>)

Ellen's testimony that her family never suspected nor witnessed any clandestine romance—“rejected with horror and contempt the charges brought against him”<sup>267</sup>—is also essential for the defense. Defending her grandfather, she asked how could a man of his character be likely to “carry on his low amours in the circle of his family.”<sup>268</sup> She singled out ‘dusky Sally’ and asked why Jefferson “should . . . have selected the female attendant of his own pure children to become his paramour! The thing will not bear telling. There are such things, after all, as moral impossibilities.”<sup>269</sup>

According to Ellen's letter, proffered testimony and the reasonable inferences drawn from the evidence, there was a general impression that Sally's children were fathered by Col. Samuel Carr.<sup>270</sup> He was the “most

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<sup>264</sup> *Id.* at 194-95.

<sup>265</sup> *Id.* at 195.

<sup>266</sup> See GORDON-REED, *supra* note 2, at 258-60.

<sup>267</sup> Letter from Ellen Coolidge to Joseph Coolidge (Oct. 24, 1958), in MYTH, *supra* note 3, at 194.

<sup>268</sup> *Id.* at 195.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 196; see also *United States v. Robinson*, 275 F.3d 371, 383 (4th Cir. 2001). Most of the adoptive admissions that we have considered have been characterized as tacit admissions or admissions by silence. A party may manifest adoption of a statement

notorious good-natured Turk that was ever master of a black seraglio kept at other men's expense."<sup>271</sup> The Carr brothers even admitted their paternity of Sally's children, according to Ellen.<sup>272</sup>

### E. Jefferson Randolph

Jefferson Randolph (1792-1875), Thomas Jefferson's grandson, did in fact relate these admissions to the historian and biographer Henry S. Randall.<sup>273</sup> Randolph would testify that he knew first hand that the Carr brothers were responsible for Sally's children because they admitted it to him. This version was told to Randall in the late 1850s, and he repeated it in 1868 to Jefferson's new biographer, James Parton:

Col. Randolph informed me that there was not a shadow of suspicion that Mr. Jefferson in this or any other instance ever had commerce with female slaves. . . . He said he had never seen a motion, or a look, or a circumstance which led him to suspect for an instant that there was a particle more of familiarity between Mr. Jefferson and Sally Hemings than between him and the most repulsive servant in the establishment, . . . no person ever living at Monticello dreamed of such a thing.<sup>274</sup>

Henry Randall, commenting on Randolph's interview, wrote that he, Randall, could "give fifty more facts were there time and were there any need of it, to show Mr. Jefferson's innocence of this and all similar offenses against propriety."<sup>275</sup>

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made by another in any number of ways, including words, conduct, or silence. In some cases, the defendant's words or conduct may supply most, if not all, of the predicate facts that the Commonwealth must prove to bring the evidence within the adoptive admission exception. *See, e.g.,* United States v. Jinadu, 98 F.3d 239, 244 (6th Cir. 1996).

<sup>271</sup> Letter from Ellen Coolidge to Joseph Coolidge (Oct. 24, 1958), in MYTH, *supra* note 3, at 196.

<sup>272</sup> GORDON-REED, *supra* note 2, at 87-88.

<sup>273</sup> *Id.* at 80-81.

<sup>274</sup> *Id.* at 254-55.

<sup>275</sup> BRODIE, *supra* note 102, at 496. As an aside, in a modern day trial, the defendants would undoubtedly file a "third party" complaint against the Carr brothers and possibly Jefferson's own brother, Randolph.

The plaintiff's attorney would derisively label this testimony the "Family Denial."<sup>276</sup> Yet, this is further proof that the plaintiff cannot sustain its case by the greater weight of the evidence. The confusion about the Carr brothers is just one example of the inconsistencies and contradictions of the evidence. Ellen accuses Samuel of paternity, but Jeff Randolph names Peter as well.

### F. Polly Jefferson

The best witness for the defense might have been Polly, Jefferson's daughter, but she died quite young. Polly left no recorded recollection that bears on a connection between Jefferson and Sally. Polly was, after all, closeted with Sally for the long sea journey to England and was close to her in Paris. After returning to Virginia, Sally was probably with Polly from time to time, at either Eppington or Monticello. In fact, Jefferson referred to Sally as Polly's "maid."<sup>277</sup>

Polly died in 1804 and never addressed the question of Sally's children.

### G. Edmund Bacon

Bacon was an overseer at Monticello. As an eyewitness to the Jefferson-Sally relationship, he would completely exonerate Jefferson of the accusation. His recollections and testimony, recorded by the Rev. Hamilton Pierson in 1862, were subsequently published and cast doubt on the plaintiff's circumstantial evidence.<sup>278</sup>

Bacon would testify that he was born and raised a few miles from Monticello, and his family knew Jefferson before he was employed there.<sup>279</sup> Bacon's older brother worked at Monticello, and Bacon visited often, but did not start his official duties as overseer until late 1806.<sup>280</sup>

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<sup>276</sup> *Id.* at 493.

<sup>277</sup> DONALD JACKSON, *A YEAR AT MONTICELLO 1795*, at 23, 30 (1989).

<sup>278</sup> DABNEY, *supra* note 71, at 79-80; *see* Jefferson, *supra* note 40, at vi, 29-57.

<sup>279</sup> Jefferson, *supra* note 40, at 39.

<sup>280</sup> *Id.* at 39-40.

Employed at Monticello on an informal basis, Bacon visited Jefferson in Washington on three different occasions, shortly after his inauguration in March 1801.<sup>281</sup>

Bacon would offer testimony on interracial relations at Monticello. For example, he would testify about a fight that involved a schoolmate of Jeff Randolph's, William Rives. Bacon added that Rives would spend the night at Monticello, but thought the other boys were too "intimate with the Negro women."<sup>282</sup> The defense would argue that this was a veiled reference to the Carr brothers, or perhaps Randolph Jefferson's sons.

Bacon, in his recorded testimony, never hinted at a relationship between Sally and Jefferson. Indeed, he indirectly refuted it.<sup>283</sup> Recalling Sally's daughter, Harriet, Bacon testified that "[s]he was nearly as white as anybody and very beautiful."<sup>284</sup> As to claims that Jefferson freed her because he was her father, Bacon said: "She was not his daughter; she was [intentional blank]'s daughter. I know that. I have seen him come out of her mother's [Sally's] room many a morning when I went up to Monticello very early."<sup>285</sup>

## H. Carr Brothers

The Carr brothers were the young sons of Jefferson's sister and her husband, Dabney Carr. Dabney was a close friend of Jefferson's, but died tragically when he was thirty years old.<sup>286</sup> Thereafter, Jefferson helped raise Samuel and Peter. They often visited Monticello and became candidates for the paternity of Sally's (and her sister Mary's) children.<sup>287</sup> They were accused by Jefferson's grandson and, according to his account,

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 88.

<sup>283</sup> White McKenzie Wallenborn, *A Committee Insider's Viewpoint*, in MYTH, *supra* note 3, at 60.

<sup>284</sup> *Id.* at 84.

<sup>285</sup> *Id.*

<sup>286</sup> Herbert Barger, *The Jefferson-Hemings DNA Study*, in MYTH, *supra* note 3, at 26-28.

<sup>287</sup> *Id.* at 27.

they virtually admitted their complicity.<sup>288</sup> The record evidence would show that the Carrs were present at Monticello during Harriet's conception in 1795, when the second Harriet was conceived in 1800 and when Eston was conceived in 1807.

### I. Other Slave Witnesses

The lack of testimony from a large number of Monticello slaves would be significant for the defense. With the exception of Madison Hemings and Israel Jefferson, not a single one ever spoke or wrote about a relationship between Jefferson and Sally.

Isaac Jefferson, if called to testify, would verify his recorded recollections in 1847.<sup>289</sup> These recordings, set down at Petersburg, Virginia, provide considerable detail about Jefferson, life at Monticello, the slaves, their families and Sally. Isaac would testify that he was deeded to Polly (Jefferson's daughter) when she was married in 1797, but he apparently worked for Martha and Tom Randolph.<sup>290</sup> He claimed that he worked at Monticello until seven years before Jefferson's death.<sup>291</sup> (Jefferson died in 1826, so this would have been 1819.) He was sold in the slave auction after Jefferson's death and was found in "retirement" when he dictated his recollections.<sup>292</sup> The defense would argue that Isaac did not allude or even hint at Sally's relationship to Jefferson. (His memoirs were not rediscovered until 1951, and were published in modernized editions in 1952.<sup>293</sup>)

Another slave, Robert Hemings, was Jefferson's personal aide, who was eventually freed.<sup>294</sup> Martha saw Robert from time to time in

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<sup>288</sup> White McKenzie Wallenborn, *A Committee Insider's Viewpoint*, in MYTH, *supra* note 3, at 60.

<sup>289</sup> Jefferson, *supra* note 40, at 16.

<sup>290</sup> *Id.* at 16-17.

<sup>291</sup> *See generally id.* at 3-24 (describing Isaac's work at Monticello).

<sup>292</sup> Rayford W. Logan, *Memoirs of a Monticello Slave: As Dictated to Charles Campbell in the 1840's by Isaac, One of Thomas Jefferson's Slaves*, AM. HISTORICAL REV., Oct. 1952, at 131-33.

<sup>293</sup> *Id.*

<sup>294</sup> BETTS & BEAR, *supra* note 165, at 133 n.1.

Charlottesville,<sup>295</sup> yet he never mentioned or alluded to the Jefferson-Sally connection.

James Hemings, who lived with the Jeffersons and Sally in Paris, was also freed and traveled for some years, including a return to Paris.<sup>296</sup> He too was silent concerning the relationship. So too were John Hemings, as well as Burwell and Joe Fossett, Betty Hemings's grandsons. Fossett, in fact, was freed by Jefferson's will.<sup>297</sup>

Thus, the defense would contend that no Hemings, except Madison, ever addressed the relationship of Sally to Jefferson.

## VI. Expert Testimony: The Historians

### A. Character Issue

The most logical defense argument to a jury would be the simplest: Thomas Jefferson's impeccable character would prevent him from conducting an affair, especially with a slave, virtually in front of his two devoted daughters. The defense could easily document Jefferson's extensive correspondence with Polly and Martha.<sup>298</sup> Jefferson's defense would cite this relationship as proof that he would never be so insensitive to consummate an affair in their presence. Neither daughter ever acknowledged the possibility of his affair with Sally, although both were in a unique position to know and personally observe it. In fact, Martha vehemently denied it.<sup>299</sup> Martha's daughter, Ellen Randolph Coolidge, echoed this denial.<sup>300</sup>

Martha visited Monticello quite often. The same was true for Polly, until she was married in 1797. When the Irish poet Thomas Moore wrote a scurrilous verse about Sally, Martha indignantly showed it to Jefferson,

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<sup>295</sup> *Id.* at 131.

<sup>296</sup> *Id.* at 145 n.3.

<sup>297</sup> *Last Will of Thomas Jefferson*, in MYTH, *supra* note 3, at 189-92.

<sup>298</sup> See BETTS & BEAR, *supra* note 165. This correspondence is substantiated by the entire work, which is primarily a composition of such correspondence.

<sup>299</sup> BRODIE, *supra* note 102, at 495-96.

<sup>300</sup> *Id.* at 497-98.

who just smiled.<sup>301</sup> There is a long record to support his attitude toward “calumnies.”<sup>302</sup> He wrote of his refusal to dignify the charges with denials: “Many of the [federal lies] would have required only a simple denial, but I saw that even that would have led to the infallible inference, that whatever I had not denied was to be presumed to be true.”<sup>303</sup>

The incongruity between Jefferson’s honorable character and a long, illicit affair with a slave would be easily established. Several witnesses would testify as to Jefferson’s reputation for truth, veracity and integrity. Chief among those would be two former Presidents: James Madison and James Monroe. The former was a close friend and colleague of Jefferson’s throughout his political life.<sup>304</sup> Madison visited Monticello many times. But there is no evidence that he ever commented on the Hemings affair, though he undoubtedly was aware of the charges made by Callender. Indeed, both Madison and Monroe met with Callender before the infamous article.<sup>305</sup> Monroe was not as close to Jefferson as Madison, but he lived nearby and certainly heard the rumors circulating in Albemarle County. In fact, he purchased a slave from Jefferson—a seventeen-year-old who was a daughter of Betty Hemings.<sup>306</sup> He even advised Jefferson on how to rebut Callender’s accusations.<sup>307</sup>

In sum, there is no recorded evidence of either Madison or Monroe commenting on the allegations of Jefferson’s alleged affair with Sally. In addition, the defense would argue that Jefferson’s behavior toward the slave children, allegedly his own flesh and blood, was nothing special. Indeed, his attitude could be characterized as indifferent or callous, as Madison Hemings claimed.<sup>308</sup> Such callousness, however, was an atypical character trait of Jefferson’s. If Madison and Eston Hemings were indeed

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<sup>301</sup> *Id.* at 370.

<sup>302</sup> See PETERSON, *supra* note 248, at 709-11.

<sup>303</sup> Letter from Thomas Jefferson to William Burwell (Nov. 22, 1808), in 11 THE WORKS OF THOMAS JEFFERSON 78 (Paul L. Ford ed., 1905).

<sup>304</sup> See DABNEY, *supra* note 71, at 8, 24, 40, 49, 59-60, 62 (indicating the extensive and lifelong dealings between Jefferson and Madison); BURTON, *supra* note 33, at 88.

<sup>305</sup> See RANDALL, *supra* note 20, at 557.

<sup>306</sup> See BURTON, *supra* note 33, at 88.

<sup>307</sup> *See id.*

<sup>308</sup> See BRODIE, *supra* note 102, at 474.

his own sons, Jefferson should have displayed some consideration, if not affection, which there is no record evidence to support.

## B. Scholars' Theories

The defense would call an array of leading historians to lend their expert opinions as to the lack of credibility of the accusation.

The first great landmark of Jeffersonian historiography was the three-volume biography by Henry S. Randall. His first volume was published in 1851 and the last in 1871.<sup>309</sup> He enjoyed the confidence of Jefferson's surviving grandchildren, especially Jeff and his sister, Ellen Randolph Coolidge.<sup>310</sup> They supplied him with their reminiscences, through letters and conversations.<sup>311</sup> He also enjoyed extensive access to Jefferson's correspondence and papers.<sup>312</sup> Some years later, when the historian James Parton wrote his biography of Jefferson, Randall summarized what he had learned from "Jeff." He wrote to Parton, conveying his recollection of what he had been told by Jefferson Randolph: "[T]here was not a shadow of suspicion that Mr. Jefferson, in this or any other instance, had any such intimacy with his female slaves."<sup>313</sup>

Both Randall and Parton attacked Callender as a vicious scandalmonger.<sup>314</sup> Parton, armed with Randall's letter claiming the Carr brothers as Sally's sexual culprits, went further than Randall and chose to offer his crisp rebuttal to Madison Hemings's interview: "Mr. Hemings has been misinformed."<sup>315</sup>

Near the end of the century, another biography was published by John T. Morse, Jr., in the *American Statesmen Series*, dealing more with foreign policy than domestic. Morse ripped into Callender for pouring

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<sup>309</sup> HENRY S. RANDALL, *THE LIFE OF THOMAS JEFFERSON* (N.Y., Derby & Jackson 1858); see DABNEY, *supra* note 71, at 22.

<sup>310</sup> See RANDALL, *supra* note 20, at 477.

<sup>311</sup> See *id.*

<sup>312</sup> See *id.*

<sup>313</sup> JAMES PARTON, *LIFE OF THOMAS JEFFERSON* 569 (1874).

<sup>314</sup> *Id.* at 606; RANDALL, *supra* note 20, at 537-38.

<sup>315</sup> PARTON, *supra* note 313, at 569.

“bucketful after bucketful from [his] foul reservoir.”<sup>316</sup> He also defended Jefferson’s silence in the face of “gossip about Jefferson’s graceless debaucheries.”<sup>317</sup> The President of the United States “could hardly stoop to give the lie to a fellow like Callender.”<sup>318</sup>

Henry Adams, in his monumental volumes dealing with Jefferson’s administration, *History of the United States*,<sup>319</sup> joined the detractors of Callender, the critic of his great grandfather. This was the same complaint of Adams’s great grandmother, Abigail, in her letters of reprimand to Jefferson.<sup>320</sup> The only result, Henry Adams concluded, was to leave a “fixed prejudice in the New England mind.”<sup>321</sup>

Thus, the most eminent historians of the 19th century completely exonerated Jefferson. Specifically, Parton based his defense on the “indecent” vituperations of Callender.<sup>322</sup> Randall cited the “offensive imputations against [Jefferson] by the opposition press; and which has since been the subject of a good many historical misstatements.”<sup>323</sup>

For most of the twentieth century, historians agreed with Randall and Parton, though they adopted a more sophisticated analysis. Two major historians, both defense expert witnesses, wrote political biographies of the Jefferson era. The best known was Professor Dumas Malone’s six-volume biography of Jefferson,<sup>324</sup> considered a monument of historical scholarship. A companion to Malone is Merrill Peterson’s one volume biography,<sup>325</sup> as well as his review of Jefferson’s “image” over the centuries.

Both authors dismiss the sexual accusations against Jefferson. Malone, in his volume dealing with Jefferson’s first presidential terms (1970),

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<sup>316</sup> JOHN T. MORSE, *THOMAS JEFFERSON 157-58* (Cumberland House 2004) (1898).

<sup>317</sup> *Id.* at 157.

<sup>318</sup> *Id.* at 157-58.

<sup>319</sup> HENRY ADAMS, *HISTORY OF THE UNITED STATES: DURING THE ADMINISTRATION OF JEFFERSON* (Library of Am. 1986).

<sup>320</sup> See generally *THE ADAMS-JEFFERSON LETTERS*, *supra* note 240.

<sup>321</sup> *Id.* at 223.

<sup>322</sup> PARTON, *supra* note 313, at 606.

<sup>323</sup> RANDALL, *supra* note 20, at 20-21.

<sup>324</sup> See DUMAS MALONE, *JEFFERSON AND HIS TIME* (1970) (six-volume work chronicling the early life of Thomas Jefferson through his first years as President).

<sup>325</sup> PETERSON, *supra* note 248, at 711.

devoted a separate Appendix refuting *The Miscegenation Legend*.<sup>326</sup> Malone also co-authored a scholarly monograph in the *Journal of Southern History*.<sup>327</sup> Quoting from contemporary commentary of other competitive journalists, he too dismissed Madison Hemings's interview as "solicited and published for a propagandist purpose."<sup>328</sup> Williard S. Randall also brushes off Madison Hemings. Hemings's account "resembles many uncorroborated slave narratives and cannot be credited. It is full of hearsay."<sup>329</sup> Similarly, in *The Jefferson Image in the American Mind*, Peterson succinctly concluded: "The legend survives, although no serious student of Jefferson has ever declared his belief in it."<sup>330</sup>

Two well-known biographers, Saul Padover and Nathan Schachner (1942 and 1951, respectively), give the Sally story little credence. Padover's abridged paperback biography ignores it altogether, and Schachner devotes his attention to the Betsey Walker affair.<sup>331</sup> Later, many historians relied on the analytical 1960 essay of historian Douglas Adair. Adair found that Sally's story, as related by Madison, had internal inconsistencies that "shake our faith in [her] statement."<sup>332</sup> In particular, Adair cites the memoirs of Edmund Bacon, Jefferson's overseer, and concludes: "No matter how sympathetic one is to Sally, one must conclude that she is not trustworthy about Jefferson's relations with her."<sup>333</sup>

The plaintiffs would rely on two experts: Fawn Brodie and Dr. Annette Gordon-Reed. Through cross-examination, both experts' opinions can be impugned due to bias and motive.

For example, Ms. Brodie cites evidence of Jefferson's preoccupation with Sally, by his use of the word "mulatto" in describing the soil of

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<sup>326</sup> DUMAS MALONE, *JEFFERSON THE PRESIDENT FIRST TERM, 1801-1805*, at 494 (1970).

<sup>327</sup> Dumas Malone & Steven Hochman, "A Note on Evidence: the Personal History of Madison Hemings," 41 *J. S. HIST.* 523 (1975).

<sup>328</sup> *Id.* at 526.

<sup>329</sup> RANDALL, *supra* note 20, at 477.

<sup>330</sup> MERRILL PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 186 (1960).

<sup>331</sup> See SAUL K. PADOVER, *JEFFERSON* (12th prt. 1952); NATHAN SCHACHNER, *THOMAS JEFFERSON, A BIOGRAPHY* (1951).

<sup>332</sup> ADAIR, *supra* note 38, at 176.

<sup>333</sup> *Id.* at 181.

southern France.<sup>334</sup> In a small volume devoted entirely to the scandals, the journalist-editor Virginius Dabney disputes Brodie point by point.<sup>335</sup> Moreover, in the decades that followed, there was a proliferation of new biographers who did not follow Brodie's lead: Alf J. Mapp,<sup>336</sup> Andrew Burstein,<sup>337</sup> Noble E. Cunningham<sup>338</sup> and Willard Sterne Randall.<sup>339</sup> In these biographies, there is neither support for Callender's contention, nor for Madison Hemings's claims. Cunningham writes: "The evidence indicates that any Paris romance between Jefferson and Sally Hemings belongs in a work of fiction, not history."<sup>340</sup> Randall concludes much the same: Madison Hemings's account "resembles many uncorroborated slave narratives and cannot be credited[;] . . . [it] must be put down as mere gossip."<sup>341</sup> Burstein speculates that Madison made up the bulk of his interview to give himself a more distinguished ancestor.<sup>342</sup>

John Chester Miller wrote extensively about Jefferson's attitudes toward slavery, including a separate chapter on *The Sally Hemings Story*.<sup>343</sup> In his expert opinion, there was no proof of the accusation that Sally was Jefferson's "concubine."<sup>344</sup> As for Madison Hemings's claims, Miller dismissed them: "His unsupported undocumented testimony conveyed in a politically suspect vehicle, the Pike County Republican would certainly not carry conviction" in a court of law.<sup>345</sup>

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<sup>334</sup> BRODIE, *supra* note 102, at 229.

<sup>335</sup> DABNEY, *supra* note 71, at 127-28.

<sup>336</sup> See ALF J. MAPP, THOMAS JEFFERSON: PASSIONATE PILGRIM (2000).

<sup>337</sup> See ANDREW BURSTEIN, THE INNER JEFFERSON: PORTRAIT OF A GRIEVING OPTIMIST (1995).

<sup>338</sup> See NOBLE E. CUNNINGHAM JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON (1987).

<sup>339</sup> See RANDALL, *supra* note 20.

<sup>340</sup> CUNNINGHAM, *supra* note 338, at 116.

<sup>341</sup> RANDALL, *supra* note 20, at 477.

<sup>342</sup> See BURSTEIN, *supra* note 337, at 230-31; ANDREW BURSTEIN, JEFFERSON'S SECRETS: DEATH AND DESIRE AT MONTICELLO (2005).

<sup>343</sup> JOHN CHESTER MILLER, THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 162-76 (1991).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

The plaintiff's expert, Dr. Annette Gordon-Reed, is a professor of law at New York Law School, who wrote *Thomas Jefferson and Sally Hemings: An American Controversy*.<sup>346</sup> Like Brodie, Gordon-Reed built her case around the interview of Madison Hemings, which she accepted at face value and stated: "[H]is mother, Sally Hemings, has come to be seen as a metaphor for the condition of blacks in American society."<sup>347</sup> She asserted the likelihood that Jefferson conducted a romantic relationship with Sally for two decades.<sup>348</sup> For her, the antagonism between the oral history of one family (Hemings) against another (the Randolphs) was a racial issue, black against white. "On this score what Madison Hemings said and the way he said it establishes him as a more credible declarant than either T. J. Randolph or Ellen Randolph Coolidge."<sup>349</sup>

Through a skillful cross-examination, it can be established that Gordon-Reed's opinions are marred by error, bias and racial overtones against the "systematic dismissal" by white historians of the words of black men, such as Madison Hemings and Israel Jefferson.<sup>350</sup> She indicted the entire white community of historians because they "never made a serious and objective attempt to get at the truth of this matter."<sup>351</sup> They ignored Madison Hemings because they had "no conception of slaves as human beings."<sup>352</sup>

## Conclusion: Final Argument

The plaintiff's case against Jefferson rests, essentially, on three skeletal pieces of evidence, framed by a selective exclusion of exculpatory evidence: (1) inadmissible hearsay testimony of Sally's son, Madison; (2) the unreliable documentation of Jefferson's physical presence at the time of conception of Sally's children; and (3) the interpretative DNA results, which would be excluded or discredited in whole or part.

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<sup>346</sup> GORDON-REED, *supra* note 2.

<sup>347</sup> *Id.* at 234-35.

<sup>348</sup> *See generally id.*

<sup>349</sup> *Id.* at 103.

<sup>350</sup> *Id.* at 226-28.

<sup>351</sup> *Id.* at 224.

<sup>352</sup> *Id.* at 200.

Ladies and gentleman of the jury, the plaintiff has failed to show by the greater weight of the evidence that Thomas Jefferson had an affair with Sally Hemings. The plaintiff's case is based on rank speculation, conjecture and witnesses whose credibility and memories have been severely impeached. In fact, the entire case is devoid of admissible and credible evidence:

(1) The testimony of Madison Hemings has been discredited and amounts to rank hearsay and speculation. Moreover, his capacity to observe events that occurred some thirty to forty years earlier was severely impeached.

(2) Hemings was coached by a politically activist editor, who had a motive and bias against Jefferson. The defense contends the editor, Wetmore, wrote some or all of the interview.

(3) James Callender's hearsay testimony has been impeached. The defense has demonstrated his bias as Jefferson's political foe. As noted historian and expert witness James Truslow Adams testified: "[A]lmost every scandalous story about Jefferson which is still whispered or believed may be traced to the scurrilous writings of Callender."<sup>353</sup>

(4) Three witnesses who intimately knew both Sally and Jefferson, (Martha Jefferson Randolph, Ellen Coolidge, and Thomas Jefferson Randolph), all found the accusations inconceivable and never witnessed any liaison. In fact, there is not a scintilla of proof of "cohabitation" or any physical intimacy between Jefferson and Sally during the thirty-seven years she lived at Monticello.

(5) The one, credible eyewitness is Edmund Bacon, Jefferson's overseer. He did not observe any evidence of a relationship and, in fact, saw another man leaving Sally's room early one morning.

(6) The DNA results would be excluded under *Daubert*.<sup>354</sup> Assuming they are admitted, the methodology and results are gross distortions at best, and unscientific at worse. The DNA does not rule out either one or both of the Carr brothers as the father of Sally's children, except Eston, or Jefferson's brother, "Uncle Randolph," as claimed by Eston's descendant. At least eight other Jefferson males

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<sup>353</sup> DABNEY, *supra* note 71, at 15.

<sup>354</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

are candidates for Sally's paternity. In essence, the DNA shows only that one descendant of Sally had a Jefferson male line halotype. Moreover, it has not been scientifically demonstrated that this halotype extended back through each generation to those male Jeffersons living in 1807, the year in which Sally's last son was conceived.

(7) The most notable Jefferson scholars have lent their expert opinions to this jury, and concluded that the accusation of an affair lacks not only credibility, but would be outside the moral character of Thomas Jefferson. Garry Wills stated the defense position succinctly: "I'm afraid that Professor Brodie, despite her admirable qualities, is the worst thing to happen to Jefferson since James Callender."<sup>355</sup>

Finally, only two people know the absolute truth; one was Sally Hemings, who was silent her entire life on the accusation—a telling deafness. As expert historian John C. Miller testified: "[W]e know virtually nothing of Sally Hemings, or her motives [and] she is hardly more than a name."<sup>356</sup>

The other witness was Thomas Jefferson, who denied the charges in private correspondence.<sup>357</sup>

Ladies and gentleman of the jury, as Ellen Coolidge testified: There are such things, after all, as moral impossibilities. And although the Sally rumor survives, no serious scholar of Jefferson has ever declared his belief in it.

And neither should this jury.

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<sup>355</sup> DABNEY, *supra* note 71, at 128 (citing Margot Hornblower, *Mr. Jefferson, With Passion: A Founding Father Revisited*, WASH. POST, Aug. 28, 1975, at B1).

<sup>356</sup> DABNEY, *supra* note 71, at 120.

<sup>357</sup> Eyler Robert Coates, Sr., *Research Report on the Jefferson-Hemings Controversy: A Critical Analysis*, in MYTH, *supra* note 3, at 81.

## **Appendix A**

### **Jury Instructions<sup>358</sup>**

Virginia Jury Instructions state, in pertinent part:

§ 12:2. Burden on plaintiff to prove defendant's negligence

The mere fact that there has been an [incident] and that as a result the plaintiff has been injured, does not of itself entitle the plaintiff to recover. In order to recover against the defendant the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that any such negligence was a proximate cause of the [incident].

And if the jury is uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendant was not guilty of any such negligence as it is that he was, then you shall return your verdict in favor of the defendant.

§ 10:17. Weighing expert testimony

In considering the weight to be given to the testimony of expert witnesses whose opinions differ, you may consider the ability and character of the witnesses, their actions upon the witness stand, the weight and process of the reasoning by which they support their opinion, their possible bias in favor of the side for which they testify, their relative opportunities for study or observation of the matters about which they testify, and other matters that serve to illuminate their statements.

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<sup>358</sup> Va. Prac. Jury Instruction §§ 12:2, 10:17 (2007).

## Appendix B<sup>359</sup> DNA Results

Final Report of the Jefferson-Hemings Scholars Commission  
April 12, 2001  
[in part]

### Summary

The question of whether Thomas Jefferson fathered one or more children by his slave Sally Hemings is an issue about which honorable people can and do disagree. After a careful review of all of the evidence, the commission agrees unanimously that the allegation is by no means proven; and we find it regrettable that public confusion about the 1998 DNA testing and other evidence has misled many people. **With the exception of one member, whose views are set forth both below and in his more detailed appended dissent, our individual conclusions range from serious skepticism about the charge to a conviction that it is almost certainly false.**

In an effort to provide further clarification of our thinking about these issues, several members have written statements of individual views, which are appended to this report. They are the views of the scholars whose names appear thereon, and do not necessarily reflect the opinions of other members of the group. Although academic or other affiliations of members are listed for purposes of identification, nothing in this report is intended to reflect the opinion of any college, university, foundation, or other entity with which members of the group may currently or in the past have been associated.

Our dissenting member believes that there is not sufficient evidence to state conclusively one way or the other whether Thomas Jefferson fathered any children by Sally Hemings. Based upon the totality of the evidence that does exist, he finds the argument for Jefferson's paternity in the case of Eston Hemings somewhat more persuasive than the case against. He regards the question of the paternity of Sally Hemings's other children as unsettled.

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### Other Candidates for the Paternity of Eston Hemings

If Thomas Jefferson was not the father of Eston Hemings, the obvious question arises: "Who was?" Jefferson scholars for nearly two centuries have

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<sup>359</sup> Appendix B is quoted directly from JEFFERSON-HEMINGS SCHOLARS COMMISSION, *supra* note 236, at 3, 28-30 & 32-35.

until very recently dismissed the Callender allegations, and without a great deal of apparent thought simply accepted the various reports that Thomas Jefferson Randolph had overheard Peter and Samuel Carr confessing to the paternity of Sally Hemings's children. But the 1998 DNA tests clearly ruled out any member of the Carr family as a possible father of Eston Hemings.

Candidly, we don't know who fathered Eston Hemings. The DNA tests narrowed the possible fathers down to a group of about two-dozen known Jefferson males in Virginia at the time, and there is at least a theoretical possibility that there may have been illegitimate sons carrying the Jefferson Y chromosome among the slaves passed down from Thomas Jefferson's grandfather, through his father, to the President. But when we consider things like the geographic location of many of these Jefferson men, the list of "most likely suspects" narrows quickly to Thomas Jefferson and perhaps half a dozen of his relatives. We know almost nothing about many of them.

Emphasizing again that we are not reaching a finding that Randolph Jefferson was Eston's father, it does appear that the circumstantial case that Eston Hemings was fathered by the President's younger brother is many times stronger than the case against the President himself. Among the considerations which might point to Randolph are:

- In *Memoirs of a Monticello Slave*, former slave Isaac Jefferson asserts that when Randolph Jefferson visited Monticello, he "used to come out among black people, play the fiddle and dance half the night . . ." In contrast, we have not a single account of Thomas Jefferson spending his nights socializing with the slaves in such a manner.
- As already noted, we have Jefferson's letter inviting Randolph (and presumably his sons as well) to come to Monticello shortly before Sally became pregnant with Eston. It was common for such visits to last for weeks.
- Pearl Graham, who did original research among the Hemings descendants in the 1940s and believed the story that Thomas Jefferson fathered Sally Hemings' children, wrote in a 1958 letter to a leading Jefferson scholar at Princeton University that a granddaughter of one of Sally Hemings' children had told her that Randolph Jefferson "had colored children" of his own.
- Until Professor Fawn Brodie persuaded the descendants of Eston Hemings that President Jefferson was his father, their family oral history had passed down that Eston was fathered by "Thomas Jefferson's uncle."

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- We don't know exactly when Randolph's first wife died, but we do know that he remarried—to a very controlling woman—shortly after Eston Hemings was born. About the same time, Thomas Jefferson retired from public office and spent the rest of his life at Monticello, where he could presumably have had access to Sally Hemings any night he wished. But Sally, although only in her mid thirties, gave birth to no known children after Eston was born in 1808. Even the Thomas Jefferson Memorial Foundation report acknowledges that Sally's childbearing years may have corresponded to the years in which Randolph Jefferson was a widower.

Randolph Jefferson had at least four sons between the ages of seventeen and twenty-seven when Eston was conceived, and if one accepts the data relied upon in the Monticello report, the number was five. One might expect the sex drives of young men in this age bracket to be greater than that of the sixty four year old President, and with their father's reported example there is no reason to assume they were under strong social pressure at home to refrain from sexual relations with female slaves. Again, we have not the slightest bit of direct evidence that any of them ever fathered a child by Sally Hemings; but that puts them in essentially the same category as Thomas Jefferson as possible suspects.

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### **Conclusions**

We do not pretend that this is the final word on the issue, and it is possible that future developments in science or newly discovered evidence will warrant a reconsideration of our conclusions. We understand that useable DNA might be obtained from the grave of William Beverly Hemings, son of Madison Hemings, which could provide new information of relevance to this inquiry. If his Y chromosome did not match that of Eston Hemings and the descendants of Field Jefferson, that would confirm that Sally Hemings could not have been monogamous. A match with the Carr family would also be significant. A match with Eston might strengthen the case for Sally's monogamy, but would not conclusively establish even which Jefferson male was the father of either child. Our thoughts here are further tempered by our concerns about the ethical propriety of disturbing the remains of the dead in the interest of historical curiosity. It may also prove useful to search for evidence concerning the whereabouts of Sally Hemings over the years. This could prove decisive, but we are not optimistic about the existence of additional records of this nature at this point in history.

In the end, after roughly one year of examining the issues, we find the question of whether Thomas Jefferson fathered one or more children by his slave Sally Hemings to be one about which honorable people can and do disagree. However, it is our unanimous view that the allegation is by no means

proven; and we find it regrettable that public confusion about the 1998 DNA testing and other evidence has misled many people into believing that the issue is closed. With the exception of one member, whose views are set forth both below and in the more detailed appended dissent, our individual conclusions range from serious skepticism about the charge to a conviction that it is almost certainly untrue.

FOR THE MAJORITY:

Lance Banning, Professor of History, University of Kentucky. Professor Banning formerly held the John Adams Chair in American History at the University of Groningen in the Netherlands . . . Two of his award-winning books (*The Jeffersonian Persuasion* and *Jefferson and Madison*) were nominated for the Pulitzer Prize in History.

James Ceaser, Professor of Government and Foreign Affairs, University of Virginia. Professor Ceaser is the author of *Reconstructing America* and has taught at Harvard, the University of Montesquieu, the University of Basel, and Marquette.

Robert H. Ferrell, Professor of History, Emeritus, Indiana University. Professor Ferrell was educated and has also taught at Yale University. He is the author or editor of more than forty books; and was described as “the dean of American presidential historians” by the *Chicago Sun-Times*.

Charles R. Kesler, Professor of Government, Claremont McKenna College. Professor Kesler is Director of the Henry Salvatori Center at Claremont McKenna College and former chairman of its Department of Government. He has written extensively on the American founding and American political thought, and is co-editor of a widely used edition of *The Federalist Papers*. . . .

Alf J. Mapp, Jr., Eminent Scholar, Emeritus and Louis I. Jaffe Professor of History, Emeritus, Old Dominion University. Professor Mapp is the author of *Thomas Jefferson: A Strange Case of Mistaken Identity*. . . . A reference source for *Encyclopedia Britannica* and *World Book*, his numerous awards include Commonwealth of Virginia Cultural Laureate and a medal from the Republic of France’s Comité Français du Bicentenaire de l’Indépendance des États Unis.

Harvey C. Mansfield, William R. Kenan, Jr., Professor of Government, Harvard University. A former Guggenheim Fellow and National Endowment for the Humanities Fellow, he served as President of the New England Political Science Association and on the Council of the American Political Science Association.

David N. Mayer, Professor of Law and History, Capital University. Professor Mayer holds both a law degree and a Ph.D. in History, and is the author of *The Constitutional Thought of Thomas Jefferson* . . . .

Forrest McDonald, Distinguished Research Professor of History, Emeritus, University of Alabama. Professor McDonald has also taught at Brown University and was the James Pinckney Harrison Professor of History at the College of William and Mary. . . . [H]is many awards and prizes include Thomas Jefferson Lecturer with the National Endowment for the Humanities.

Thomas Traut, Professor of Biochemistry & Biophysics, School of Medicine, University of North Carolina. Professor Traut is Director of Graduate Studies and a former Ford Foundation and National Institute of Health Fellow. He is the author or coauthor of more than seventy publications . . . .

Robert F. Turner (Chairman), University of Virginia. Professor Turner holds both professional and academic doctorates from the University of Virginia School of Law, and is a former Charles H. Stockton Professor of International Law at the U.S. Naval War College and a Distinguished Lecturer at West Point. . . . A former president of the congressionally-established U.S. Institute of Peace, he has had a strong professional interest in Jefferson for three decades.

Walter E. Williams, Professor of Economics, George Mason University. Professor Williams is Chairman of the Department of Economics at George Mason University and the author of half-a-dozen books. He is a nationally syndicated columnist.

Jean Yarbrough, Professor of Political Science, Bowdoin College. Professor Yarbrough is former Chair of the Department of Government and Legal Studies at Bowdoin and a National Endowment for the Humanities Bicentennial Fellow. She has lectured at the International Center for Jefferson Studies, is a consultant to the *Jefferson Papers* project, and serves on the editorial board of both the *Review of Politics* and *Polity*. . . .

## Appendix C<sup>360</sup> “The Family Denial”

*Ellen (Eleanora) Wayles Randolph Coolidge to Joseph Coolidge, Jr.  
Edgehill 24 October 1958*

I am just from church, a church originally planned by Grandpapa, where I heard a good sermon from an Episcopalian Clergyman, a young man, the Revd. Mr. Butler.

I have been talking freely with my brother Jefferson on the subject of the ‘yellow children’ and will give you the substance of our conversation, with my subsequent reflections.

It is difficult to prove a negative. It is impossible to prove that Mr. Jefferson never had a coloured mistress or coloured children and that these children were never sold as slaves. The latter part of the charge however is disproved by its atrocity, and its utter disagreement with the general character and conduct of Mr. Jefferson, acknowledged to be a humane man and eminently a kind master. Would he who was always most considerate of the feelings and the well being of his slaves, treat them barbarously only when they happened to be his own children, and leave them to be sold in a distant market when he might have left them free as you know he did several of his slaves, directing his executor to petition the Legislature of Virginia for leave for them to remain in the State after they were free. Some of them are here to this day.

It was his principle (I know that of my own knowledge) to allow such of his slaves as were sufficiently white to pass for white men, to withdraw quietly from the plantation; it was called running away, but they were never reclaimed. I remember four instances of this, three young men and one girl, who walked away and staid away. Their whereabouts was perfectly known but they were left to themselves for they were white enough to pass for white. Some of the children currently reported to be Mr. Jefferson’s were about the age of his own grandchildren. Of course he must have been carrying on his intrigues in the midst of his daughters family and insulting the sanctity of home by his profligacy. But he had a large family of grandchildren of all ages, older & younger. Young men and young girls. He lived, whenever he was at Monticello,

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<sup>360</sup> Appendix C consists of two parts. The first part is quoted from Coolidge Family Papers, acc. No. 9090, Special Collections Department, University of Virginia Library, excerpted in MYTH, *supra* note 3, at 193-96. The second part is quoted from The Papers of James Parton, bMS Am 1248.1 (240), Houghton Library, Harvard University and excerpted by DABNEY, *supra* note 71, at 74-77, and BRODIE, *supra* note 102, app. III, at 668-74.

and entirely for the last seventeen years of his life, in the midst of these young people, surrounded by them, his intercourse with them of the freest and most affectionate kind. How comes it that his immoralities were never suspected by his own family that his daughter and her children rejected with horror and contempt the charges brought against him? That my brother, then a young man certain to know all that was going on behind the scenes, positively declares his indignant disbelief in the imputations and solemnly affirms that he never saw or heard the smallest thing which could lead him to suspect that his grandfather's life was other than perfectly pure. His apartments had no private entrance not perfectly accessible and visible to all the household. No female domestic ever entered his chambers except at hours when he was known not to be there and none could have entered without being exposed to the public gaze. But again I would put it to any fair mind to decide if a man so admirable in his domestic character as Mr. Jefferson, so devoted to his daughters and their children, so fond of their society, so tender, considerate, refined in his intercourse with them, so watchful over them in all respects, would be likely to rear a race of half breeds under their eyes and carry on his low amours in the circle of his family.

Now many causes existed which might have given rise to suspicions, setting aside the inveterate rage and malice of Mr. Jefferson's traducers.

The house at Monticello was a long time in building and was principally built by Irish workmen. These men were known to have had children of whom the mothers were black women. But these women were much better pleased to have it supposed that such children were their master's. 'Le Czar m'a fait l'honneur de me faire cet enfant.' There were dissipated young men in the neighborhood who sought the society of the mulattresses and they in like manner were not anxious to establish any claim of paternity in the results of such associations.

One woman known to Mr. J. Q. Adams and others as 'dusky Sally' was pretty notoriously the mistress of a married man, a near relation of Mr. Jefferson's, and there can be small question that her children were his. They were all fair and all set free at my grandfather's death, or had been suffered to absent themselves permanently before he died. The mother, Sally Hemings, had accompanied Mr. Jefferson's younger daughter to Paris and was lady's maid to both sisters. Again I ask is it likely that so fond, so anxious a father, whose letters to his daughters are replete with tenderness and with good counsels for their conduct, should (when there were so many other objects upon whom to fix his illicit attentions) have selected the female attendant of his own pure children to become his paramour! The thing will not bear telling. There are such things, after all, as moral impossibilities.

The habit that the southern slaves have of adopting their master's manes is another cause of misrepresentation and misapprehension. There is no doubt

that such of Mr. Jefferson's slaves as were sold after his death would call themselves by his name. One very notorious villain who never had been the property of Mr. Jefferson, took his name and proclaimed himself his son. He was as black as a crow, and born either during Mr. Jefferson's absence abroad, or under some other circumstances which rendered the truth of his assertion simply impossible.

I have written thus far thinking you might chose to communicate my letter to Mr. Bulfinch. Now I will tell you in confidence what Jefferson told me under the like condition. Mr. Southall and himself being young men together, heard Mr. Peter Carr say with a laugh, that the old gentleman had to bear the blame of his and Sam's (Col. Carr) misdeeds.

There is a general impression that the few children of Sally Hemings were all the children of Col. Carr, the most notorious good-natured Turk that ever was master of a black seraglio kept at other men's expense. His deeds are as well known as his name. I have written in very great haste for I have very little time to write. We sat down sixteen at my brother's table to day, and are never less than twelve Children, grandchildren, visitors, friends I am in a perfect whirl. Yet this is the way in which I lived during all my girlish days, and then it seemed the easiest and most natural thing imaginable. Now I wonder how any head can bear it long. But Jefferson [her brother] and Jane [his wife] are the most affectionate parents and the kindest neighbors that I know.

[Signed]

The second part of the "Family Denial" is a letter from Henry S. Randall, reporting a conversation between himself and Thomas Jefferson Randolph in which Randolph stated that Peter Carr had fathered Sally Hemings's children. This letter was published in full in MILTON E. FLOWER, JAMES PARTON—THE FATHER OF MODERN BIOGRAPHY 236-39 (1951), and printed in Fawn Brodie's biography of Jefferson:

*Dear Sir [to James Parton],  
Courtland Village, N.Y. June 1, 1968*

The "Dusky Sally Story"—the story that Mr. Jefferson kept one of his slaves, (Sally Hemings) as his mistress and had children by her, was once extensively believed by respectable men, and I believe both John Quincy Adams and our own Bryant sounded their poetical lyres on this very poetical subject!

Walking about mouldering Monticello one day with Col. T. J. Randolph (Mr. Jefferson's oldest grandson) he showed me a smoke blackened and sooty room

in one of the colonnades and informed me it was Sally Hemings' room. He asked me if I knew how the story of Mr. Jefferson's connection with her originated. I told him I did not. "There was a better excuse for it, said he, than you might think: she had children which resembled Mr. Jefferson so closely that it was plain that they had his blood in their veins." He said in one case the resemblance was so close, that at some distance or in the dusk the slave, dressed in the same way, might have been mistaken for Mr. Jefferson. He said in one instance, a gentleman dining with Mr. Jefferson looked so startled as he raised his eyes from the latter to the servant behind him, that his discovery of the resemblance was so perfectly obvious to all. Sally Hemings was a house servant and her children were brought up house servants~o that the likeness between master and slave was blazoned to all the multitudes who visited this political mecca.

Mr. Jefferson had two nephews, Peter Carr and Samuel Carr whom he brought up in his house. They were the sons of Jefferson's sister and her husband Dabney Carr, that young and brilliant orator described by Wirt, who shone so conspicuously in the dawn of the Revolution, but who died in 17(?). Peter was peculiarly gifted and amiable. Of Samuel I know less. But he became a man of repute and sat in the State Senate of Virginia. Col. Randolph informed me that Sally Hemings was the mistress of Peter, and her sister Betsey the mistress of Samuel and from these connections sprang the progeny which resembled Mr. Jefferson. Both the Heming girls were light colored and decidedly good looking. The Colonel said their connection with the Carrs was perfectly notorious at Monticello, and scarcely disguised by the latter never disavowed by them. Samuel's proceedings were particularly open.

Col. Randolph informed me that there was not the shadow of suspicion that Mr. Jefferson in this or any other instance had commerce with female slaves. At the periods when these Carr children were born, he, Col. Randolph, had charge of Monticello! He gave all the general directions, gave out their clothes to the slaves, etc., etc. He said Sally Hemings was treated, dressed, etc., exactly like the rest. He said Mr. Jefferson never locked the door of his room by day: and that he (Col. Randolph) slept within sound of his breathing at nights he said he had never seen a motion, or a look, or a circumstance which led him to suspect for an instant that there was a particle more of familiarity between Mr. Jefferson and Sally Hemings than between him and the most repulsive servant in the establishment and that no person ever living at Monticello dreamed of such a thing.<sup>7</sup> With Betsy Hemings, whose children also resembled him, his habitual meeting, was less frequent and the chance of suspicion still less, and his connection with her was never indeed alleged by any of our northern politicians, or poets.

Col. Randolph said that he had spent a good share of his life closely about Mr. Jefferson at home and on journeys in all sorts of circumstances and he fully believed him chaste and pure as "immaculate a man as God ever created."

Mr. Jefferson's oldest daughter Mrs. Gov. Randolph, took the Dusky Sally stories much to heart. But she never spoke to her sons but once on the subject. Not long before her death she called two of them the Colonel and George Wythe Randolph to her. She asked the Colonel if he remembered "—Henings (the slave who most resembled Mr. Jefferson) was born." He said he could answer by referring to the book containing the list of slaves. I turned to the book and found that the slave was born at the time supposed by Mrs. Randolph. She then directed her son's attention to the fact that Mr. Jefferson and Sally Hemings could not have met —were far distant from each other for fifteen months prior to such birth. She bade her sons (to) remember this fact, and always to defend the character of their grandfather. It so happened when I was afterwards examining an old account book of Jefferson's I came upon the original entry of this slave's birth: and I was then able (to know) from well known circumstances to prove the fifteen months separation—but those circumstances have faded from my memory. I have no doubt I could recover them however did Mr. Jefferson's vindication in the least depend upon them.

Colonel Randolph said that a visitor at Monticello dropped a newspaper from his pocket or accidentally left it. After he was gone, he (Colonel Randolph) noticed the paper and found some very insulting remarks about Mr. Jefferson's mulatto children. The Colonel said he felt provoked. Pete, and Samuel Carr, were lying not far off under a shade tree. He took the paper and put it in Peter's [sic] hands, pointing out the article. Peter read it, tears coursing down his cheeks, and then handed it to Samuel. Samuel also shed tears. Peter exclaimed "Ar'nt you and I a couple of \_\_\_ pretty fellows to bring this disgrace on poor old uncle who has always fed us! We ought to be \_\_\_ by \_\_\_."

I could give fifty more facts were there time and were there any need of it, to show Mr. Jefferson's innocence of this and all similar offenses against propriety.

I asked Col. Randolph of, on earth Mr. Jefferson did (not) put these slaves who looked like him out of the public sight by sending them to his Bedford [Bedford] estate or elsewhere. He said Mr. Jefferson never betrayed the least consciousness of the resemblance and although he (Col. Randolph) and he had no doubt his mother, would have been very glad to have them removed, that both and all venerated Mr. Jefferson too deeply to broach such a topic to him. What suited him, satisfied them. Mr. Jefferson was deeply attached to the Carrs especially to Peter. He was extremely indulgent to them and the idea of watching them for faults or vices probably never occurred to him.

Do you ask why I did not state, or at least hint the above facts in my Life of Jefferson? I wanted to do so, but Colonel Randolph, in this solitary case alone, prohibited me from using at my discretion the information he furnished me with. When I rather pressed him, on the point, he said, pointing to the family graveyard, "You are not bound to prove a negation. If I should allow you to take

Peter Carr's corpse into Court and plead guilty over it to shelter Mr. Jefferson, I should not dare again to walk by his grave: he would rise and spurn me." I am exceedingly glad Col. Randolph did overrule me in this particular. I should have made a shameful mistake. If I had unnecessarily defended him (and it was purely unnecessary to offer any defense) at the expense of a dear nephew and a noble man hating a single folly. \_\_\_\_\_

I write this currente, calamo, and you will not understand that in telling what Col. Randolph and others said, I claim to give their precise language. I give it as I now recall it. I believe I hit at least the essential purport and spirit of it in every case.

Do you wonder that the above explanations were not made by Mr. Jefferson's friends when the old Federal Party were hurling their villanes at him for keeping a Congo Harem. Nobody could have furnished a hint of explanation outside the family. The secrets of an old Virginia Manor house were like the secrets of an Old Norman Castle. Dr. Dungleon, and Professor Tucker had lived years near Mr. Jefferson in the University and were often at Monticello. They saw what others saw. But Dr. D. told me that neither he nor Prof. T. ever heard the subject named in Virginia. An awe and veneration was felt for Mr. Jefferson among his neighbors which in their view, rendered it shameful to even talk about his name in such a connexion [sic]. Dr. D. told me that he never heard of Col. Randolph talking with anyone on the subject bot [sic] me. But he said in his own secret mind he had always believed the matter stood just as Col. Randolph explained it to me.

You ask if I will not write a cheap Life of Jefferson of 600 pages, to go into families who will not purchase a larger work. I some years ago commenced such a condensed biography. I suspended the work when the storm of Civil War burst over the land. I have not again resumed it. I may yet do so hereafter—I have been strongly urged to the work by a prominent publishing house, and if I find time I may again mount my old hobby.

I must again express my regret that I cannot send you a fine auto graph letter of Mr. Jefferson on some interesting topic but I am stripped down to those his family expected me to keep. But I send you some characteristic leaves—one from his draft of his Parliamentary Law.

Very truly yours,

HENRY S. RANDALL  
James Parton, Esq.

## Appendix D

### List of Key Witnesses

EDMUND BACON—Jefferson’s overseer at Monticello from 1806 to 1823.

JAMES CALLENDER—Journalist. First published allegation that Jefferson had fathered the children of Sally Hemings.

PETER CARR—Nephew of Thomas Jefferson. Alleged lover of Sally Hemings and alleged father of her children. Born in 1770, died in 1815.

SAMUEL CARR—Nephew of Thomas Jefferson. Brother of Peter. Alleged lover of Sally Hemings and alleged father of her children. Born in 1771, died in 1855.

ELLEN RANDOLPH COOLIDGE—Granddaughter of Thomas Jefferson. Daughter of Martha Jefferson Randolph and Thomas Mann Randolph, Jr. Wrote letter to her husband saying that Samuel Carr was the father of Sally Hemings children.

MARIA COSWAY—Recipient of Jefferson’s love letter *Dialogue between My Head and My Heart*. It was thought the relationship was intense, but platonic.

MARY JEFFERSON EPPES—Youngest surviving daughter of Jefferson and Martha Wayles Jefferson. Also called Maria and Polly. Born in 1778, died in 1804. Sally Hemings accompanied her to France in 1787. Married John Eppes.

BEVERLY HEMINGS—Full name William Beverly Hemings. Born in 1798. Son of Sally Hemings. Alleged son of Thomas Jefferson or Peter or Samuel Carr. Ran away from Monticello in 1822.

CRITTA HEMINGS—Sister of Sally Hemings. Daughter of Elizabeth Hemings and John Wayles.

ELIZABETH (BETTY) HEMINGS—Mother of Sally Hemings. Mistress of John Wayles.

ESTON HEMINGS—Full name Thomas Eston Hemings. Born in 1808. Son of Sally Hemings. Alleged son of Thomas Jefferson or Peter or Samuel Carr.

MADISON HEMINGS—Full name James Madison Hemings. Born in 1805, died in 1877. Son of Sally Hemings. Alleged son of Thomas Jefferson or Peter or Samuel Carr. Interview printed in *Pike County (Ohio)*

*Republican* in 1873, in which he said he was the son of Thomas Jefferson.

SALLY HEMINGS—Probable given name Sarah. Alleged mistress of Jefferson. Born in 1773, died in 1835. Daughter of Elizabeth Hemings and John Wayles.

MARTHA WAYLES JEFFERSON—Wife of ten years of Jefferson. Born in 1748, died in 1782. Daughter of John Wayles. Mother of two children who survived to adulthood, Martha and Mary (“Maria”).

ISAAC JEFFERSON—Former slave from Monticello. Gave a statement to the *Pike County (Ohio) Republican* affirming Madison Hemings’s assertion that Jefferson had a sexual relationship with Sally Hemings.

RANDOLPH JEFFERSON—Thomas Jefferson’s younger brother, and candidate for the paternity of Eston Hemings as well as Sally’s other children.

GEORGE WYTHE RANDOLPH—Youngest grandson of Thomas Jefferson. Son of Martha Jefferson Randolph and Thomas Mann Randolph, Jr. His mother attempted to prove to him and his older brother that Jefferson could not have been the father of Sally Hemings’s children.

MARTHA JEFFERSON RANDOLPH—Oldest daughter of Thomas Jefferson. Also called Patsy. Married to Thomas Mann Randolph, Jr. Mother of twelve children, including Thomas Jefferson Randolph, Ellen Randolph Coolidge, and George Wyeth R Randolph.

THOMAS JEFFERSON RANDOLPH—Oldest grandson of Thomas Jefferson. Son of Martha Jefferson Randolph. Told his grandfather’s biographer that Peter Carr had admitted to being the father of Sally Hemings’s children. Told his sister Ellen Randolph Coolidge that he overheard Peter Carr saying that he and his brother were the fathers of Sally Hemings’s children.

JOHN WAYLES—Father of Thomas Jefferson’s wife, Martha Wayles Jefferson.

S.F. WETMORE—Editor of the *Pike County (Ohio) Republican*. He was a census taker for Pike County. Wrote down and published Madison Hemings memoirs in 1873.

## Appendix E

### Rebuttal of the John Hartwell Cocke Letters<sup>361</sup>

TJMF Report, September 11, 2000  
 Assessed by Jefferson Family Historian, Herbert Barger,  
 Dr. E.A. Foster's DNA Study Assistant

Much emphasis has been placed upon the two John Hartwell Cocke letters on pages 13 and 14 of the Thomas Jefferson Memorial Foundation Report. Proponents of the Thomas Jefferson-Sally Hemings liaison are always quick to point out that even Mr. Jefferson's great friend and one of the founding officials of the University of Virginia, Mr. Cocke, also accused Mr. Jefferson of fathering children by Sally Hemings. It must be remembered that Mr. Cocke never charged Mr. Jefferson with Callender's rumors and Campaign Lies while Jefferson was alive but he wished to make sure Mr. Jefferson was not around.

In the case of these two letters, one written 27 years after Mr. Jefferson's death and the other 33 years after his death, are general statements originally discussing the overall "institution" of fathering illegitimate slave children and cited some instances.

1853: The January 26, 1853 letter (pg. 13), tells of Rev. Lemuel Hatch informing him of two wealthy friends of Virginia sending away from their premises a slave woman who had a number of illegitimate children of the "INSTITUTION," defined in the dictionary as "an established practice." We might ask, is this not in reference to the "institution of slavery," not a reference and indictment of any one individual. He further states, "A "SAMPLE" of the moral and social blessing of the "INSTITUTION" (institution of slavery). NOTE: As a preacher he is against this "institution" and may possibly be anti-Jefferson as were many of the clergy of that era(t0 0.0000 D(to)TT4eo j3.2400 0.0000 TD(e)Tj-p6000 0.0

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<sup>361</sup> Appendix E is quoted from Herbert Barger, Jefferson Family Historian, *Rebuttal of the John Hartwell Cocke Letters*, in TJMF REPORT, Sept. 11, 2000. The John H. Cocke journal entries were dated January 26, 1853 and April 23, 1859. The original journal is at the University of Virginia Library. See BURTON, *supra* note 33, at 94-96.

someone in the limelight and politically connected? He goes on to say it was sustained by other such dignitaries of the Republic. While the monstrous doctrine, finds men in other respects respectable, who assert that slavery is a moral, social, and political blessing.

As we can see, a preacher is giving John Hartwell Cocke, who wrote it in his journal, his opinion of slavery and cites instances of what are the results of “this institution of slavery.” In no way did the Reverend Hatch state that Thomas Jefferson (himself) fathered a Hemings child, he was merely speaking of “the institution of slavery.” Many in the year 1853 remembered the charges spread by James T. Callender’s article of September 1802 naming Thomas Jefferson the father of Sally’s child, Tom “Hemings” Woodson . . . DNA testing eliminated (on two separate tests) any connection of the Woodson and Jefferson descendants’ DNA.

1859: The April 23, 1859 letter (pg. 14), tells of a rich planter, Mr. Nixon, a bachelor, building a splendid mansion and lived with a mulatto girl. The defenders of “THE INSTITUTION” (meaning slave-owners, one of which was Jefferson as we all know), omit to look at the future, –that all bachelors–or a large majority–at least–keep as a substitute for a wife –some individual of their own slaves. NOTE: This is not news and we know it went on, but how can Mr. Cocke say first, all then change it to or a large majority (sounds like the headlines of today to grab attention). Now he proceeds to involve Mr. Jefferson by stating, “In Virginia, this damnable practice prevails as much as anywhere–and probably more–as Mr. Jefferson’s example can be () for its defense.” What is he saying? He is merely saying that the practice of slavery is probably more prevalent in Virginia and that “all or a large majority of bachelors engage in this practice. Yes, we all know about the numerous mulattos at Monticello of which he is referring to. However, he has not accused Thomas Jefferson of personally fathering a Sally Hemings child. Remember that accusation goes back to James T. Callender’s . . . article of 1802, which has been proven by DNA to be a lie. Please read all the revealing Callender articles compiled by Dr. & Mrs. James McMurry. Callender was most unkind in his references to Sally Hemings and had never seen or met her, she was just being slandered because he wished to “get” Thomas Jefferson. These Callender accusations, complete with the same misspelling of the name, “Wales,” which should be “Wayles,” and other thoughts, are just repeated in the article of Pike County, Ohio by Madison Hemings, son of Sally Hemings, who NEVER stated that his mother TOLD HIM these accusations. They were just stated in the reporter’s words in the article.

1840: Something even more revealing about General John Hartwell Cocke comes to us from a book/manuscript by Lucius Manlius Sargent, “Reminiscences of Lucius Manlius Sargent,” a leather-bound type written, privately printed book. He wrote it sometime before his death in 1867. Mr. Sargent

describes his father, a staunch Federalist and his grief at the death of George Washington. After describing the scene (which took place in Boston), Mr. Sargent notes, "In the spring of 1840 (Barger notes: well before the 1853 and 1859 letters mentioned above), when I related this anecdote to my friend, Gen. Cocke, in Richmond, Va. he observed, that the people of the North cherished the memory of Washington, much more gracefully, than those of the South; and added, that no persons had done more to injure his reputation, than two Virginians, Jefferson & Randolph." SO we can see that Gen. John Hartwell Cocke, now political enemy and FORMER friend of Jefferson, had a reason as early as 1840 to paint Mr. Jefferson in a bad light and proceeded to do so in those two letters cited by TJMF as "proof of some kind of truth." It was no more than a further assignation of Mr. Jefferson's character, NOT first hand statements of fact that Jefferson fathered any Hemings child.

Historian Andrew Burstein writing in his 2005 book, "Jefferson Secrets," (five years after my above rebuttal of 2000), states that he (Cocke), felt antagonistic toward Jefferson's undemanding Unitarianism, a feeling that had built over decades. Even the week of Jefferson's death, brought a suggestion from a friend, that they might want to lobby for a replacement for Jefferson on the university's Board of Visitors who better satisfied the "friends of Religion." And here comes the clincher, Burstein states, "So we cannot, without pause, consider Cocke an unimpeachable observer on the subject of Thomas Jefferson's private conduct." Yes, in the earlier founding days of the University of Virginia they were friends but "religion" changed all that we can see. So now it was time for Cocke to throw in some old rumors that James Callender had written as part of his Campaign Lies against Jefferson in 1802 . . . . Callender's lies were forever put to rest when DNA indicated there was NO DNA match between Jefferson DNA and Woodson DNA. This was where Mr. John Hartwell Cocke had gotten his rumors of a Thomas-Sally liaison. Mr. Burstein then remarks, "Certainly he knew the content of the Callender articles, as a young adult, out of college and newly married when they were published." Mr. Burstein further states that Cocke does not indicate how he knows firsthand of Jefferson's complicity in race mixing . . . whether he even [saw] Sally or the Hemings children.

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