Criminal Trials as Culture Wars: Southern Honor and the Acquittal of Frank James

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I. INTRODUCTION

More than any other nation, the United States was formed by individuals for whom public justice was central to identity. What the country has lacked in public religious spectacle we have replaced with public narratives of crime, justice, and redemption. A century before we became addicted to simulated spectacles of triumph, tragedy, life, and death in movie theaters and sports arenas, we sought out the real thing in criminal trials and executions. These legal proceedings were often the most widely-attended public events in the community.

While even “ordinary” criminal trials could become important events, “showcase” trials could become particularly important, as theater, as social commentary, and as a stage of morality plays. In some cases, such as the Scopes trial, the trial would become important because of the legal context. In other cases, sensational underlying facts or the celebrity of the participant might cause great public interest. When any of these factors was combined with great advocacy, the important events could serve to “capture or even transform the views or prejudices of a period.”

In the Midwest, perhaps no nineteenth-century trial better captured these aspects of a “showcase” trial than the trial of Frank James. For certain, the criminal was notorious—Jesse and Frank James were at the time the most famous pair of outlaws in American history. The crime for which Frank was tried—one of the gang’s train robberies, which included two murders—was lurid enough, but virtually all participants

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knew that the crime was just one of a multitude of similar crimes the brothers committed (or allegedly committed).

More importantly, the events of the James brothers occupied a contested narrative. The statement that "one man's terrorist is another man's freedom fighter" was never more true, in the United States, than in the Missouri of the Civil War and its aftermath. Although there is powerful evidence that the James brothers committed their crimes for money or thrills, the brothers, with some very able help, were successful in creating an invented narrative in which they were cast as noble soldiers who were turned into political criminals. Supporters of the James brothers believed them to be defenders and exemplars of a Southern tradition of honor and morality. According to this account, they were courageous, honorable, chivalrous, and protective of family. Meanwhile, their Northern pursuers were alien, faceless corporate cowards who were willing to attack women and children, and who cared nothing for ties of blood and friendship.

To Missourians not sharing this Southern sensibility and mythology, the James brothers were vicious criminals, and their success was a financial catastrophe and an acute ideological embarrassment. For these people, the defeat of the James brothers was crucial, for only after it occurred would Missouri be able to enter, unambiguously, the modern world.3 The trial of Frank James, the last act in this drama, would help determine whether law and order had returned to the state.

The James brothers were thus a part of a culture war fought in the lingering shadows of the real Civil War. The trial was conducted in the echoes of that war. The litigants played to the sentiments evoked by the war. To some degree, their speeches shaped the way the war was remembered. The trial featured two magnificent speeches that have been recorded and preserved, the summation of Chief Prosecutor William Wallace and that of defense attorney John Philips.4 Ultimately, Philips's was the more successful. Philips's speech was an incredibly partisan attempt at both victory and reconciliation. It was not an appeal for null-

3. See, e.g., DAVID THELEN, PATHS OF RESISTANCE 71–77 (1986) (relaying one account of this divide); see also MICHAEL FELLMAN, INSIDE WAR 260–63 (1989) (discussing the legend that surrounded the James brothers in the eyes of many Missourians).

4. There is no verbatim record of the entire trial. The closest thing to a complete account was published in 1898, and reprinted in 1977. GEORGE W. MILLER, INTRODUCTION TO JAMES D. HURON, THE TRIAL OF FRANK JAMES FOR MURDER (Crown Publishers, Inc., 1977) (1898). Substantially the same version is set forth in volume XI of AMERICAN STATE TRIALS, a multi-volume treatise compiled by John D. Lawson, first published in 1914–36, and reprinted in 1972. XI AMERICAN STATE TRIALS 661–852 (John D. Lawson ed., 1972). Because the version in AMERICAN STATE TRIALS is likely to be more accessible to readers of this article, I will cite to the trial from that volume.
fication, but rather was an argument for the existence of reasonable doubt. The key to that doubt, in Philips’s account, was the matter of honor. Philips argued that James was honorable, and therefore believable, and that his foes were dishonorable and unworthy of belief.

In his appeal, Philips raised arguments that are rarely sounded in modern defense summations. He exalted the physical courage of the defendant and belittled any fear that James might have inspired in any of the prosecution witnesses. He applauded the refusal of defense witnesses to answer questions put to them. He glorified ties of friendship and family, transferring into a reason for belief the very bonds that ordinarily arouse suspicion of bias.

Philips moved the trial audience to applause and tears. He helped produce a not-guilty verdict. His client, Frank James, was allowed to live out his life in peace. After the trial, Philips and co-counsel went on to a succession of elected and appointed positions. Missouri continued to heal, with its newly-minted Southern identity and its rapidly-developing Northern industry. A generation later (during the lifetime of Frank James), the state would host the entire globe as St. Louis, the fourth largest city in the United States, played host to the World’s Fair.

This article examines Frank James’s trial, and particularly the speech of John Philips, to determine the way it reflected its time and the meaning it had and continues to have. I will begin, in Part II, with a brief description of the tumultuous events of the Civil War and then summarize the “career” of the James brothers that came in its aftermath. Then, in Part III and IV, I will look at the events of James’s trial, beginning with his “surrender” and culminating with Philips’s speech. Finally, in Part V, I shall attempt some conclusions concerning the power of the myth of Southern honor in producing the verdict and in shaping its remembrance.

II. RISE AND FALL

Perhaps no criminal in American history was more notorious at the time of his trial than Frank James. No other pair of American robber-killers matched the ability of Frank and his brother Jesse to secure fame for their crimes, while simultaneously denying their commission. For over fifteen years the pair successfully evaded capture, with Jesse falling to a bullet from one of his partners in crime and Frank only coming to trial after surrendering himself personally to the Governor of Missouri. During their reign, the duo possessed a popularity and drew on a well-spring of sympathy undreamed of by modern criminals. Although wanted for any number of crimes, they moved more-or-less openly in Missouri, Kentucky, and Tennessee, sheltered by family and friends.
Many regarded them as heroes, while their pursuers were regarded as murderers. The brothers have retained more enduring fame than perhaps any other pair of American outlaws.

A. The War

Frank and Jesse James were the product of our country’s most turbulent time—the Civil War and its aftermath—in its most turbulent place—the Missouri-Kansas border. The James brothers were born in Clay County, Missouri, to Robert and Zerelda Cole James, who were originally from Kentucky. The family owned slaves, and they were always outspokenly pro-Southern. The state into which Frank and Jesse were born could truly be described, prior to 1860, as a “border” state. Although slavery was legal, most of the citizens were not slaveholders. African-Americans constituted only ten percent of the prewar population. The state contained rural areas, such as Clay County in the west, devoted to agriculture where slavery was common. But it also included cities, St. Louis in particular, full of immigrant laborers with no ties to any “Southern” identity. Although most citizens of the state were, in some sense, “southern” in origin, most participated in the economic changes that were “northerly in direction.”

Thus, when the Civil War came in 1861, there were currents pulling Missouri toward both the Union and Confederacy. It is possible that, had such a stance been possible, a majority of Missouri voters would have opted for neutrality. Such a resolution was not possible. A constitutional convention failed to support secession but the pro-Confederate Governor, Claiborne F. Jackson, ordered the State Guard into camp and, in a rump session of the legislature, passed an ordinance of secession. In response, the convention deposed the governor and established a provisional government. Each side attempted to raise an army and fighting began.

The early Confederate efforts were mostly unsuccessful and, by 1862, the state was firmly in Union hands. But while the formal Civil War wound down in Missouri, the more brutal guerrilla war was only

5. WILLIAM SETTLE, JESSE JAMES WAS HIS NAME, OR, FACT AND FICTION CONCERNING THE CAREERS OF THE NOTORIOUS JAMES BROTHERS OF MISSOURI 6–11 (1966); T. J. STILES, JESSE JAMES: LAST REBEL OF THE CIVIL WAR 54–55 (2002). The family owned 275 acres of land. While they were not rich plantation owners, they were not the yeoman farmers pictured in so many of the legends that would grow up around the family.
6. FELLMAN, supra note 3, at 22.
7. Id.; SETTLE, supra note 5, at 12.
8. SETTLE, supra note 5, at 12–15.
beginning. The first campaign was concentrated in western and central Missouri. Guerrillas tore down telegraph poles, tore up railroad tracks, sniped at federal sentries, and exiled pro-Union families. Federal officials retaliated with harsh counter-measures, including a decree that any saboteur would be immediately shot. Military commissions tried those suspected of disloyalty.

Missouri gradually descended into a “war of 10,000 nasty incidents,” the most brutal guerrilla conflict ever waged on American soil. This cycle of violence—with its escalating savagery by the guerrillas and ever-more-harsh reprisals by federal authorities, which produced more Confederate sympathizers, and furnished justification for yet more reprisals—is a litany that has depressingly familiar echoes to any twenty-first-century reader. Frank James, who had joined the “regular” Confederate forces in 1861, eventually became a recruit in a number of the guerrilla bands. His younger brother, Jesse, joined him as the war wound down. They were members of the units that engaged in the worst atrocities. Although neither attained any position of leadership, they were reportedly able and remorseless killers. The brothers survived the fighting and, in 1865, they returned to the family homestead.

The years following the War were difficult in many parts of the United States; few places were harder hit than Missouri. Between 1861 and 1865, the state’s population fell by 300,000. The conflicts between pro-Union and pro-Confederate Missourians were bitter and often personal. The peace imposed by the James’s Unionist neighbors was neither

9. See, e.g., STILES, supra note 5, at 74; SETTLE, supra note 5, at 17. Southern partisans were primed for this kind of warfare, in part, by virtue of having engaged in it against Kansans during the “border war” of the 1850s. See generally THOMAS GOODRICH, WAR TO THE KNIFE: BLEEDING KANSAS 1854–1861 (1998) (chronicling border wars between Kansas and Missouri); THOMAS GOODRICH, BLACK FLAG: GUERRILLA WARFARE ON THE WESTERN BORDER 1861–1865, 2–10 (1995) (recounting some occurrences from the Kansas-Missouri border wars); FELLMAN, supra note 3, at 23–29 (discussing guerrilla warfare during the Kansas-Missouri border wars).

10. FELLMAN, supra note 3, at 251.

11. Frank James participated in the worst single atrocity of the War, the destruction of Lawrence, Kansas in 1863, in which 150–200 mostly unarmed men and boys were killed by the guerrillas. The massacre, the deadliest committed by whites upon whites in our nation’s history, was followed by General Order 11, issued by Union General Ewing, which ordered the evacuation of four Missouri counties that bordered Kansas.


13. See id. at 122–23 (recounting the James brothers’ participation in the Centraltia massacre).

14. SETTLE, supra note 5, at 32.

15. “Roughly one out of every three citizens had been killed in battle, murdered at home, driven out by guerrilla threats, banished by the authorities, or simply had fled to a more hopeful place.” STILES, supra note 5, at 156; see also FELLMAN, supra note 3, at 242 (stating Missouri’s population decreased by an estimated 300,000 by 1865).
charitable, nor was it intended to be. A constitutional convention that was empaneled before War's end in 1865 voted to require administration of an oath, which demanded that each potential officeholder, juror, educator, voter, and even minister, swear that he had not supported rebellion. Both legal and vigilante "justice" were employed to maintain order. Soldiers on both sides returning to their homes were likely to be armed, and many continued to harass their neighbors. Acts of violence, including bank robbery, were endemic.

B. The Rise of the James Gang

Although their precise activities immediately following the War are unknown, Frank and Jesse James may have engaged in some of these robberies. But, during the first four turbulent years after the War, they were not formally charged with any, nor were they even publicly connected to the most violent of the activities. Had they wished, they might well have been able to lead an obscure and peaceful life as farmers on the family homestead.

In 1869, Frank and Jesse James were publicly identified, for the first time, as robbers and killers. They and a number of associates robbed the Daviess County Savings Association in Gallatin, Missouri. During the robbery, they killed John W. Sheets, the sole operator of the bank, and a local democratic politician. Authorities pursued the brothers, but they made a narrow escape from their home. The Governor, Sheets's widow, the bank, and the people of Gallatin and Daviess County posted rewards for their capture totaling more than $2000.

What followed the 1869 robbery was one of the great collaborations of imagination and publicity in American history. Sometime after the robbery, Jesse James came into contact with John Edwards, a former Confederate soldier and the editor of the Kansas City Times. In June, 1870, the newspaper published a letter purporting to come from James. In the letter, the fugitive invoked themes that became his trademark for

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16. The Missouri delegation to the 1864 Republican Convention actually voted against Lincoln because it believed his peace terms to be too magnanimous. STILES, supra note 5, at 157.
17. The oath was ultimately declared a violation of the Ex Post Facto clause in Cummings v. Missouri, 21 U.S. 277 (1866).
18. STILES, supra note 5, at 162–63, 179, 192–96.
19. SETTLE, supra note 5, at 32.
20. See STILES, supra note 5, at 203–06 (describing the robbery); SETTLE, supra note 5, at 39 (same).
21. STILES, supra note 5, at 203.
22. STILES, supra note 5, at 206.
over a decade. He argued that he was, in fact, innocent of the crimes. James also took his first pass at playing the war card, contending that, as a Southern "bushwacker," he could not surrender without fear of being lynched. He stated he would never surrender "to be mobbed by a set of bloodthirsty poltroons." It is true, he added, that "during the war I was a Confederate soldier, and fought under the Black flag," but now, he said, he was a peaceful citizen, who would turn himself in just as soon as he could get a fair trial.

In September, 1872, James and Edwards collaborated again. On September 26, three masked men robbed the cashier of the Kansas City fair; even those not in sympathy with the James gang considered this daylight robbery, in an area crowded with thousands of people, remarkable. But for Edwards, no superlatives were enough. In his editorial he declared the robbery an act of "superb daring." He argued that readers were bound to admire the deed and "revere" the perpetrators.

Two days later, Edwards published his most famous editorial, which he entitled the *Chivalry of Crime*. In it, he declared the robbers as heroes, as "chivalric, poetic; superb." He argued that such noble robbers would "never go upon the highway in lonesome places to plunder the pilgrim," but, instead, would only rob in daylight. Robbers such as these belong to the times of Arthur, Edwards seemed to argue, and such individuals were those who rode with the Confederacy:

There are men in Jackson, Cass, and Clay—a few there are left—who learned to dare when there was no such word as quarter in the dictionary of the Border. Men who carried their lives in their hands so long that they do not know how to commit them over into the keeping of the laws and regulations that exist now... Edwards thus posited the mythology of the "noble guerrilla," and then argued that those who robbed were a part of this tradition, and, indeed, a tradition that extended to times of legend.

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24. The "Black Flag" was the flag of no quarter. James thus boasted of his status as an unlawful combatant, and justified his side's own decision, literally, to take no prisoners. In fact, there is no evidence that the units in which he fought actually carried a Black Flag. Kansas State Historical Society, *Quantrill's Flag*, at http://www.kshs.org/cool12/coolquan.htm (last visited Jan. 23, 2003).
25. *Stiles*, supra note 5, at 211.
26. *Settle*, supra note 5, at 45; *Stiles*, supra note 5, at 223.
27. *Settle*, supra note 5, at 45; *Stiles*, supra note 5, at 223.
28. *Settle*, supra note 5, at 45; *Stiles*, supra note 5, at 224.
29. *Settle*, supra note 5, at 45; *Stiles*, supra note 5, at 224.
31. *Id.*
The third salvo was launched three weeks later, with the publication of a letter from the alleged robber. The letter denied that those who took the money were thieves but instead asserted that they were "bold robbers" who were linked in history with Alexander the Great and Julius Caesar. The letter included an explicit denunciation of the Republican Party, with the writer arguing that it was an insult for him to be compared to President Grant: "Grant's party has no respect for any one. They rob the poor and rich, and we rob the rich and give to the poor..."33

Over the next four years, James and Edwards continued their alliance. Jesse and Frank James graduated from bank to train robberies.34 As they moved up, so too did Edwards. On November 23, 1873, he published A Terrible Quintet, a special supplement of twenty pages for a national audience.35 Eleven of the twenty pages were devoted to Frank and Jesse James and featured the cognitive dissonance that is a part of the legend—a lengthy excuse for their deeds, a glorification of the acts, and a denial that James had in fact committed them.36

From every appearance, it seems that Edwards and the James brothers were successful in their public relations efforts to link their robberies to a remembered guerrilla past, and to suggest that, then and now, their acts represented ideals of honor and chivalry of which the defeated South could be proud. At least some parts of the state viewed the brothers with sympathy and support. This support may have originated from the belief that the brothers' acts reflected honor upon them and their service in the Southern cause. They may have received support simply because those who sympathized with the South were pleased to have a symbol of resistance to the Radical Unionist victors. Whatever the reason, enough people were willing to justify their deeds, or even to harbor the men, that they were able to travel with some degree of freedom throughout Missouri and the South.

The tragic event that most demonstrated the power of the James brothers occurred in 1875. At the time, detectives from the Pinkerton Detective Agency, which had a contract with some of the affected railroads, were pursuing Jesse and Frank.37 On January 25, 1875, several detectives attempted a raid on the house of Jesse and Frank's mother, Mrs. Zerelda Samuels.38 The detectives threw in a crude incendiary de-

32. STILES, supra note 5, at 224.
33. Id. at 225.
34. SETTLE, supra note 5, at 47.
35. Id.
36. STILES, supra note 5, at 241–42.
38. See id. at 134–36 (describing the incident at the James home).
vice in an effort to force those inside out of the house. The device itself was not designed to explode but, apparently, Mr. Samuels, unable to remove the device from their floor, threw it into the fireplace. The casing of the device exploded, wounding Mrs. Samuels and killing her thirteen-year-old son.

The Pinkerton attack provoked enormous rage throughout the state. For many Missourians, the incident reawakened memories of the war. The media expressed outrage over the killing of an innocent child. John Edwards, as might have been expected, played the war card. He urged the citizens of Clay and other counties to:

rise up and hunt the midnight cowards and assassins to their death. Such a species of warfare is worse than any yet painted of savage nature of the dastardly dogs who were hunting flesh for hire . . . . Men of Missouri, you who fought under Anderson, Quantrill, Todd, Poole, and the balance of the borderers and guerrillas—you who live in Clay country, and Jackson, and wherever these detectives have dared to leave the railroad to go into the country, recall your woodcraft and give up these scoundrels to the Henry rifle and Colt's revolver. It is not for the robberies that Pinkerton hates the James Brothers. It is because like you they were at Lawrence, Centralia, and Fort Lincoln, and upon the Canadian, wherever the Black Flag floated and men neither knew or wanted quarter.39

The Missouri General Assembly took action to condemn the raid. It swiftly passed a resolution demanding an investigation. Thereafter, it considered and almost passed a measure to grant amnesty to the brothers. In a resolution offered March 17, 1875, the bill declared that the James brothers had "gallantly periled their lives and their all in the defence of their principles," and that they were driven to become outlaws by necessity. Declaring the brothers to be "too brave to be mean, too generous to be revengeful, and too gallant and honorable to betray a friend or break a promise," it urged that amnesty be extended for acts committed during the war.40 The amnesty bill actually received a majority vote, but failed to achieve the two-thirds needed for passage.41

The amnesty bill is powerful evidence of the success of Edwards's efforts to create a noble mythology for the James brothers and for the Confederate guerrillas as well. Through Edwards's pen, the vicious killers had become noble soldiers and bandits. The true Civil War in Mis-

40. Settle, supra note 5, at 81; Stiles, supra note 5, at 289–90.
41. Settle, supra note 5, at 81–83; Stiles, supra note 5, at 288–90.
souri, in which most young men had fought with the North, had instead become a war where the authentic citizens (the Southern Guerrillas) had fought against northern Occupiers. In this respect, the "invasion" of the James farm by Pinkerton detectives became the paradigm of the agony of Missouri during the Civil War and its aftermath.

As it was, the rise of the James gang coincided with the resurrection of pro-Southern political activity in Missouri. In 1870 the oath was repealed, and in 1872, 75,000 formerly disenfranchised ex-Confederates were finally able to vote again. Capitalizing on a split in the Republican Party, Democrats swept the state elections. Just three years later, ex-Confederates were in fact in command of state politics. In 1875, a constitutional convention was convened to redraw the state's constitution. Half of the delegates were Confederates or secessionist sympathizers, while only a quarter were pro-Union. The new Missouri Constitution they created was a triumphant Southern document: it segregated the schools, banned interracial marriages, strictly regulated taxes, banned serving soldiers and sailors from voting, and included an amnesty for all wartime activity taken under Union or Confederate authority.

C. Retirement and Return

If 1872–1875 marked the years of the James gang's greatest triumphs, 1876 marked their worst defeat. On September 7, 1876, Jesse and Frank James, the three Younger brothers, and three other men attempted to rob the First National Bank in Northfield, Minnesota. In the course of the robbery, the gang gunned down the bank teller and wounded another innocent citizen. The townspeople fought back and all but Jesse and Frank were either killed or captured. The brothers were able to make their way back to Missouri but, in the face of continuous pursuit, they were forced to flee; tracked through several states, the brothers seemingly vanished.

Between 1877 and 1879, Frank and Jesse James lived quietly in Tennessee. Despite their notoriety, they were successful in living nor-

44. See Robert Bar Smith, The Last Hurrah of the James-Younger Gang 85–92 (2001) (describing the robbery); see also Settle, supra note 5, at 92 (same); Stiles, supra note 5, at 328–35 (same).
45. Stiles, supra note 5, at 351.
mal lives under assumed names. The descriptions of the brothers continued to be so vague and inconsistent that they could not be apprehended on that basis alone.\textsuperscript{46} Stories of where they might be abounded, but interest in their capture had begun to wane.

Frank succeeded as a farmer, and apparently enjoyed his life. Jesse, who attempted a normal life as a horseman and gambler, apparently enjoyed his less. For whatever reason, in 1879, Jesse decided to continue his life as an outlaw. He visited the home of former Confederate General Joseph Shelby and began recruiting a new gang.\textsuperscript{47} Among the members were his cousin, Wood Hite, and Ed Miller, Bill Ryan, Tucker Bassham, and Dick Liddil.\textsuperscript{48}

What was the last phase of the James gang began with the robbery, in October, 1879, of a train in Glendale, in Jackson County, Missouri.\textsuperscript{49} This robbery, for which Jesse took credit in a subsequently published letter,\textsuperscript{50} was followed the next year by a string of crimes in Kentucky.\textsuperscript{51} In early 1881, Jesse and Bill Ryan participated in the robbery of a payroll clerk in Mussel Shoals, Alabama.\textsuperscript{52} That same year, Jesse James brazenly moved his family back to Missouri and recruited his last set of Confederates. On July 15, 1881, Jesse and Frank James, cousins Wood and Clarence Hite, and Dick Liddil boarded a train near Winston, Missouri.\textsuperscript{53} The James brothers and Wood Hite took seats in the smoking car. Clarence Hite and Liddil went to the front of the train to stop it. Jesse James shot and killed the conductor of the train, William Westphall, and a passenger, Frank McMillan, who apparently failed to get out of the way in time.\textsuperscript{54} On September 7, 1881, the robbers committed the last of their crimes, robbing a Chicago & Alton Railway Train at an excavation called Blue Cut.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{46} \cite{settle:note5,99}.
\item \textsuperscript{47} \cite{stiles:note5,352}.
\item \textsuperscript{48} \cite{id:yeatman,note37,212}.
\item \textsuperscript{49} \textit{See} \cite{settle:note5,102-03} (chronicling this train robbery); \cite{stiles:note5,355} (chronicling the Bluewater division of the canal project).
\item \textsuperscript{50} “We are the boys that are hard to handle and will make it hot for the party that ever tries to take us.” \cite{stiles:note5,355} (quoting the \textit{Kansas City Daily Journal}, Oct. 10, 1897).
\item \textsuperscript{51} \textit{See}, e.g., \cite{id:yeatman,note37,218-22} (describing multiple crimes effectuated by Jesse James in Kentucky).
\item \textsuperscript{52} \textit{See} \cite{stiles:note5,359-60} (recounting the robbery of the receiver of materials for the Bluewater division of the canal project).
\item \textsuperscript{53} \cite{stiles:note5,364}.
\item \textsuperscript{54} \textit{See} Clarence Hite’s Confession, \textit{reprinted in} \cite{miller:note4,311-12,52-53} (recounting Liddil’s testimony, which described the shooting of William Westphall and Frank McMillian); \cite{stiles:note5,364-65}.
\item \textsuperscript{55} \cite{stiles:note5,369}; \cite{id:yeatman,note37,253-56}.
\end{itemize}
The last set of robberies caused considerable outrage and calls for the apprehension of the gang. In the years between 1876 and 1879, sentiment toward the gang had changed. Whatever sympathy the public at large might have had toward the gang prior to 1876, by reason of their Civil War connection, there could be no conceivable Civil War justification for robberies begun after the three-year hiatus.\textsuperscript{56} James was now an embarrassment to many, and enormous pressure began to build to put an end to the gang. Thomas Crittenden, the Democratic Governor elected in 1880, expressed, in his inaugural address, his determination to rid the state of the bandits.\textsuperscript{57} William Wallace, the newly-elected prosecutor of Jackson County, also came to office on a pledge of stopping the gang.\textsuperscript{58} Following the Gallatin robbery-murder, the Governor, with the financial assistance of some of the affected railroads, offered a reward of $5000 for the delivery of Frank and Jesse, $5000 more for their conviction, and an additional $5000 for the apprehension of other members of the gang.\textsuperscript{59} In July, gang-member Tucker Basshem pleaded guilty to one of the robberies.\textsuperscript{60} In September, prosecutor Wallace was successful in convicting William Ryan, the first of the members of the James gang to be convicted after a trial.\textsuperscript{61} Later that fall, Dick Liddil, one of the gang, killed fellow gang-member Wood Hite.\textsuperscript{62} In early 1882, Clarence Hite, James's cousin and co-participant, was captured and pled guilty.\textsuperscript{63} Finally, on April 4, 1882, Robert Ford shot Jesse James in the back.\textsuperscript{64} By the end of April, 1882, the state had successfully ended the gang. Only Frank James remained at large.

\textsuperscript{56} The Glendale and Winston robberies are certainly a part of the fame of the James gang, see, e.g., The Ballad of Jesse James, quoted in Settle, supra note 5, at 173–74. But the crimes are not remembered as acts of resistance against Northern occupiers.
\textsuperscript{57} Settle, supra note 5, at 110.
\textsuperscript{58} Stiles, supra note 5, at 362–63.
\textsuperscript{59} Settle, supra note 5, at 110.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 113–14.
\textsuperscript{62} Yeatman, supra note 37, at 262.
\textsuperscript{63} Settle, supra note 5, at 115.
\textsuperscript{64} Robert Ford and his brother Charlie were indicted for Jesse's murder. After pleading guilty, they were sentenced to death. They were then promptly pardoned by Governor Crittenden. Id. at 119.
III. THE PROSECUTION

A. The Surrender

During the summer of 1882, Frank James and his family made a number of efforts to craft a deal whereby he might be granted immunity in return for his surrender and offer to live peaceably. James’s wife and mother met with William Wallace, prosecutor in Jackson County, Missouri. Wallace promised that James would not be harmed if he gave himself up. He also secured a promise, through Governor Crittenden, that while James would not receive immunity, the state would be satisfied with a short prison term. John Edwards, Jesse’s former mouthpiece, also attempted to negotiate Frank’s surrender.

Edwards’s efforts in fact succeeded in an arrest unlike any other in American history. On October 4, Edwards and James traveled to Jefferson City and checked themselves into a local hotel. Late that afternoon, they went to the Governor’s Office, where the Governor, numerous state officials, and the press that had been gathered for the occasion met them. Edwards introduced James to the Governor. James unbuckled his gunbelt and stated: “Governor Crittenden, I want to hand over to you that which no living man except myself has been permitted to touch since 1861, and to say that I am your prisoner.” James was then allowed to return to his hotel room, where he entertained a parade of hundreds of guests, including the Governor and his wife. Early the next morning, a party of several individuals, including Edwards, James, the Governor’s secretary, and Frank O’Neill, a reporter with the St. Louis Missouri Republican, departed by train across the state to Independence. During the journey, Frank pointed out to the reporters a number of the locations that he had visited while a guerrilla in the Civil War. In the meantime, news of the train was widespread, and throngs of people lined the rail-

65. Yeatman, supra note 37, at 278; see also William H. Wallace, A Brief Succinct History of the Career and Overthrow of the Missouri Outlaws, Being the Only Book Account Ever Published Founded on the Facts, in Speeches and Writings of WM. H. Wallace, 263, 283–84 (1914) [hereinafter Wallace].

66. Wallace, supra note 65, at 283–84.

67. Settle, supra note 5, at 130; Yeatman, supra note 37, at 279.

68. Settle, supra note 5, at 131; Yeatman, supra note 37, at 279 (quoting St. Louis Daily Republican, Oct. 6, 1882). The quotation reported in the Kansas City Evening Star and Atchison Daily Globe is somewhat different: “Governor, I am Frank James. I surrender my arms to you. I have removed the loads from them. They are not loaded. They have not been out of my possession since 1864. No other man has ever had them since then. I now give them to you personally. I deliver myself to you and the law.” Bob Ford, Four O’Clock, Kansas City Evening Star, Oct. 6, 1882, at 1 [hereinafter Four O’Clock].

69. Settle, supra note 5, at 131.
way’s route. When the train arrived in Independence, James was given a hero’s welcome. Hundreds of people met the train in Independence. James was allowed to check into a hotel, while family, friends, and hundreds of admirers milled about for hours.\footnote{SETTLE, supra note 5, at 131; YEATMAN, supra note 37, at 280.}

The arrest coincided with a barrage of favorable publicity designed to distance Frank James from the sordid end of his gang. At the time of the “surrender,” the press released a letter allegedly written by James, and a reply penned by the Governor. In his letter, Frank stated his decision as the culmination of a “determination which has been forming for years, and which has already stood the test of four years of sober, industrious farm life . . . .”\footnote{Four O’Clock, supra note 68.} The press also simultaneously reported James’s claim, made at his arrest, that he had not been in Missouri for four years and that he was, in fact, an industrious farmer.\footnote{SETTLE, supra note 5, at 131.} The same battery of articles included a sympathetic biographical sketch of James’s wife.\footnote{ATCHISON DAILY GLOBE, Oct. 6, 1882.} They reported comments at the time of the surrender by State Supreme Court Justice John Ward Henry that James had won his sympathy and that if Henry were Governor, he would pardon James.\footnote{YEATMAN, supra note 37, at 279.} Frank O’Neill, the reporter given access to James, published a long article in which he described Frank’s effort to reform and in which he described the robber as a refined gentleman.\footnote{SETTLE, supra note 5, at 131.}

Frank James continued to be treated as a celebrity while in jail. His cell floor was decorated with a European carpet, pictures were hung on the cell wall, a rocking chair was placed in the corridor for his use, and his cell was unlocked.\footnote{YEATMAN, supra note 37, at 36, at 281.} He received scores of visitors, including the Governor. His stay, and the public relations bombardment that accompanied it, apparently did much to advance his popularity.

B. The Dream Team

Just as the arrest and confinement of James was different than an ordinary robber’s, so too was his legal representation. A team of seven attorneys represented James, not counting an eighth who came from Nashville to lend his assistance.\footnote{American State Trials, supra note 4, at 664; Gerard S. Petrone, Judgment at Gallatin: The Trial of Frank James 71 (1998).} All seven of the lawyers, as far as one
can tell, served without fee. 78 Two of the attorneys were individuals of considerable political influence. Charles P. Johnson, an experienced and well-known attorney, had previously served as the Lieutenant Governor of the State of Missouri. 79 John F. Phillips had already served two terms in the United States House of Representatives. 80 Phillips was a war hero, but, importantly for James, he had served in the Union Army. 81 He was thus in a position to argue the “war card” in a way that might reach both Union and Confederate veterans. He was also an attorney of considerable renown. At the time of his representation of James, “Judge” Phillips was serving as a Commissioner of the Missouri Supreme Court. 82 This roster is not only a testament to James’s notoriety, it is a testament to his political power. Here was a robber-murderer who personally surrendered to the Governor of the State and who was then represented, pro bono, by an ex-lieutenant governor and an ex-congressman who happened to then be serving as an appointee of the State Supreme Court.

C. The Circus

The trial was the biggest legal or political event in the post-War history of western Missouri, and certainly in Gallatin, the small community in which it was held. Thousands of spectators poured into the small town, overflowing all of the hotels. The case was moved from the courthouse to the Opera Hall. Hundreds of spectators attended at a time. Many or most of them were admirers of Frank James. In particular, James enjoyed the enthusiastic support of hundreds of female admirers. 83 The “ladies,” who were much discussed in the press, were permitted to occupy the front of the spectator section. 84 James’s male admirers occupied themselves in a different way, sending threatening letters on a regular basis to prosecutors and potential prosecution witnesses. 85

Both sides recognized that jury selection would be crucial. Selection took several days; the panel ultimately produced was made up entirely of

78. AMERICAN STATE TRIALS, supra note 4, at 664.
79. Id.; PETRONE, supra note 77, at 71.
80. AMERICAN STATE TRIALS, supra note 4, at 664; SETTLE, supra note 5, at 139.
81. AMERICAN STATE TRIALS, supra note 4, at 664.
82. The Commission was a special panel appointed by the court to hear what was a backlog of lower court cases. PETRONE, supra note 77, at 74–75.
83. There is simply no question that were the trial held today, they would be described, accurately or not, as groupies.
84. See KANSAS CITY JOURNAL, Sept. 5, 1893 (describing the numerous ladies in the courtroom); PETRONE, supra note 77, at 81.
85. PETRONE, supra note 77, at 81.
Democrats, with two former Confederate veterans. It was almost universally regarded as an acquittal-prone jury.  

While partisans of Frank James thus might have expected an acquittal, their cause did face some genuine obstacles. First, James’s notoriety really was a double-edged sword. Even his strongest supporters did not deny that the James brothers were engaged in robbery. That was the very reason for their fame. And this publicity was not simply constructed by reporters. Jesse’s open letters, written for years to Missouri newspapers explaining their exploits, abetted it.

Second, the State, in fact, had a reasonably strong, although by no means overwhelming case. Because it had no eyewitnesses to the robbery, the State’s principal witness was Dick Liddil, the other living participant in the robbery. Liddil, a Jackson county farm-boy, had met the James brothers in the 1870s, before going off to prison to serve a term for horse robbery. He then joined the gang in 1879 and participated in the Glendale robbery, the first robbery committed by Jesse after his three-year “retirement.” In July, 1880, Liddil traveled with Jesse to

86. See, e.g., KANSAS CITY DAILY JOURNAL, Aug. 24, 1883 (“James’ friends and attorneys wore the smiling faces and the satisfied air of men who feel that they are treading on safe ground”); KANSAS CITY EVENING STAR, Aug. 24, 1883 (“The opinion is generally expressed that a verdict of guilty is out of the question. A hung jury is probable and acquittal possible. The solid democracy of the jury, the youth and associations of four of the members, and the ex-confederate record of six of the number give rise to this belief.”); N.Y. TIMES, Aug. 25, 1883 (“The general impression is that the defense has won half the fight in getting the jury.”). In his account of the trial, Gerald Petrone likens the case to that of O.J. Simpson. He believes that, like Simpson, James got away with murder and that, like Simpson, “the jury was the source of the problem.” PETRONE, supra note 77, at 181, 292. Even at the time, there were two theories about why the selection produced an unrepresentative panel. The prosecution basically alleged that a fix was in—that county officials had deliberately gone out of their way to select an unrepresentative jury. See KANSAS CITY EVENING STAR, Sept. 8, 1883. The “fix” allegations are discussed in detail in Wallace’s memoirs. WALLACE, supra note 65, at 263, 287–88. According to accounts somewhat more sympathetic to the defense, the jury was pro-defense because of the dogged efforts of the defense “dream team” to investigate the background of the potential jurors. ST. JOSEPH GAZETTE, Sept. 8, 1883. The Gazette reporter stated that the defense had twenty individuals who it sent out to interview potential jury members.

87. The State’s theory was that Frank & Jesse James, Dick Liddil, and Clarence and Wood Hite robbed the train and murdered two of the passengers. According to the prosecution’s account, Clarence and Liddil entered the engine compartment to stop the train; the James brothers and Wood Hite entered the passenger compartment, where they killed a passenger who stood up at the wrong time. AMERICAN STATE TRIALS, supra note 4, at 666–68 (the prosecution’s opening statement).

88. There was an elaborate legal argument concerning whether Liddil, as a result of this conviction, was incompetent to testify. The prosecution contended that Liddil had been pardoned and, after lengthy and elaborate argument, the court ruled him competent to testify. AMERICAN STATE TRIALS, supra note 4, at 673–76; MILLER, supra note 4, at 27–35; PETRONE, supra note 77, at 95–102. Following the trial, the Supreme Court of Missouri ruled that absent a formal pardon, a felon was disqualified from testifying, rendering Liddil an incompetent witness for any other crime that James might have committed. See infra note 114 and accompanying text.

89. STILES, supra note 5, at 352–53. Liddil refused to testify concerning this robbery, invoking his Fifth Amendment privilege. MILLER, supra note 4, at 50.
Tennessee, where he lived for nearly a year. After the arrest of Bill Ryan, in March, 1881, Liddil, Frank, and Jesse left Tennessee and made their way back to Missouri, where they eventually robbed the train. Liddil testified in copious detail to his journey, to specific times and places, and to having met with specific individuals. Although grilled for hours, "under a cloud of monstrous incivility," he did not waver in any substantial respect.

In addition to Liddil's testimony, the prosecution introduced evidence to corroborate Liddil's account of his and Frank James's whereabouts. On the first day of trial, it introduced the testimony of two witnesses to the robbery, one who related the events occurring in the passenger car, and the other who related the actions taken by the two robbers who entered the engineer's cab. After Liddil's testimony, the State introduced the testimony of more than a dozen witnesses who identified Frank James as being in the vicinity of Gallatin at the time of the robbery. One witness of seemingly great significance was Jamin Matchett, a minister at whose house James had stopped the night before the robbery. Matchett, who immediately identified James, described how his guest had quoted Shakespeare to him during the evening. Frank James's love of the Bard was well-known and, among train robbers, was utterly singular.

The defense's case was not strong. The James dream team, somewhat perilously, seemed to shift its defense as the case proceeded. At the outset, it appeared the defense was seeking to prove mistaken identity, that the "fifth" robber in fact was a gang member named Jim Cummins. Thus, the team repeatedly questioned prosecution witnesses about Cummins and his whereabouts. By the time the defense began its case, it was clear that James could not be mistaken for Cummins. Somewhat bravely, the defense then announced that there were really only four rob-

90. See Stiles, supra note 5, at 352-61.
91. AMERICAN STATE TRIALS, supra note 4, at 676-84.
92. Petrone, supra note 77, at 103. The trial judge admonished the defense for its incivility on several occasions.
93. Newspaper accounts differed concerning the efficacy of the defense efforts to discredit Liddil, but none of the accounts reported that he altered his testimony or that his recollection was shattered on any important subject. See, e.g., Kansas City Daily Journal, Aug. 28, 1883; St. Louis Globe Democrat, Aug. 28, 1883; Kansas City Evening Star, Aug. 27, 1883. Of course, the question of whether the defense was successful in painting Liddil as a dishonorable liar is another matter.
94. AMERICAN STATE TRIALS, supra note 4, at 668-70.
95. Id. at 684-96.
96. Id. at 691-92; N.Y. Times, Aug. 30, 1883.
97. Petrone, supra note 77, at 94, 121.
bers, and that Liddil and other defense witnesses had invented James’s presence.98

Frank James and a number of family members and friends also offered a defense of alibi. It is fair to conclude that this testimony was weak, at best. Many of the alibi witnesses were family members; one friend came drunk and was fined for contempt.99 Frank James testified, but he was unable or unwilling to identify any individuals with whom he spoke or places he visited during the crucial days around the time of the crime.100

In sum, at the close of the evidence, the consensus was that the prosecution had put on a reasonably strong case and that, while victory was by no means certain, it was not out of the question.101

IV. THE SUMMATION

While there were certainly many potentially crucial moments during the trial, the event cited most often by observers as pivotal was the speech of Judge John Philips. Judge Philips’s speech was the second to last for the defense in the trial. It was given on what was the most crowded day of the trial, with hundreds of people in attendance.102 There is no question that Judge Philips’s speech had a galvanizing effect on the trial. One newspaper account (admittedly biased) stated that the “court, audience and Jury [were] all swayed by the Torrent of His Eloquence.”103 The speech was proclaimed as a “masterly effort,”104 the “[e]vent of the trial,”105 “[o]ne of the greatest speeches of the age,”106 and “the greatest forensic display ever heard in this part of the State.”107 Even opposition newspapers conceded that the speech was “remarkably fine” and “one of his best efforts.”108 Newspapers that had earlier spoken about the difficulty faced by the defense were predicting that no conviction could be had.109 Philips was actually congratulated by the trial court and other

98. AMERICAN STATE TRIALS, supra note 4, at 697–99; PETRONE, supra note 77, at 119–24.
100. See infra notes 133–35 and accompanying text.
101. See, e.g., KANSAS CITY STAR, Aug. 23, 1883; N.Y. TIMES, Aug. 30, 1883 (“[I]t is admitted on every hand that the state has made a strong case.”).
102. See PETRONE, supra note 77, at 146; ST. LOUIS REPUBLICAN, Sept. 5, 1883.
103. ST. JOSEPH GAZETTE, Sept. 5, 1883.
104. Id.
105. Id.
106. SEDALIA (MO.) NEW AGE, Sept. 7, 1883.
107. Id.
108. KANSAS CITY JOURNAL, Sept. 5, 1883.
109. See id., Sept. 6, 1883 (discussing the closing speeches of the trial).
members of the bar, and he received a prolonged round of applause upon completing.\textsuperscript{110} Perhaps most important, his speech literally moved members of the audience to tears, and "it was with great difficulty that two or three of the jurymen kept the cast-iron faces that they believe is the proper thing."\textsuperscript{111}

It is, of course, impossible to know with certainty whether the speech had the effects credited by the press reports. But it is possible to look at some aspects of the oration and see how Philips constructed a lens through which the jury might, without overt nullification, reach a verdict of acquittal. Unlike some of the other defense attorneys, Philips did not argue that Frank James should be acquitted because his acts were justified. Rather, he argued that the evidence failed to show guilt beyond a reasonable doubt. The basis for this argument was grounded in his view of the honor and dishonor involved in the witnesses and participants.

Judge Philips drew a Manichean picture of honor and dishonor, nobility and perfidy. Frank James, his family, and his friends were exemplars of the former. Their lives exemplified the pillars of Southern honor.\textsuperscript{112} They were intensely loyal to family and friends. They were paragons of physical bravery. They used violence, but for noble ends, and by noble means. The men cherished and protected their women. The women were virtuous, beautiful, and stoic. Moreover, as Philips would point out, this honor was self-evident. By their bearing and beauty you could know their character. Whatever their sins, they represented honor and, by extension, truth.

The forces arrayed by the prosecution, on the other hand, represented perfidy and ignobility. They were motivated by money, not honor. They exhibited treachery, not loyalty. They were cowards, not brave men. As a consequence, they were, one and all, unworthy of belief. Indeed, it was a sin for the prosecution to have arrayed these witnesses against this last soldier of the Civil War.

\textbf{A. Playing the War Card}

Judge Philips played the war card early and often, but as an excuse, rather than a justification. He also did so as a Union man rather than

\begin{footnotes}
\item[110] See \emph{id.}; Sept. 5, 1883 (discussing the close of Colonel Phillips's speech and the comments that followed).
\item[111] \emph{Id.; Sedalia (Mo.) New Age}, Sept. 7, 1883; \emph{Kansas City Times}, Sept. 5, 1883; \emph{St. Louis Post Dispatch}, Sept. 6, 1883.
\item[112] See Bertram Wyatt-Brown, \textit{Honor and Violence in the Old South} 27 (1986) (discussing characteristics of "Southern" honor).
\end{footnotes}
Confederate, thus laying the groundwork for an appeal that might be effective to all members of the jury:

In that fierce, internecine strife, which swept the land like a tornado, dividing families, arraying . . . brother against brother, in deadliest contention, Frank James and I stood in mortal antagonism.

Whatever others may say or think, the idea I had and have of the episode of the James brothers was that it came as the bitter fruit of that dire strife. And when, from the summit of peace on which we stand today, we look back over the trampled fields yet marked with the red hot ploughshare of war, and recall the history of civil wars, reciting how slowly nations recover from the blight—how long it takes the ghastly wounds in the body politic to heal, I affirm surprise at the rapidity of our recovery. And when I recall all the local bitterness of that day, with its crimination and recrimination, its reprisals and outrages, peculiar to neither side in Missouri, with the bad blood it engendered, and today behold the magnificent picture of a civilized state, reposing in peace, exulting in plenty, and marching on to higher achievements in the arts of peace and social order, my heart swells with pride and gratitude to the God of our deliverance.

And when I saw the so-called James gang—the last remnant in the state of un-reconciled and unaccepted parties to the local predatory struggle, suing for reconciliation—offering to throw themselves on the justice of the law and the mercy of the Commonwealth, asking nothing but fair treatment— with but one aspiration and one hope, to devote, if allowed, the remainder of their lives and energies to the duties of a husband, father and good citizenship, my whole heart went out in congratulation to the good people of the state.113

Philips began, then, by placing James as a combatant, rather than a thief. As a combatant, of course, James was entitled to use force until his surrender. Thus, while not supporting James’s actions in robbery and plunder, he attempted to portray him as acting in the tradition of Robert E. Lee. Frank James’s surrender was the second Appomattox.

Although the efforts to apprehend James were not, strictly speaking, a part of the Civil War, Philips also sought to gain sympathy by demonizing the efforts to bring him to justice. Most notably, he evoked the memory of the Pinkerton raid. Although Philips adverted to the incident more than once, his most direct appeal was in his discussion of the credibility of James’s mother:

As day unto day uttereth speech, and night showeth knowledge thereof, this old mother Samuels, never lifts up in prayer, or moves in her daily round of domestic duty, her right arm that its missing hand does not remind her of persecution and suffering endured because she was a mother. And if, as often as her chil-

113. AMERICAN STATE TRIALS, supra note 4, at 728 (emphasis added).
dren have looked upon that handless arm, they have felt the beatings of the tig-
er's heart within them, as thought of the mercenary vandals who, to slake their
thirst for gold and feed their ravenous maws on prize money, threw hand gre-
nades into a mother's home, tearing muscle from muscle and bone from bone,
and murdering her innocent helpless child, is it too much, in human nature, to
say the world ought to forgive them much? 114

B. The Family Man

Another theme emphasized again and again by Philips was Frank
James's love of family, and their love of him. James's relation to his
family encompassed several strands in the portrayal of the honorable
man. First, James's love of family was important because honorable
men act to support and protect their families. Actions prompted by that
love are, of course, admirable.

The surrender, much discussed by all the defense attorneys, was also
honorable because of its motivation—to allow James to return to his
family. 115 That desire was the touchstone of Philips's explanation of
Frank James's activities. In 1877, James left Missouri and moved to
Tennessee. 116 For the next five years, he lived quietly under an assumed
name. 117 According to Philips, James made this move because

[...]he miseries and ghosts of the war hung around his footsteps in Missouri.
Weary and heartsick of it all he determined to turn his back upon it, and seek a
new home, under an assumed name, in the hope that he might find a new life of
peace in humble, honest industry. He had just taken to his bosom and confi-
dence a young, trusting sweet woman. That of itself was highest proof that he

114. Id. at 755.
115. Id. at 728, 730. As James's action was honorable, so too was Philips's. The attorney de-
defended his decision to represent James while serving as a Supreme Court Commissioner as moti-
vated by nothing other than honor and chivalry. When Frank James appealed to Philips, prior to his
surrender,

I had but one response to make to their personal appeal to me. No man, no
creature made in the image of God, could appeal to me for words of justice,
for one throbb of sympathy, under such conditions, without my heart beating a
little warmly for him and his. As cowardly and mean as the miserable fellows
are, who are traducing me for this act of chivalry and grace, I would ask
mercy for the, if not justice—should they come to contrition, especially if they
had wife and child, with piteous eyes beaming on me, pleading for the life of
the man they love... To keep that promise I am here. What brave man, with
any nobility in his soul, will deny the rectitude, the honor of my action?

I am not here as commissioner, with the judicial ermine around me. I
am here as a licensed attorney of this commonwealth.....

AMERICAN STATE TRIALS, supra note 4, at 728–29.
116. See, e.g., STILES, supra note 5, at 351–52 (discussing James's move from Missouri).
117. Id.
was not seeking longer adventure, but that pleasure and happiness which come surest from domestic life and retirement.118

According to Philips, "those were the happiest days of his life. His bread was sweet, because it was labor's reward. It was wet with no tears, and cankered by no cares, because it was planted in peace, watered with heaven's dews, and gathered with the hands hardened with honest toil."119 The virtuous soldier had become the humble and honest farmer. He therefore had no motive at all to resume his life of crime, if that is what it was.

C. Family Loyalty

A second and obvious strand in love of family is loyalty to that same group. That loyalty and love is, of course, entirely appropriate. Frank James did not, and could not, dishonor or betray that loyalty. Ordinarily, family loyalty is a problematic issue for defense attorneys, since ties of love and affection also serve as a reason why individuals might lie for one another. Not here. For the noble Frank James and his family, loyalty was an undorned virtue. Much, if not all, of the testimony in support of James's alibi came from family members. Frank James's Texas alibi was supported only by his testimony and by the testimony of the two people with whom he was alleged to have resided, his sister and her husband. James's sister had an obvious and powerful motive to lie. But, in Philips's telling, family loyalty is not a reason for disbelief, but rather a virtue, and by extension, a reason for belief:

If Frank James was not in Texas, as he testified, Palmer and wife are perjurers. . . . [S]he told her story, let it bear as it might. Is Mrs. Palmer unworthy of belief because she is a sister? Is it the unwritten law of a Christian land that where blood runs thick and sisterly love is quick, perjury knots and breeds? You, gentlemen of the jury, beheld her on the witness stand. You looked into her calm, sweet face, all over which God has written innocence, purity and truth. Will you brook its persuasive eloquence and stamp it with perjury . . . ?120

Philips was even more emphatic in arguing for the truthfulness of James's wife and mother, both of whom were crucial witnesses. James's mother testified that her son was not in Missouri during the time of the

118. AMERICAN STATE TRIALS, supra note 4, at 730. This is a rather inventive description of James's flight after having committed the Northfield Minnesota robbery and murders, and having been pursued for them.

119. Id.

120. AMERICAN STATE TRIALS, supra note 4, at 754–55.
robery. James's wife, who was not with her husband at the time of the robbery, described her travels from Texas to Missouri to meet with Joe Shelby, a former Confederate officer, to attempt, prior to the Winston robbery, to arrange for her husband's surrender. As with James's sister, James's mother's testimony was more worthy of belief because of her kinship, not less so:

Mrs. Samuels, it is true, is the prisoner's mother. I know how the unfeeling world and a censorious, sensational press have chided her—even making her the subject of ribald jest. But whatever else she may be to the world, she is to this prisoner a mother. Whatever he may be to the jaundiced public eye, to her he is a son—her boy Buck. O! how much of divinity and consecration are wrapped up in those two words—mother, child! How the one stirs while it chastens our youth; while the other quickens the pulse and gladdens the heart of old age.

It has been whispered about this temple of justice, and into too-willing ears, that this old mother is unworthy of belief, and ought to have staid at home. The icy heart often tells the mother to let her child go; but the instinct of a mother's heart knows no policy, it employs no stratagem and deploys no vidette . . .

Who will banish her from this court room? Who shall set bounds to her devotion, measure, estimate it, or reach down to its fathomless depths, grasp and bind its operations?  

But in the matter of family, the last, and perhaps most effective, paean, was Judge Philips's ode to Frank James's wife. The sanctification of James's wife both begins and ends the speech. At the outset, Frank James's wife is identified as the agent who helped turn Frank from "adventure" into an individual seeking "that pleasure and happiness which come surest from domestic life and retirement." The woman who could produce such an effect was "a young, trusting, sweet woman." Philips argued that it was obvious that such a woman must be telling the truth when she stated she had gone to Missouri in 1881 to attempt to arrange the surrender of her husband.

At the close of his speech, Philips returned to the subject of Annie's virtue as he explained again the reason why Frank James turned away from his "war:"

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121. Id. at 755.
122. Id. at 730.
123. Id.
124. Id. at 734–35.
I had heard of the little woman, spotless as the falling snow, whose youth, like the season it typifies, was one crowded garland of rich and fragrant blossoms, refreshing every eye with present beauty and filling every heart with promised benefits; who, spurning the smiles of the world, gave the bold rider her virgin heart, to cleave to him in shadow as in sunshine, in sorrow as in joy. And as I have witnessed how loyally she has kept her vow, how like a good angel she has attended him at rest or wandering, how closer she has drawn the cords of affection about him as the pelting storms of vengeance and hate have pitilessly beaten about the iron doors and grated windows of his prison, I have felt that if I could utter a word that might give to this noble woman the man, unfettered, to whom she so clings, it were an honor more to be coveted than offices and the praises of men.\(^{125}\)

There are a number of ways in which this last, legally irrelevant, but apparently effective, plea played to notions of Southern honor. First, “honor” and “beauty” were joined once again. This was relevant in the lexicon of honor, for in a culture of honor, “bodily appearance [is an] outward sign of inner merit.”\(^{126}\) Second, the theme of Annie’s civilizing influence was again alluded to. Third, Frank James’s courage was restated, when he was described as the “bold rider.”\(^{127}\) Finally, this noble and virtuous pair were cast heroically, standing alone but proud, although battered by “vengeance and hate” lurking outside the “grated windows” of the prison.\(^{128}\)

D. Loyalty to Friends and Hospitality

The noble individual is not only loyal to family; he is loyal to friends as well. Throughout his summation, Philips sought to ascribe to James and his friends the virtue of loyalty. This virtue was central to honor in Southern culture generally, and particularly in “Southern” Missouri.\(^{129}\) In Philips’s conversation with the jury, loyalty and honor were characteristics that trumped other considerations, such as the need to testify fully and truthfully. These virtues served to explain what might otherwise be somewhat difficult aspects of defense testimony.

\(^{125}\) Id. at 756.

\(^{126}\) WYATT-BROWN, supra note 112, at 33.

\(^{127}\) AMERICAN STATE TRIALS, supra note 4, at 756.

\(^{128}\) Id. This plea for sympathy must have been galling, to say the least, to the family of James’s victims. In fact, there was considerable support in the town for the robber, and this ostracized bandit was in fact housed in an open cell with an imported rug, and visited continually not only by family, but by a large group of female admirers. See supra note 83 and accompanying text.

\(^{129}\) See FELLMAN, supra note 3, at 255 (describing how the ex-guerrillas, such as James and his friends, believed they had banded together to seek cooperative revenge).
Of most importance, loyalty explained the defects in Frank James’s testimony. James testified on direct examination to an alibi. He explained his post-1876 life as a farmer in Tennessee, and he denied that his decision to leave Tennessee in 1881 was related to the robbery that occurred later that year. On direct examination, James recounted, with fairly fulsome detail, aspects of his travels from Tennessee, to Kentucky, to Virginia, prior to the time at which his alibi was central. Then, on cross-examination, his testimony fell apart. He could not tell the name of any person in Texas, outside of his sister, her husband, and neighbors, who had been previously named by his sister. The one friend he was willing to describe he nevertheless refused to name. He was unable to name any towns in which he had stayed.

But what was widely reported as a devastating failure was explained by Philips as evidence of virtue:

But why don’t you give up the name of the friend at Denison, inquired by the state’s counsel. I’ll tell you frankly: It is because Frank James, unlike your pet, Dick Liddil, never betrays a friend or foe. Situated as Frank James was, with the royal posse comitatus of a state after him, with a swarm of detectives and spies scenting his footsteps like sleuth-hounds, stimulated to assassination by large rewards, it was perilous for any citizen to give this hunted man shelter, bread, or to be even the medium of a word of love from his far-away wife. Whatever the world may think of Frank James he is made of that stuff, before he would expose to public obloquy, with his consent, the name of the man who thus succored him, he would march to the deadfall on the scaffold as calm and intrepid as did the grand marshal of Saxony to his untimely grave.

In addition to loyalty, another important characteristic of Southern honor was hospitality. In his description of the conduct of two of his witnesses, Philips found the virtues of loyalty and hospitality, where others might have found contempt or blatant bias.

The first of the witnesses was Frank O’Neill, a correspondent with the Missouri Republican. The prosecution called him to describe the circumstances surrounding an interview of James that O’Neill had con-

130. PETRONE, supra note 77, at 133.
131. AMERICAN STATE TRIALS, supra note 4, at 711–16; MILLER, supra note 4, at 123–39.
132. ST. LOUIS GLOBE DEMOCRAT, Sept. 2, 1883; accord ST. LOUIS POST DISPATCH, Sept. 2, 1883 (“It was a big Mistake to Put Him on the Stand. He is Cornered by the State’s Attorney.”).
133. PETRONE, supra note 77, at 134.
134. Id.
135. Id.
136. AMERICAN STATE TRIALS, supra note 4, at 753. This argument was nonsense, since no individual in Texas who might have aided James could be in the slightest possible danger.
137. WYATT-BROWN, supra note 112, at 119.
ducted while James was a fugitive. O'Neill described the interview, but when asked to state who was at the meeting besides himself and James, he refused, on the grounds that to do so would compromise a “confidence” and subject to criticism a “friend.”

Although threatened with contempt, the reporter refused to disclose the individual, stating that he did not see himself under any “obligation” to do so, nor would he state where the interview had taken place. One might have expected that Judge Philips would not boast of O'Neill's behavior, but O'Neill's decision to commit contempt in fact was lauded: “We had in the progress of this trial a striking illustration of the inviolability of the laws of hospitality and personal confidence . . . . It was manly and brave of [O'Neill] to stand and keep faith.”

Philips's approbation of defense witnesses extended to another who committed contempt, former Confederate General Joseph Orville Shelby. General Shelby came drunk to trial. After testifying for the defense about Annie James's visit to him to attempt to arrange a surrender for Frank James, he turned hostile, evasive, and incoherent upon cross-examination. He swore at defense counsel; he was reputed to have threatened a number of individuals at a saloon in Gallatin. But for Philips, Shelby's harboring of James and his refusal to give evidence of his contacts with him was admirable:

Smirking Puritans and lugubrious Pharisees have shrugged their shoulders at the fact of Shelby giving a bed and a glass of water and a pinch of salt to the defendant when he chanced to pass his door; and for extending the hand of assistance and a word of sympathy to Frank James' wandering heart-sick wife. In the midst of so much moral cowardice and starving charity in this age, I rather admire the quality of heart which prompted Shelby. It was not the promptings of a spirit of disloyalty to law and society, but it was the quick response of a brave and generous heart to that sentiment which makes us humane instead of savage. There are ties betwixt these men which were formed back in war times, when they stood elbow to elbow upon the perilous edge of battle.

138. PETRONE, supra note 77, at 113.
139. AMERICAN STATE TRIALS, supra note 4, at 691, 697; PETRONE, supra note 77, at 113; ST. JOSEPH GAZETTE, Aug. 29, 1883.
140. AMERICAN STATE TRIALS, supra note 4, at 753.
141. Besides his testimony in the James trial, General Shelby may be most noted in history for his failure to surrender at the close of the Civil War. With several hundred of his former soldiers, he crossed into Mexico and ultimately put his troops at the service of Emperor Maximilian. The Emperor refused Shelby's offer of assistance and the soldiers eventually scattered. PETRONE, supra note 77, at 137–39.
142. PETRONE, supra note 77, at 127.
143. Id. at 127–28.
They had marched, tented and fought side by side. Who would dissolve the bonds of fellowship born of such comradeship?¹⁴⁴

Again, Judge Philips's summation elided over difficulties, to put it mildly, in the witness's testimony. In most cases, partiality to one party is a reason to disbelieve a witness. In most cases, harboring a known outlaw would be a reason to disbelieve the witness. In most cases, a refusal to testify about a matter would leave the jury with the impression that a witness had something to hide. But in this case, those difficulties were not only minimized, they were turned into virtues. What was on display was not bias or cover-up, but loyalty and hospitality.

E. Traitors and Cowards—The Prosecution Witnesses and Their Minions

In the same way that Philips sought to lionize James and his family as an embodiment of virtue, he sought to portray Liddil as its opposite. James was loyal; Liddil was a traitor. James was brave; Liddil was a coward. James was regal in his bearing; Liddil was ugly and sniveling. As with James, Liddil's character was obvious to any observer. Indeed, according to Philips, the attributes and defects were inherent:

The learned counsel for the state, who have preceded me in argument, have warned you that I would abuse poor Dick Liddil. If I did not, in this respect, meet their expectation it would be because of the injunction that we ought not to kick a dead dog. For he is so morally dead that like Lazarus he stinketh in the nostrils of every honest man. If ever there stood a creature in a court of justice as a witness who has justly called down upon him the imprecations and loathings of every manly heart it is this witness. There is nothing—absolutely nothing—in and about the fellow to excite one emotion of pity, sympathy or respect. We are just as the good God has made us. We are endowed with certain instincts and sentiments which we would not resist if we could.¹⁴⁵

Liddil's greatest sin, of course, was his treachery. He had abused Frank James's hospitality, and he had turned against a would-be friend:

The world over the brave and the true despise a traitor and a coward. This man is both: a coward, because to save himself he would through perjury, destroy

¹⁴⁴. AMERICAN STATE TRIALS, supra note 4, at 735. In fact, it is not clear that Shelby knew either of the James brothers until after the Civil War. See STILES, supra note 5, at 217–18 (discussing Shelby's relationship with the James brothers), YEATMAN, supra note 37, at 35 (stating that documentation suggests that the James brothers met Shelby at a later date).

¹⁴⁵. AMERICAN STATE TRIALS, supra note 4, at 737.
his alleged confederate; a traitor he is to friendship, confidence and honor, even among thieves. . . .

You, gentlemen of the jury, have never met with such a constellation of atrocities in any one man as this fellow represents in his character. He comes, just before this trial, to this state, crawling vampire like, from the jail in Alabama, to drink the life blood of this defendant; to taint the sanctuary of justice with his false breath, instinct with venom, and wreaking with treachery to the offices of friendship and hospitality.\textsuperscript{146}

After a somewhat more curious attack on the witness because of his involvement in robbery and killing, Philips returned to Liddil’s cowardice. In blistering language, he ridiculed Liddil’s need for police protection:

Gentlemen of the jury, I witnessed here in this court house a sight I trust my eyes may never see again in an American court of justice . . . . He has been smuggled, hid and concealed from all other eyes than those of his masters and trainers in Kansas City. Like some curious animal brought from Eastern jungle for exhibition, he has been kept concealed from the public until the circus opened. He has been fed and housed at the courthouse in Kansas City under the guardianship of supple officers of that county, exercised I presume, only between suns. The day before he was needed here he was, at the bidding of the prosecution, put under arrest for some undisclosed offense. He is neither jailed nor bailed, but put in charge of a deputy marshal of that county and brought here as a prisoner, escorted around town, on exhibition . . . . No person, outside of the elect, was permitted to come in contact with the creature, as if he was a leper. He and the deputy marshal have been inseparable since coming here. They eat together, sleep together, until they begin to look alike and smell alike. And when the sheriff of this jurisdiction called Richard Liddil as a witness, he came into the court house and on this platform, to the witness stand, and by his side came and sat through his testimony his alter ego—his body guard and shadow—the deputy marshal of Jackson county.\textsuperscript{147}

For a modern audience, this attack might have been ineffective, if not outright dangerous. We are now all aware that witnesses who are threatened may need police protection, and we do not regard the seeking of such protection as a vice. Indeed, it is usually prejudicial to the defense to point out a witness’s need for protection, as it invites the jury to infer that the defendant has threatened the witness. For Philips’s audience, however, it was Liddil who was worthy of condemnation for his cowardice. And, in the post-Civil War era, few epithets could be more damning than that of coward.

\textsuperscript{146} Id. at 737–38. The catalogue runs several pages.
\textsuperscript{147} Id. at 739.
Philips attacks on character also extended to the other prosecution witnesses who had previously been acquainted with the James brothers, the Fords and Boltons. Philips described Mrs. Bolton as a "bad woman" whose whole family was "wicked and degraded." Philips argued that the Bolton children were "chips off the old block. They both reflect the teachings of the dragon that bred them."149

Philips's conclusion, of course, was that the defense witnesses were entirely unworthy of belief. Indeed, not only were the witnesses dishonorable, so too was the prosecution, which should never have brought a case against James, at least on such evidence. Judge Philips closed with an admonition to the jury that it should not yield to popular calls for vengeance, particularly such calls emanating from the Republican elites:

I do not think it necessary, in order to appease [the miserable politicians and editors], or the land agents, or the long haired men and short haired women, who imagine themselves the satellies of higher civilization, to attend the star of empire in its westward flight, that one day out of every seven should be set aside by executive proclamation for the hanging of an old Missourian.150

F. The Prosecution Summation

Philips's oration did not go unanswered. The final, lengthiest, and most notable prosecution summation came from chief prosecutor William Wallace, on the final day of the trial.151 The speech, also several hours long, has also been adjudged a masterpiece, even if it ultimately failed to sway the jury.152 To some degree, Wallace's summation was a different kind of speech. It could not have been challenged, as Philips's speech was challenged, as a "smokescreen."153 Much more of it was spent reciting "the facts." Unlike Philips, Wallace engaged in an incredibly detailed recitation, without notes, of the trial evidence and the

148. Id. at 740.
149. Id. at 743.
150. Id. at 757.
151. In addition to being recorded in the two major accounts of the trial, the summation is set forth in a volume of Wallace's writings that was published last century. WALLACE, supra note 71, at 132–36.
152. See PETRONE, supra note 77, at 160–68. Petrone's assessment was held by virtually all newspapers that reported on the trial, most of whom regarded the speech as the equal, if not the superior, to Philips's speech. See MISSOURI REPUBLICAN, Sept. 7, 1883 (stating the speech "would have done credit to any man in the country, whatever his name or reputation, and which will always shine out as the most admirable and conspicuous feature in the history of this most remarkable trial"); ST. LOUIS GLOBE-DEMOCRAT, Sept. 7, 1883 (noting that "good judges declare they never heard it surpassed for vigor, evenness, power and eloquence"); ST. LOUIS POST-DISPATCH, Sept. 7, 1883 (describing the speech as a "grand effort").
153. PETRONE, supra note 77, at 160, 152–53.
court’s instructions. While the difference in emphasis is obvious, it is an
overstatement to assert that Wallace was appealing to reason, while Phi-
lops was appealing to emotion. Wallace’s speech contains innumerable
emotional appeals; it includes, for example, a short but extremely effec-
tive account of the suffering endured by the victim of the train robbery
and of the suffering of his widow.

Who are the parties to be considered in this most important trial? To come to
an impartial and intelligent verdict it is well to bear them all in memory. The
first one that presents himself to an unprejudiced mind is Frank McMillan, but
it has been so long since you have heard his name that I almost feel like apolo-
gizing for its mention. But it can do no harm—not good. For two years has his
voice been hushed in death; and even if I so desired, I could not now catch up
the faintest echo of his dying shriek and sound it in your ears, pleading for pity
from your hearts, or justice at your hands. He was a poor, innocent, insignifi-
cant stone mason, who, in the summer of 1881, with the pale blood oozing
from his brain, was laid away to rest; and for days have the gifted attorneys of
his gallant slayer tread above his ashes, with scarcely a whisper of his fameless
name. The evidence shows that he, too, had a wife, plain, humble woman, no
doubt, dependent upon his daily toil for the food she ate and the raiment she
wore. Even now, while I speak, with tattered garments and streaming eyes she
may sit upon his tomb, trying to fathom that mysterious Providence by which
her stay in life lies slumbering in the grave, whilst his murdered sits at his trial
the observed of all observers—the most remarkable man of the age. Let her sit
there, gentlemen. We have not brought her here as if oft times done, in piteous
disconsolate widowhood, to crave your sympathy. Let her sit there. Though
her heart be as lonely as the grave-yard about her, and her hands as chilly as the
rough, rock slab upon which she sits, we do not ask even the poor privilege of
bringing her here, to warm for one moment the tips of her fingers at the glow of
your hearts.154

It contrasts, superbly, the victim’s obscurity with Frank James’s fame.155
Wallace’s summation also includes a vivid (if irrelevant) description of
his own family’s suffering during the Civil War.156

What is different, then, is not so much the absence of appeals to
emotion but the different values to which Wallace appeals, and the dif-
ferent world that he describes. The values are those of law and order,
where there is no honor in robbery and no special dishonor in testifying
for the prosecution. The world is the modern world, where individuals
are not inherently good or evil. Wallace’s world is also the modern
world of crime, where both prosecution witnesses and defendants often

154. AMERICAN STATE TRIALS, supra note 4, at 770–71.
155. Id.
156. Id. at 767–68.
act for ignoble motives, where witnesses will testify falsely to shield friends, and where jurors are to be appropriately wary of such testimony. Wallace thus argued that Liddil’s character was no different than the character of any other member of a criminal gang:

Dick Liddil was a member of a band of train robbers, known as “the James’ Gang.” This nobody denies. If he had not been, he could not have rendered the state the vast benefit he has. When men are about to commit a crime they do not sound a trumpet before them. They do their work in secret and darkness. Neither when they are forming bands for plunder or death, do they select conscientious, honest citizens. . . . For this reason, when the state would break up a band of criminals, it must depend upon the assistance of one of their peers in crime to do it. Hence it is a custom, as old as the law, to pick out from a desperate band one of their own number, and, use him as a guide to hunt the others down. No law-abiding man objects to this. When men go about where this is done, crying “perfidy,” “traitor,” “treason,” you can put them down as the enemy of good government, or so steeped in prejudice that they know not what they do. Liddil, the least depraved man in the most secret, desperate band, perhaps the world ever saw, has thus been used; and the state has chosen, also to call him as a witness in this case. Mountains of abuse have been heaped upon him; the English language has been ransacked for terms of vilification. Once, forsooth, and after he got to be a train robber, too, he was a splendid fellow; splendid enough to be the boon companion of so pure and great a man as Frank James. You remember that the defendant himself testified that Liddil, passing under an alias, was his guest, at his table, and slept under his roof. Liddil was one of the heroes then, of whom we have heard so much. But suddenly he makes a change. He leaves that shades of crime and comes out into the sunlight of law and order; and all at once, strange to say, he is transformed into a “viper,” a “villain,” a “scoundrel,” a “demon” of such “execrable shape” as his old tutor’s counsel can give him. But let the attorneys for the defense go on with their abuse; it is a part of their business. I shall not retort by calling the defendant a “viper,” a “perjurer,” a “demon” and the like.157

The prosecutor, having argued that the witness deserved to be believed no less than a defense witness, then urged the jury to consider whether that testimony had, in fact, been corroborated, and he identified (from memory) fifty-six instances in which the witness’s testimony had been supported by that of other witnesses.158 Wallace dealt similarly with the other defense witnesses who had known Frank and Jesse James. He argued that if the witnesses were disreputable, they had been so when Jesse and Frank knew them. If they were outlaws and desperados, they were induced to be so by the James brothers. He then urged the jury to

157. Id. at 804–05.
158. See id. at 814 (listing the instances and Wallace’s assertion: “I could have extended it to a hundred or more.”).
consider whether their testimony was supported by disinterested witnesses, and he elaborated that support in exhaustive detail.\(^\text{159}\)

Wallace’s construction of the defense and defense witnesses is also a more contemporary reading. That all witnesses to Frank’s alibi were members of his family was a weakness, not a strength. The prosecutor argued that family ties were not, in themselves, a sign of virtue, but a reason for untruth. He observed that Frank James’s mother had harbored Jesse and his gang for years and had assisted him in evading the law: “Would she not shield Frank from the law as quick as she would Jesse[?]”\(^\text{160}\) He noted that the only support for the defendant’s assertions that he was in Texas were his testimony and the testimony of his sister and brother-in-law. Wallace argued that Mrs. Palmer, who seemed to appreciate her terrible situation, was a “sad . . . sight” on the stand; he ridiculed Mr. Palmer’s inability to supply any detail at all for his explanation of his work during the summer of 1881.\(^\text{161}\)

Finally, Wallace sought to demythologize the defendant. He argued, in sum, that the defendant was a criminal, not a soldier or legend. He ridiculed the notion that, having evaded detection until his brother had been killed and the rest of the gang disbanded, he was entitled to be released when he turned himself in.\(^\text{162}\) He argued that the notion that Frank should be acquitted because of his war service, because he was, in fact, the last combatant of the Civil War, was an affront to every virtuous Southern soldier whose cause did not involve “pillage, plunder, train-robery and murder.”\(^\text{163}\) He then turned to Frank James’s alibi and pointed out its incredible flaw—the absence of any detail surrounding the defendant’s wanderings at the time of the Winston robbery.\(^\text{164}\)

As with Philips, Wallace finished his speech to rousing applause. Newspaper writers, of all persuasions, lauded his speech. Grateful citizens of Gallatin attempted to present him with a gold watch, a gift that he declined.\(^\text{165}\) But Wallace did not persuade the jury. In less than four hours, it returned a verdict acquitting Frank James. At the announcement of the verdict, the auditorium was engulfed in applause.\(^\text{166}\)

\(^{159}\) See id. at 810–14 (highlighting Wallace’s argument).

\(^{160}\) Id. at 819.

\(^{161}\) Id. at 820.

\(^{162}\) Id. at 823–24.

\(^{163}\) Id. at 825.

\(^{164}\) Id. at 822–23.

\(^{165}\) St. Louis Globe Democrat, Sept. 7, 1883, at 2.

\(^{166}\) Id. at 1.
V. THE AFTERMATH

A. Recriminations

Outside of rural Missouri, the verdict in the case, and in particular the celebration at its close, provoked outrage and even incredulity. For the most part, newspapers outside of Missouri (at least in the North) were hostile or exasperated. Though they were a minority within Missouri, Republicans were a majority outside of it; newspapers found acquittal by a jury from which Republicans had been carefully excluded and to whom the “Civil War” card had been played an act of nullification.\(^{167}\) Even those less appalled believed that the verdict was attributable to the public sympathy for the bandit, rather than weaknesses in the evidence.\(^{168}\) Within Missouri, most of the “big city” papers were also appalled.\(^{169}\)

What was most distressing to many of these papers was the potential appeal of the rhetorical argument made by Philips. Thus, the \textit{St. Louis Globe-Democrat} condemned the efforts to paint James “as a martyr, a hero, a noble fellow who, if not persecuted for righteousness’ sake, was at least persecuted.”\(^{170}\) The paper condemned the use of the “war card” to make noble what were heinous crimes.\(^{171}\) As to friendship, the editorial argued that “it is not a crime to hunt down bandits, nor does a friendship as close as that of David and Jonathan justify armed warfare on society.”\(^{172}\) The \textit{St. Louis Post-Dispatch}, published by Joseph Pulitzer, argued that the evidence against James was “strong enough to have hung Dick Liddil or any other man undefended by the influence that protected Frank James.”\(^{173}\)

\(^{167}\) The reaction of Kansas newspapers, as could have been predicted, was outrage. \textit{See e.g.}, \textsc{Atchison Daily Globe}, Sept. 7, 1883, at 1 (expressing disapproval of “the liberality of the law toward the defense . . .”); \textsc{Topeka Daily Capitol}, Sept. 7, 1883, at 1 (“A General Disgust with the Verdict.”).

\(^{168}\) \textit{E.g.}, \textsc{N.Y. Tribune}, Sept. 7, 1883, at 1 (“Frank James has been acquitted. The result will not greatly surprise those who have watched the proceedings in court and noted the popular feeling in favor of the prisoner.”); \textsc{N.Y. Times}, Sept. 7, 1883, at 4 (“There is no need to say that the acquittal of Frank James is a miscarriage of justice.”). The \textit{Times} opined that while it was no shame for a community to be plagued with crime, the setting free of James by popular sympathy “is a scandal to the whole community from which the jurors were drawn and which it is to be presumed that they represented.”

\(^{169}\) \textit{See, e.g.}, \textsc{St. Louis Post Dispatch}, Sept. 7, 1883, at 4 (expressing disagreement with the verdict); \textsc{Kansas City Daily Journal}, Sept. 7, 1883 (“A Villainous Verdict”); \textsc{St. Louis Globe-Democrat}, Sept. 8, 1883, at 6 (discussing “the most unpleasant incidents of the affair”); \textsc{Kansas City Evening Star}, Sept. 7, 1883 (interviewing Wallace).

\(^{170}\) \textsc{St. Louis Globe-Democrat}, Sept. 8, 1883.

\(^{171}\) \textit{id.}

\(^{172}\) \textit{id.}

\(^{173}\) \textsc{St. Louis Post-Dispatch}, Sept. 7, 1883.
A number of the papers were also dismayed at the political influence they believed was brought to bear in James’s behalf, and in particular the participation of Colonel Philips. The St. Louis Post-Dispatch was especially bitter, arguing even before the verdict that if James were not convicted, Philips’s representation “will make all the world ascribe the defeat of justice to political influence.”174 Having represented himself to the jury as a member of the Supreme Court Commission, Philips’s presence let the jury know that

while the nominal representative of the State in that trial was the Prosecuting Attorney, the real power of the State, and especially its highest judicial authority, were there arrayed for the defense in the person of a high-salaried representative of the Supreme Judiciary and of the Big Four who run Missouri politics. To the presiding Judge, Commissioner Phillips’ presence there said: ‘Beware how you rule against this prisoner. The Supreme Court has in his behalf suspended the laws, and sent me here to run this case as its representative.’175

According to the Post-Dispatch, Philips’s decision to take the case was to be rewarded with higher office.176 Following the verdict, the newspaper urged that there be an investigation by the Missouri legislature.177 The acquittal also produced expected complaints that the outcome was a result of juror bias and even intimidation by James’s supporters.

The newspapers that supported the result also seemed influenced, at least in part, by their view of the nobility and ignobility of the participants. As might be expected, a couple of newspapers were pro-James on purely “partisan” grounds. The Huntsville Herald noted that despite James’s “surrender,” some cowardly Democrats were calling for his conviction. “To the devil with such Democrats, and let Yankeedoodlin howl itself hoarse, while the faithful and manly contend for justice and proclaim the truth . . . .”178 But even those newspapers that were somewhat more measured, and which argued that the acquittal was an appropriate view of the evidence, rather than a matter of right, seemed influenced by the rhetorical appeals, or by the sentiment that lay behind them. Thus, the Missouri Republican, which argued that the trial was “entirely fair,” attributed the not-guilty verdict to “[t]he imperturbable demeanor of the accused[,] . . . the striking contrast in intelligence, in general bearing and in the circumstance of his surrender to the authorities of the man on trial

174. Id., Sept. 8, 1883.
175. Id.
176. In fact, after the verdict in this case, Philips was appointed to the Court of Appeals in Missouri.
177. St. Louis Post-Dispatch, Sept. 8, 1883.
178. Sedalia Democrat, Sept. 15, 1883 (quoting from the Huntsville Herald).
with Liddil the state's chief witness, the demure, modest and pleading manner of the young wife."\textsuperscript{179}

Because the jurors left town shortly after the conclusion of trial, it is difficult to know with any certainty why they reached their judgment. None of the jurors ever gave a formal interview, nor did any member write an account of deliberations. Even an intensely covered trial in the nineteenth century did not invite the kind of scrutiny given late twentieth-century "trials of the century." The one newspaper account purporting to reflect an interview with one of the trial jurors supports the view that the verdict was not a conscious act of nullification. The juror was reported to have asserted that the panel's decision was reached because of its unwillingness to believe Dick Liddil, although he did not state his reason for disbelief.\textsuperscript{180}

\textbf{B. The Truth—Getting Away with Murder}

For at least some trials of the century, the question of the truth of the defendant's guilt is central to the meaning of any remembered narrative. In the O.J. Simpson case, the enduring meaning, such as it is, of the case is framed by the view that the jury "got it wrong" and a guilty man was able to get away with murder. Had Simpson been seen as innocent, the defense he was able to buy would hardly have seemed subversive, and the playing of the "race card" might well have been regarded as justified.

In the case of Frank James, it is a good deal less clear that his factual guilt was as critical. For James's supporters, even an ironclad demonstration of Frank's guilt would not have served to justify punishment. Frank was the last combatant of the Civil War. He had surrendered. His gang was no more. He deserved to be allowed to go on his way. In any event, supporters of James were not about to take the position that he had never engaged in robbery or killing, for such an assertion would have stripped him of the very acts that were the source of his notoriety.

For those who wanted to see James punished, the question of Frank's factual guilt was relevant, but it was probably not central to their concerns. First and foremost, those interested in law and order wanted to stop the gang's activities. Once Jesse was killed, Frank's fate became somewhat less important. Those opposing deification of Frank and Jesse James were intent on labeling their acts as cold-blooded robbery and murder, but this deconstruction was more important than the question of

\textsuperscript{179} \textit{St. Louis Missouri Republican}, Sept. 8, 1883.
\textsuperscript{180} \textit{Kansas City Times}, Sept. 8, 1883 ("Well, we just did not believe Dick Liddil. He was the only one that said Frank was on the train, and we just did not believe him.").
Frank’s personal guilt in this one robbery. Indeed, some of the newspaper accounts that urged conviction suggested that the State’s case was something less than ironclad.\footnote{See The Acquittal of James, N.Y. TIMES, Sept. 7, 1883, at 4 (commenting that the failure of the prosecution for “lack of evidence” was a scandal).}

Events shortly after the trial served to resolve the factual issue of Frank’s participation, if his participation was ever in doubt. Within one week, police commissioner Henry Craig released a written confession of Dick Liddell, made shortly after his apprehension and the confession of Clarence Hite, Frank James’s cousin.\footnote{MILLER, supra note 4, at 283–324; YEATMAN, supra note 37, at 285; PETRONE, supra note 77, at 172–73.} Both confessions contained detailed descriptions of Frank James’s participation that corroborate the trial evidence. Hite’s confession—made by a relative of James, shortly before his death in prison, under circumstances where there was no reason to implicate Frank James—is particularly telling.\footnote{SETTLE, supra note 5, at 148; YEATMAN, supra note 37, at 285.} Frank’s factual guilt was thus made abundantly clear to those who wished to look, and it was made clear shortly after the trial.

C. Aftermath

Although the public may well have believed (correctly) that Frank James got away with murder, that belief played little or no part in its view of him or his state. Indeed, the aftermath of the verdict was kind to the defendant, and to his political allies. For Frank James, it was the beginning of his march toward freedom. The Winston case was the single case (at least in Missouri) in which the prosecution’s evidence was strongest. Whatever chance there might have been for a conviction in Missouri was then rendered virtually impossible by the Missouri Supreme Court, which, in December, 1883, in an unrelated case, ruled that a felon was disqualified from testifying, absent a pardon.\footnote{State v. Grant, 79 Mo. 113 (1883).} Although Wallace requested that Governor Crittenden pardon Liddell, the Governor refused.\footnote{SETTLE, supra note 5, at 150.} Left without its principal witness, the state ended up dismissing all charges in Missouri against James.\footnote{SETTLE, supra note 5, at 150–51; STILES, supra note 5, at 380–81; YEATMAN, supra note 37, at 285–89.}

Shortly after the dismissal, federal authorities arrested Frank for a robbery committed by the gang in Alabama.\footnote{SETTLE, supra note 5, at 152–53, STILES, supra note 5, at 380.} This time, James in fact had a reasonable alibi, and he was
acquitted after a ten-day trial. A final charge was dropped later in 1884. But there remained the matter of the Northfield Minnesota robbery, which had resulted in the murder of two townspeople. While it is not clear whether there was any real threat, eight years after the robbery, the thought that Minnesota would attempt a trial proved too much; James’s allies were not going to allow the matter to be tested. In 1885, Missouri elected former Confederate General John Marmaduke. Frank’s friends interceded with the Governor and apparently secured a promise that he would refuse to agree to James’s extradition, should Minnesota request him. By 1885, Frank James was a free man. He never served a day in prison for his multitude of robberies and homicides. Although he surfaced publicly from time to time, and joined Cole Younger for a Wild West Show for a short period of time, he led a mostly obscure life.

Frank James’s dream team also advanced professionally. Joshua Alexander, who was thirty-one in 1883, served as a representative in the Missouri General Assembly, including a year as Speaker of the House. In 1901 he was appointed a Circuit Judge. In 1907 he began eleven years of service in the United States House of Representatives. John Glover was elected as a State Representative one year after the trial. James Slover became a Judge of the Circuit Court for Jackson County in 1885. William Rush, who was thirty-three at the time of the trial, became an Assistant United States Attorney and a member of the St. Joseph City Counsel. In what may be regarded as something of an irony considering his client’s exploits, Christopher Garner, an experienced trial attorney, and the only member of the defense team who did not apparently seek a “public” life after the trial, served for many years as counsel for the Santa Fe and Wabash Railroad. Finally, John Philips was appointed in 1885 to the Missouri Court of Appeals.

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188. Settle, supra note 5, at 152–53; Stiles, supra note 5, at 380.
189. Settle, supra note 5, at 152–53; Stiles, supra note 5, at 380.
190. Settle, supra note 5, at 157–58; Yeatman, supra note 37, at 289.
193. Id. at 665 n.14.
194. Id.
195. Id. at 664 n.11.
196. Id. at 664 n.10.
197. Id. at 665 n.15.
198. Id. at 664. n.13.
199. American State Trials, supra note 4, at 664; Settle, supra note 5, at 157. William Wallace did not fare as well. He resigned his position as district attorney to run for Congress, but he failed to receive the nomination.
The election of 1884 completed a remarkable transformation in Missouri politics. During the Civil War, Missouri truly was a “border” state. It was divided between North and South, and it bordered not only Kansas, but also the American frontier. With the end of the Civil War, the victors sought to resolve the political alignment of the state in favor of the Union and emancipation. But those defeated in the War resisted fiercely, and, in the end, triumphed.

As remarkable, the ex-Confederates were able to win the culture war, successfully creating for the state a Southern identity that lacked during the conflict. Like the Confederacy itself, the mythology of Confederate Missouri involved a Lost Cause and a “way of life” defended by noble and chivalrous soldiers. Unlike the rest of the South, however, there was no longstanding way of life or chivalrous tradition that existed in the frontier state. Without these traditional symbols, Southern sympathizers instead celebrated “the legend of the noble guerrilla.” According to that legend, the guerrilla, once a gentle farm boy, was stirred to anger and fought to protect friend and family. While fighting under the “Black Flag,” the guerrilla neither gave nor received quarter. Although a fierce fighter, the guerrilla was nevertheless valiant when it came to women and children (at least white women and children). During the 1870s, the James brothers had been a significant rallying point for Southern sympathy. Having been a part of the creation of Missouri’s Southern identity and the icon of the noble guerrilla, it is perhaps fitting that Frank James became its beneficiary during his trial.

By 1885, the saga of the James brothers finally fell from view as a current event, and it lost its hold on Missouri politics. The canonization, however, was just beginning. Over the next several decades, the James brothers would become iconic American heroes, looking more and more like western Robin Hoods and less and less like Klan partisans. They appeared in innumerable dime novels, with one publisher turning out 121 between only 1901 and 1903. In the twentieth century, the James


201. There have been innumerable ways in which the legend has been told. One of the more popular in recent years was Clint Eastwood’s depiction of the plain but noble Missouri farmer driven underground and to vengeance in The Outlaw Josey Wales. In the modern telling, Eastwood does achieve a happy ending that includes reconciliation with both American Indians and Kansans (in approximately that order).

202. V. Lonnie Lawson, He Carried a Gun and Rode a Horse: Jesse James in the Movies, available at http://library.cmsu.edu/vertreece/jesse.htm; see generally YEATMAN, supra note 37 at 306-10 (describing the “Frank James and Cole Younger Wild West Show” and its tour across the country).
brothers moved seamlessly into the motion picture canon\textsuperscript{203} and then to television. Their life and times seem to hold endless fascination and an ability to be reinterpreted with each change in our culture.\textsuperscript{204}

VI. CONCLUSION

While it is difficult to generalize, it is probable that this “trial of the century” was more a reflection of its time than a creator of memory. Philips’s evocation of the chivalrous warrior effectively captured what people wanted to believe about Frank James. But looking back, it is difficult to see how the legend would have been altered or tarnished had Philips not given his speech, or even if James had been convicted.

The trial strategy did indeed capitalize on evocations of honor and nobility. But, notwithstanding the conviction, it is difficult to see how the trial furthered the myth. The robbery itself was brutal. Even if Frank was not involved, there was no question of Jesse’s guilt. The picture painted by Liddel, the Fords, and the Boltons of the gang members themselves was an ugly picture indeed. While Philips’s efforts to separate Frank James from these activities may have been successful, they left Jesse James in the middle of a murderous group of individuals.

If the trial strategy did nothing to further the image of Jesse James, it is unlikely that a different result would have done much to tarnish the image of his brother. Indeed, to the extent that the James’s myth is one of a Robin Hood, or a Rob Roy, a conviction, hanging, and martyrdom might have furthered it as much or more. But an execution of James seems, at least in retrospect, an almost absurd ending. Given the political support for the James brothers in general, and Frank James in particular, it is difficult to imagine the state actually carrying out an execution, even had a conviction been secured. The same forces that prevented James’s surrender to Minnesota surely would have come to his rescue to pardon him before a conviction, in the unlikely event that the judicial process had concluded with a judgment that he should be executed.

In the end, Frank James and his legend were far bigger than the trial. In this respect, the case is unlike the O.J. Simpson trial or some other trials of the century. For better or worse, Frank James had become a folk hero prior to the trial; he would continue to be one well thereafter. The

\textsuperscript{203} Jesse and Frank James have now been portrayed in more than 35 movies. See, e.g., The Internet Movie Database, at www.imdb.com (last visited Apr. 7, 2003) (employing whole world searches for character “Jesse James” and “Frank James”); YEATMAN, supra note 37, at 368–70 (listing films in which Jesse James was portrayed as a character).

\textsuperscript{204} See STILES, supra note 5, for the most modern “revisionist” interpretation.
trial probably did not shape, over the generations, the public's attitude about James's deeds. One supposes that the trial did convince those in the North who needed convincing that Missouri was still a somewhat backward state, with a nostalgia about, if not support of, outlaws and terrorists. For some in the state, it may have played a part in cementing the Southern identity that the state was adopting during the latter part of the nineteenth century. For the most part, however, it was a reflection, rather than a generator, of memory. Frank James had done his part to create the memory, so it is perhaps understandable that he was its beneficiary.