# Commonwealth v. Underwood (1857)

## Section 1: Case Summary

### Synopsis

On August 3, 1857, justice of the peace and prominent Prince William County community member, John Underwood, was indicted at the Brentsville County Courthouse "for unlawfully maintaining by speaking that the owners of Slaves in the Commonwealth, have not the right of property in said Slaves." In finding that the charges brought against Mr. Underwood did not violate his rights, the Court fined him $312.50. At the heart of the matter was a fierce debate regarding the scope of freedom reserved for Virginian speech.

### Significance of the Case

In the 1830s, the abolitionist movement[1] in Virginia began picking up steam. Seeing this as a threat to the institution of slavery, Virginia lawmakers tried multiple ways to restrict the circulation of those ideas.[2] These attempts ranged from prohibiting the advocacy of anti-slavery sentiments to a ban on the distribution of "incendiary" pamphlets. At the federal level, Virginians led the development of a "gag-rule" that barred Congress from even discussing the issue of slavery. Bloody events such as Nat Turner's Rebellion in Southampton County and John Brown's Raid at Harpers Ferry further spurred Virginian fear over abolition-inspired violence.

Before the passage of the 14th Amendment at the conclusion of the American Civil War, in 1868, the rights found in our Constitution's Bill of Rights did not apply to the states. Therefore, Virginia was able to place constraints on speech that the 1st Amendment of the United States Constitution would have prohibited. Prince William County was at the forefront of this conflict between speech and censorship. As of 1857, there had been only three cases in Virginia involving unlawful abolitionist speech, two of which occurred in Prince William.

[1] The abolitionist movement refers to the push to end slavery in America.

[2] https://babel.hathitrust.org/cgi/pt?id=uva.x002676106&seq=werewere784&q1=incwere,,endiary Page 746

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**Key Facts**

- The function of the Bill of Rights is not to protect what is popular, but rather to protect what is unpopular. Underwood's abolitionist speech was deeply unpopular in the South, yet the First Amendment should have prevented its abridgement.
- Justice in America looked very different back then than it does today. Many times, these matters wouldn't even go to the courts. Unpopular sentiments such as Underwood's were often dealt with by mobs of agitated people and other violent methods. Additionally, not everyone was equal under the law. Depending on a person's gender, race, and ownership of land, they could be limited in their ability to represent themselves in court.
- The structure of Virginia's judicial system was also a lot different. Today in Virginia counties, we have either a board of supervisors or a city council serve as the executive and legislative power, and courts serve as the judicial power. In the period where this case took place, executive and legislative authority was instead vested solely in magistrates, the very same ones who would serve as judges. These magistrates were not required to have any sort of legal education; it was the job of the Clerk of the Court to uphold legal procedure and application of the law.

**<u>Section 2: Historical Characters:</u>**

**Defendant: John Underwood –** A local Justice of the Peace, accused of espousing anti-slavery sentiments.

**Witness #1: James Dawson –** A carpenter and active community member to whom Underwood expressed abolitionist views.

**Witness #2: Samuel Taylor –** A tavern manager in the nearby town of Occoquan. Present during a discussion where John Underwood verbally attacked slavery in a butcher's shop.

**Chief Justice Seymour Lynn –** Chief or presiding magistrate of the county court, presiding over Underwood's trial.

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**Justice William W. Thornton –** A magistrate presiding over Underwood's trial.

**General Eppa Hutton –** A prominent lawyer and high-ranking state militia officer, serving as Commonwealth's Attorney. Would later serve in the Confederate Army.

**William Dulany II –** Counsel for Underwood.

**Sheriff Thomas K. Davis –** Responsible for keeping order in the Court. A Republican who would later become a Unionist.

**Clerk of the Court Philip D. Lipscomb –** Responsible for taking notes and recording court proceedings; serves as a reference for legal rules and orders.

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## Section 3: The Court Proceedings

**Chief Justice Lynn:**
Sheriff, bring the court to order.

**Sheriff Thomas K. Davis:**
All rise! Oyez, oyez![3] Silence is commanded in the court while the honorable Chief Justice is sitting, upon pain of imprisonment. All manner of persons that have anything to do with this court draw near and give your attendance, and if anyone have any plaint to enter or suit to prosecute, let him come forth, and they shall be heard. God bless the United States of America!

**Clerk of the Court Philip D. Lipscomb:**
To Your Honors, the Commonwealth of Virginia brings suit against John Underwood, a gentleman justice of the peace for this county, accused of maintaining by speaking that owners have not the right of property in said slaves.

**General Eppa Hutton:**
The Commonwealth of Virginia, as aforesaid, giveth the court further to understand and be informed that a certain John Underwood, late of the town of Occoquan,[4] in the year eight hundred and fifty-seven, being a person of wicked mind and corrupt disposition, did commit the crime of peddling the loathsome notion that owners have not the right of property in their slaves.

There situated, he did criminally produce incendiary remarks for innocent ears in the county of Prince William: then and there being criminally endeavored to propose the right of an owner to his slaves to be illegitimate and evil, against the

[3] The archaic term “oyez” comes from the Anglo-French legal tradition, which roughly translates to “hear ye.” While no longer commonly heard in our courts, the Supreme Court of the United States contiunes to use it. Until 1962, they even had a designated person called the Court Crier specifically to perform the role of opening the court sessions with “oyez.” Today, the role is delegated to the Marshall of the Supreme Court.

[4] Political tension between Occoquan and the rest of Prince William County greatly increased in the years leading to the civil war. While Prince William County was generally considered a solidly southern county, but Occoquan contained a pocket of northern sympathizers. The rise of Abraham Lincoln in the 1850s further polarized Occoquan from the rest of Prince William.

peace and dignity of the Commonwealth and against the force of the General Assembly of Virginia, such case is made and provided.

**Clerk of the Court Philip D. Lipscomb:**
The Commonwealth calls as witness James Dawson. Raise your right hand and swear this oath.[5]

*James Dawson raises his right hand.*

**Clerk of the Court Philip D. Lipscomb:**
The evidence which you shall give in the case now depending between the Commonwealth of Virginia and John Underwood, defendant, shall be the truth, the whole truth, and nothing but the truth.

**James Dawson:**
The evidence which I shall give in the case now depending between the Commonwealth of Virginia and John Underwood, defendant, shall be the truth, the whole truth, and nothing but the truth.[6]

**General Eppa Hutton:**
Mr. Dawson, how do you know the Defendant?

**James Dawson:**
We are—or were—good friends. I did some carpentry work for him some summers ago. Mr. Underwood has a wheelwright business, and he required my expertise for one of his projects. Over the course of working together, he took a liking to me.

[5] Typically, giving testimony in court included swearing with the right hand on the Bible. To avoid complications regarding religion in the classroom, this aspect is absent. However, if so desired, instructors may substitute raising the right hand with a book. Additionally, despite the perpetuation of slavery and restriction of speech (as exemplified in the current case), Virginia's laws on religion were quite lenient. A person was not required to swear on a Bible or even a religious text, any solemn text would do.

[6] There were many limitations on who could testify in open court in the antebellum period as opposed to today. For instance, African Americans and Native Americans could not testify against anyone who didn't belong to either of the aforementioned categories. Additionally, wives did not have the right to testify on their own behalf; that was reserved for their husbands.

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**General Eppa Hutton:**
I see. In the years you have known Mr. Underwood, has he ever expressed sentiments contrary to the right of a slave owner in their property?

**James Dawson:**
Yessir, he has. One time I recall we were lounging in his parlor, and he was telling me he thought a slave could be just as good as a white man. I said, 'You must be an Abolitionist,' and he replied, 'I am!'

**General Eppa Hutton:**
Did he give you a reason for thinking in such a way?

**James Dawson:**
He said all men are born as human beings, so we should all be treated the same and should share the same rights. I told him what he was saying was dangerous, and at that, he became agitated.

**General Eppa Hutton:**
Very well. I am finished with this witness, your honor.

*Defense Counsel William Dulany II rises to question the witness.*

**William Dulany II:**
Mr. Dawson, were there any negroes, enslaved or otherwise, present to hear your conversation?

**James Dawson:**
No, sir, there were not.

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**William Dulany II:**
Clearly, then, Mr. Underwood's intent was not to incite violence or sow seeds of insurrection, but rather express his personal views in the privacy of his parlor.[7]

**James Dawson:**
Well, I wouldn't know. What he was saying was so shocking to me, I haven't the faintest idea what he was thinking when he told me that.

**William Dulany II:**
I have no further questions for the witness, your honor.

**Clerk of the Court Philip D. Lipscomb:**
The Commonwealth calls as witness Samuel Taylor. Raise your right hand and swear this oath.

*Samuel Taylor raises his right hand.*

**Clerk of the Court Philip D. Lipscomb:**
The evidence which you shall give in the case now depending between the Commonwealth of Virginia and John Underwood, defendant, shall be the truth, the whole truth, and nothing but the truth.

**Samuel Taylor:**
The evidence which I shall give in the case now depending between the Commonwealth of Virginia and John Underwood, defendant, shall be the truth, the whole truth, and nothing but the truth.

**General Eppa Hutton:**
Have you ever witnessed the defendant sitting over there proclaim that slave owners do not retain the right to their property?

[7] Note that Mr. Dulany is not arguing that Mr. Underwood's speech was morally sound, but rather focuses on the fact that his speech didn't incite the black population.

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**Samuel Taylor:**
Yes, I have. Myself, a few others, and Mr. Underwood were at the butcher's shop on Mill Street about a month ago when the topic of slavery came up. Mr. Underwood said horrible things, such as slavery being evil and whatnot. He even said that if he were a slave, he would turn on his own master for his freedom.

**General Eppa Hutton:**
And how did that make you feel?

**Samuel Taylor:**
To be honest, it scared me. To think a Justice of the Peace would harbor such dangerous and menacing thoughts in his head is frightening.

**General Eppa Hutton:**
Thank you for your candor. I'm done with this witness, your honors.

**Justice William W. Thornton:**
It's your witness, Mr. Dulany.

**William Dulany II:**
Did Mr. Underwood do or say anything to threaten or make you fear for your physical safety?

**Samuel Taylor:**
What? No, I guess not.

**William Dulany II:**
Then why is it that you were so disturbed by Mr. Underwood's mere words?

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**Samuel Taylor:**
Talk like that is not welcome here, sir. There are some things so barbaric and dangerous that even saying them can result in great turmoil.[8] Mr. Underwood disturbed the peace, and now he has to answer for it.

**Justice William W. Thornton:**
That's for this court to decide, not a witness. But your point still stands

**Samuel Taylor:**
Sorry, your honor.

**William Dulany II:**
No further questions for the witness at present, your honors.

**Clerk of the Court Philip D. Lipscomb:**
The Commonwealth has exhausted its list of witnesses. The defense now calls upon Mr. John Underwood as a witness. Raise your right hand and swear this oath.

*John Underwood raises his right hand.*

The evidence which you shall give in the case now depending between the Commonwealth of Virginia and John Underwood, defendant, shall be the truth, the whole truth, and nothing but the truth.

**John Underwood:**
The evidence which I shall give in the case now depending between the Commonwealth of Virginia and John Underwood, defendant, shall be the truth, the whole truth, and nothing but the truth.

[8] Even today, the 1st Amendment freedom of speech is not absolute. For example, obscenity, true threats, and incitement are still exceptions. These restrictions on speech are narrow, which was not always the case. The controversial Sedition Act of 1798 heavily limited criticism of the U.S. Government, and the Sedition Act of 1918 again criminalized "disloyal" speech. During the Cold War, the ability to express one's support of communism was also curtailed.

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**William Dulany II:**
You've been a Justice of the Peace for some years now, is that correct?

**John Underwood:**
Yessir, that's right.

**William Dulany II:**
As an active member of the larger Prince William community, have you ever found yourself in conflict with the law?

**John Underwood:**
No, I have not. This is my first time on this side of the bench.

**William Dulany II:**
It sounds to me that you are a model citizen and are well respected in your community. However, today you stand charged of proclaiming a slave owner does not have a right to own his slaves. Tell me, Mr. Underwood, did any violent acts result from your words?

**John Underwood:**
No, I was merely advocating for what I believe is right. I've never taken up arms against or threatened to hurt anyone. I've also never encouraged anyone else to commit a violent act.

**William Dulany II:**
Have any Negroes been in earshot of you when expressing your abolitionist views?[9]

**John Underwood:**
I don't reckon any have been. I've been careful about what I say so as not to get myself in trouble. Clearly, that hasn't worked out for me.

[9] The fear of slave rebellions during this period didn't necessarily always stem from the slaves themselves, but instead from outsiders who were capable of stirring the slaves to revolt. Many laws were passed in Virginia restricting the movement of free African Americans due to this concern. Specifically, Virginians were most afraid of Black preachers.

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**William Dulany II:**
Then it seems to me that you've not only been an exemplary member of your community, but also a virtuous man in exercising caution. Your speech didn't endanger anybody, so I see no reason why this court should hold you liable. That's all the questions I have for this witness, your honor.

**Chief Justice Seymour Lynn:**
Mr. Hutton, you may question the witness.

**General Eppa Hutton:**
You say you never expressed abolitionist sentiments in the presence of negroes. Even if that were true, does it really matter? If everyone thought the way you thought and said the things you said, we'd have countless slave uprisings on our hands. Was this your intention?

**John Underwood:**
I've not contributed to nor caused any slave uprisings. I intended to advocate for the freedom of all persons, not for senseless violence.

**General Eppa Hutton:**
Regardless of your intentions, if you continue spewing abolitionist ideas, that will be the result. No further questions, your honors.

**Clerk of the Court Philip D. Lipscomb:**
Mr. Hutton, your closing arguments if you'd please.

**General Eppa Hutton:**
The preservation of an orderly society is of the utmost importance, and Mr. Underwood's speech directly threatens the tranquility of all Virginia. To leave Mr. Underwood unpunished would be to allow the unravelling of the traditions which provide stability and peace we have so long enjoyed. His views are plainly dangerous and have no place in our republic.

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This very morning Mr. Underwood joined the other magistrates of this court in convicting five slaves of the most cruel, unnatural, and shocking crime of murdering their master George Green in his bed with an axe. Is it not conceivable that they expected, if caught, they would face a court inclined to grant leniency thanks to the words of Mr. Underwood?

The law is clear as it was when laid down by the great architects of our Commonwealth's criminal code; 'maintaining by speaking that the owners of Slaves in the Commonwealth, have not the right of property in said Slaves' is a violation of that Code. Excusing this behavior such as this, no matter how highly placed the individual, would set off a chain reaction that would destroy the serenity we have fought so hard to protect. For these reasons, I ask that Mr. Underwood be found guilty as charged. Thank you.

**Clerk of the Court Philip D. Lipscomb:**
Mr. Dulany, you may present your closing arguments.

**William Dulany II:**
Mr. Underwood has committed no wrongdoing other than expressing views contrary to the views of the government. Just over four score years ago, the founders declared our independence from the Crown, delivering liberty to every man to speak his mind. We fought a war for our inalienable rights, yet the Commonwealth would prefer to revert to tyranny. Did Patrick Henry himself not warn us when arguing the cause of Hanover County against the Church of England, that to make laws abridging the liberty of the people caused the government to degenerate into a Tyrant, and forfeit all right to its subjects' obedience? He warned them then as I do now, that you risk riveting the chains of bondage around your own necks because of small-minded spite.

The charges brought against my client are a gross miscarriage of justice. They are the antithesis to everything this great nation stands for. A decision in favor of the Commonwealth would create a standard under which the Virginia legislature could prohibit any speech it deems personally odious, undoing all the progress toward

distancing us from the cruel and stifling practices of the British Empire. Therefore, this court must find Mr. Underwood not guilty in the case before it.

**Chief Justice Seymour Lynn:**
Thank you, counsels. The jury may now go and deliberate. Return when you have reached a verdict. It is so ordered.

**HISTORICAL VERDICT**

*"On this day, August 3rd, one thousand eight hundred and fifty-seven, John Underwood is found guilty of criminally maintaining by speaking that the owners of Slaves in the Commonwealth have not the right of property in said Slaves and is fined the amount of three-hundred and twelve dollars and fifty cents for his crimes against the Commonwealth of Virginia."*[10]

[10] This story does have a happy ending, as a month later, the statute John Underwood was convicted under was declared void and a violation of the Virginia Constitution, which contained an analog to the U.S. Constitution's 1st Amendment. He was paid back in full.