# THE PERSISTENCE OF CASTE: RACE, RIGHTS, AND THE LEGAL STRUGGLE TO EXPAND THE BOUNDARIES OF FREEDOM IN ST. LOUIS

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ABSTRACT

*The roots of racial hierarchy in St. Louis run deep and have taken so many different forms that they require the unflinching gaze of history to understand what continues to give such enduring force to the unseen power of caste in St. Louis's racialized present. The present Article therefore begins with a prologue reaching back more than a millennium to call attention to the region's earliest inhabitants and the destruction of the monumental structures they left behind. Though no longer present in any physical sense, the story of these earthen mounds offers parallels illustrating the unseen power of caste that contributed to the shaping of the aptly nicknamed "Mound City" that rose on their ruins and the Bar Association whose hundredth anniversary this issue commemorates. Linking ancient and modern St. Louis provides a useful heuristic, one that testifies to the protean nature of caste and the enormous difficulties of overcoming it no matter how far separated its historical subjects are.*

*The prologue lays the basis of the main thrust of the Article: the legal struggle against the imposition of a racialized caste system. It therefore revisits the founding of the United States and the replacement of Revolutionary idealism by an ideology of white nationhood that excluded Black Americans. Unlike the prevailing paradigm of the Antebellum Black struggle for freedom, however, which has emphasized acts of flight or rebellion or of political petitioning to change racist laws, this Article draws on recent scholarship that has revealed the way in which enslaved Blacks learned how to use the courtroom to put existing law to use and assert their*

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*rights. By moving beyond the traditional constitutional paradigm and centering the efforts of the enslaved and their lawyers, Konig examines how hundreds petitioned the Circuit Court of St. Louis County with tenaciously pursued "freedom suits" claiming that their enslavement was illegal. Half of them successfully achieved their own liberation and escaped further enslavement, but whether or not they prevailed in their lawsuits, they all achieved something of broader impact on future struggles for Black freedom. Taking advantage of what the freedom suits taught them about using the law to pursue justice, they contributed to the creation and promotion of an enduring legal consciousness of individual rights. The hundreds of petitions for freedom were heard in a trial court before white judges and juries, where they produced verdicts, not ringing judicial pronouncements, against the system of enslavement. For that reason, their efforts have remained largely unstudied and nearly invisible, their roots buried in a legal culture before Reconstruction that no longer exists. The end of slavery, however, did not mean the end of racial hierarchy, which then took new forms demanding new means of resistance. In that struggle, the experiences of suing for freedom left a robust legacy of a "rights consciousness" and familiarity with the ways that law could be an instrument of justice.*

# THE PERSISTENCE OF CASTE

When French colonists established a settlement at the confluence of the Missouri and Mississippi Rivers in 1764, they found an abandoned site covered with mounds erected centuries earlier by vanished Indigenous peoples.[1] The newcomers did not know what they had found, but the enormous mounds—the largest earthen structures on the planet—anchored what archaeologists call a "mound-plaza" form of organization, a manifestation of elite power "suggestive of conflict and the importance of warriors."[2] For the unfortunate captives who were brought there, writes historian Anne Twitty, "[t]heir subjugation, torture, humiliation, and, sometimes, death, demonstrated the power and supremacy of their captors."[3] Barely a century later, in 1869, the relentless pressure of modern urban expansion claimed the last major mound within the present-day city limits of St. Louis, whose removal all but erased the last traces of the people we know only through their acts—as Mound Builders—or their location—Mississippian or Woodland. Dhegiha Siouan language speakers had occupied the site of the modern city of St. Louis for centuries before moving west.[4] The names given to the mound and its surroundings by its Indigenous occupants are lost to history, but the descendants of the European settlers who laid claim to the land and destroyed the visible remnants of the earlier civilization referred simply to the "Big Mound," and its location as "Mound City." The removal of Big Mound and its neighbors has left a gaping void in the story of this region, a void that has engulfed not only the history of the Mound Builders and the enslaved laborers who had constructed the mounds, but also of the enslaved African Americans who labored to remove them and build the modern city that rose on its site. Their legacy, which is

1. STEPHEN ARON, AMERICAN CONFLUENCE: THE MISSOURI FRONTIER FROM BORDERLAND TO BORDER STATE 5 (2006). The first European explorers found twenty-six mounds at the site of present-day St. Louis, which "were dwarfed in number and size," writes Stephen Aron, "by the 120 mounds located just across the river" at Cahokia. *Id.*

2. THOMAS E. EMERSON, CAHOKIA AND THE ARCHAEOLOGY OF POWER 39–41, 239 (1997).

3. ANNE TWITTY, BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787-1857 28 (2016) (citing BRETT RUSHFORTH, BONDS OF ALLIANCE: INDIGENOUS AND ATLANTIC SLAVERIES IN NEW FRANCE 28 (2012)).

4. Scholars are divided over the migration of these inhabitants, also referred to as "Dhegiha." On the difficulties of using fragmentary or conflicting bodies of evidence to determine their migration and settlements, see Susan C. Vehik, *Dhegiha Origins and Plains Archaeology*, 38 PLAINS ARCHAEOLOGIST 231 (1993); and Beth R. Ritter, *Piecing Together the Ponca Past: Reconstructing Degiha Migrations to the Great Plains*, 22 GREAT PLAINS Q. 271 (2002).

the subject of this Article, lives on: though unseen, the void that was Big Mound constitutes the foundation of an invisible legacy of caste recreated in a racialized social hierarchy that persists to this day.[5]

Caste has taken on many forms as it has adapted over the centuries to changing political and economic systems. For purposes of comparison, we can refer to its modern American form, as described by sociologist Gunnar Myrdal in a landmark study in 1944,[6] and which Pulitzer Prize-winning journalist Isabel Wilkerson finds embedded in an American "architecture of human hierarchy" whose "invisibility is what gives it power and longevity."[7] She summarizes America's racialized hierarchy as

> an artificial construction, a fixed and embedded ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of ancestry and immutable traits, traits that would be neutral in the abstract but are ascribed life-and-death meaning in a hierarchy favoring the dominant caste whose forebears designed it. A caste system uses rigid, often arbitrary boundaries to keep the ranked groupings apart, distinct from one another and in their assigned places.[8]

We shall return to the historical creation of caste in the modern St. Louis context, but before doing so we must recognize the process by which the removal of Big Mound from St. Louis can remind us how the controlling narrative of our national history has also ignored the vigorous Black legal culture of Antebellum St. Louis this Article examines. Like the histories of so many peoples of color in the American experience, both stories are

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5. A smaller mound, now known as "Sugarloaf Mound," is the sole surviving structure within the city limits of present-day St. Louis. To save this last mound and restore the Indigenous historical presence, the Osage Nation, whose ancestral links connect it to the Mound Builders, purchased the site in 2009 and in 2017 demolished a house built atop it in 1928. *See* Andrea Hunter & Andrew Weil, *Saving Sugarloaf Mound*, 7 J. HERITAGE STEWARDSHIP 78 (2010). For an excerpt from their full report, see Andrea Hunter & Andrew Weil, *St. Louis' Last Standing Mound*, THE OSAGE NATION, [https://perma.cc/4B9U-83SJ]. For an overview of the Indigenous peopling of the region, see *Ancestral Osage Geography*, THE OSAGE NATION, https://www.osageculture.com/culture/geography [https://perma.cc/3DSJ-JSQQ].

6. Myrdal points out that the term "caste, which was already in use before the Civil War, was increasingly employed" after emancipation. GUNNAR MYRDAL, AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 677 (1944).

7. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 17, 72 (2020).

8. *Id.* at 17.

victims of the way history erases parts of the vital past and renders them invisible in order to serve the interests of a dominant group.[9] Both remind us of Ralph Ellison's comment about literature, which grows truer the more we recover dimensions of the past rendered invisible in the interest of a controlling narrative written by those who did the erasing. The protagonist of Ellison's masterwork, *Invisible Man,* puts this bluntly: "I am an invisible man . . . ," he explains as he introduces himself to his readers, "I am invisible, understand, simply because people refuse to see me . . . . When they approach me they see only my surroundings, themselves, or figments of their imagination–indeed, everything and anything except me."[10] In an interview many years later, he left us with the oft-quoted comment which provides a more accurate, inclusive narrative: "Much of what gets into American literature," he observed, "gets there because so much is left out."[11] It is what has been left out until recently—and why—that this Article employs to make visible and to expose the deep historic roots of racial exclusion that have barred its way.[12]

Looking at the landscape of the modern city of St. Louis, we "see" what has been left out: not only the Big Mound, but the invisible force of urban sprawl that provided the foundation for a segregation of races and the containment of its Black population within the invisible barriers of a new type of caste. With the irony that comes into view only when historical sleuthing connects long-ignored facts, the dirt and rock that once were the Big Mound were removed and repurposed as landfill to support the tracks of the North Missouri railway and open up suburban municipalities, one of which was Ferguson, which was incorporated in 1894, and where violent

9. One of the most trenchant critiques, still pertinent to our present national dialogue on race, was made by W.E.B. Du Bois many decades ago. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 (1935). In demonstrating how the enslaved shaped the struggle for Black freedom after the Civil War, he wrote, "Up from this slavery gradually climbed the Free Negro with clearer modern expression and more definite aim long before the emancipation of 1863." *Id.* at 16.

10. RALPH ELLISON, INVISIBLE MAN 3 (1947).

11. RALPH ELLISON, THE COLLECTED ESSAYS OF RALPH ELLISON: REVISED AND UPDATED BY JAMES CALLAHAN 390 (preface by Saul Bellow, 2003).

12. Omissions of this sort persist, most recently revealed in the contemporary coverage given to the massacre of Blacks in Tulsa, Oklahoma, in 1921. For an example of one way that the erasure of this tragedy began the day after it occurred, see the news coverage in *Two Whites Dead in Race Riot*, TULSA DAILY WORLD, June 1, 1921, at 1.

confrontations of social protest and militarized suppression in 2014 laid bare the inescapable legacies of unacknowledged inequality. The city shaped literally by invisible enslaved laborers tells yet another story that bears silent witness to another reality: the site of Big Mound is marked today by a nondescript monument at the end of Mound Street, near the intersection of two interstate highways (Interstates 44 and 70). Together, these two vehicular arteries are part of a system that enabled the westward suburban development that destroyed neighborhoods in their path and paved the way for the flight of white St. Louisans, answering the question, "How fast can you get out of town?" Encouraged as well by governmental subsidies for home construction, newly incorporated cities enacted zoning restrictions such as minimum lot sizes for single-family homes and bans on multifamily dwellings, producing segregated suburban enclaves.[13] Placing St. Louis in a context often overlooked, historian Colin Gordon brings together the embedded forces of an untold story we hear only when their effects are revealed. Gordon places its development historically:

> As a border city, Greater St. Louis bears a dual legacy: its race relations are essentially Southern, rooted in the institutions and ideology of Jim Crow, but its organization of property – reflected in private realty and in public policy – follows a national pattern in which the institutions and mechanisms of local segregation are particularly stark.[14]

Gordon's research reveals how formal freedom in St. Louis began with a "strong de jure commitment to individual rights," but that "all of this was conceived in a slave-holding republic" in which legalized segregation and disenfranchisement "sustained slavery in all but name."[15] His work is required reading for our rediscovery of the unseen political processes that shattered Black communities and cloaked the barriers to full citizenship behind facially neutral public policy. The process he describes is one of political disfranchisement and political isolation that silently enables the

13. COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF AN AMERICAN CITY 159 (2008); *see also* COLIN GORDON, CITIZEN BROWN: RACE, DEMOCRACY, AND INEQUALITY IN THE ST. LOUIS SUBURBS (2020). For more by Gordon, see Colin Gordon, *Dress Rehearsal for* Shelley*: Scovel Richardson and the Challenge to Racial Restrictions in St. Louis*, 67 WASH. U.J.L. & POL'Y 87 (2022) (also published in this volume).

14. GORDON, CITIZEN BROWN, *supra* note 13, at 121.

15. *Id.* at 12.

systemic denial of public services and equal access to labor and housing markets. The exercise of the rights of citizenship, he explains, "should be understood as more than just legal or political formalities," adding that "the enjoyment of those rights also depends on political agency and capacity and on social inclusion or membership in a political community."[16] These unseen communal institutions—whose absence is a product of embedded historical attitudes and forms a template of systemic exclusion—are necessary to enable "lived citizenship." "Citizenship and community are powerful and palpable locally," he explains, "at a scale where natural solidarities are easier to forge and sustain."[17] What are all too visible, by contrast, are the formal public institutions whose role is "simply regulating, disciplining, or punishing" those who dare to exercise their rights.[18] Our most basic public services begin with the police whose visibility reminds citizens when they are "out of place" and must not cross the invisible borders between America's "two societies, one black, one white—separate and unequal."[19]

The reasons behind the conscious erasure of this historical process gain explanatory power when understood within the same historical framework that obliterated the story of Indigenous dispossession and removal. As archaeologist Sarah Baires has written, the story of the "Vanishing Indian" propagated "a myth-history of the 18th and 19th centuries that depicted Native Americans as a race incapable of adapting to the new American civilization."[20] The image of doomed Indigenous peoples defied obvious contrary evidence that was erased from history. Literary scholar Gordon Sayre makes clear that "the invaders' ideology of conquest had systematically denied the natives' agricultural and military skills" despite Indigenous victories in armed resistance to the new republic's expansion in the 1790s.[21] Legal scholars have amply documented the contradiction between the rationalization of territorial dispossession when leaders in

16. *Id.* at 11.
17. *Id.* at 14–15.
18. *Id.* at 11.
19. KERNER COMM. REP. OF THE NAT'L ADVISORY COMM. ON CIV. DISORDER at 1 (1968).
20. Sarah E. Baires, *White Settlers Buried the Truth About the Midwest's Mound Cities*, SMITHSONIAN MAG. (Feb. 23, 2021), https://www.smithsonianmag.com/history/white-settlers-buried-truth-about-midwests-mysterious-mound-cities-180968246/ [https://perma.cc/97EB-P3KL].
21. Gordon M. Sayre, *The Mound Builders and the Imagination of American Antiquity in Jefferson, Bartram, and Chateaubriand*, 33 EARLY AM. LITERATURE 225 (1998).

Washington systematically took over control of Indigenous land claims while simultaneously insisting that their Indigenous occupants had no understanding of law.[22] To political scientist Rogers Smith, the government's paternalistic acts to prevent white settlers from defrauding them "confirmed the implication in the Constitution: the U.S. did not really regard the tribes as independent nations" and "treated the tribes as subordinate parts of the new nation in some ill-specified sense."[23] Indigenous Americans, like Black Americans, were deemed incapable of assuming the responsibilities of citizenship, which Smith has analyzed as those "ascriptive" qualities that entitle full membership in the political and social communities of a nation.[24] "Rather than stressing protection of individual rights for all in liberal fashion, or participation in common civic institutions in republican fashion," he writes, the course of American law reveals the imposition of "forms of second-class citizenship denying personal liberties and opportunities to most of the adult population on the basis of race, ethnicity, and even religion."[25] Caste had reappeared in a new form.

The English who colonized North America had little trouble creating the necessary model for the creation of a subordinate laboring caste living apart from English colonizers, for they could draw on a centuries-old tradition in the forging of an Anglo-American identity. The creation of a racialized caste continued practices devised by English colonizers to legitimate the conquest and subjugation of an Irish Roman Catholic population they believed fit only to labor for God's Chosen People in England's first overseas enterprise. To advance England's Protestant mission across the Irish Sea, its "wilde Irishe" inhabitants were consigned to compulsory labor on lands held by English colonizers granted land

22. LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005). For an alternative interpretation to this standard account, see STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).

23. ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U. S. HISTORY 144–45 (1997). My debt to Smith's penetrating work (and especially to chapter eight) from which this characterization is drawn, will be obvious to those who have also benefited from his work.

24. Smith defines and explains the "inegalitarian ascriptive traditions of Americanism" in his "Introduction." *Id.* at 1–12.

25. *Id.* at 2.

confiscated by the Crown.[26] Typical of the role they were to play, the native Irish were to "have no voice or authoritie in our common wealth, and no occasion is made of them but onlie to be ruled, not to rule other."[27] Discipline was to be enforced by violent methods reserved for use against them alone, and by military force if necessary. This caste system was seamlessly adapted to North America when English colonizers brought the first Africans to England's Virginia colony, later to be enforced by the slave patrols that kept Black mobility in check.[28]

The unique iteration as a racialized caste in North America, nevertheless, required the formal creation of a debased legal status defined by the "bright line" that the law craves. A vast literature—far too vast for the present Article—exists to chart the twisted logic by which this occurred, but the watershed work on this process remains Winthrop Jordan's masterful account of the deep intellectual roots of anti-Black racism and their even deeper penetration into the soil of England's plantation colonies in the seventeenth century.[29] The collective attention of a generation of gifted intellectual historians and legal scholars has followed Jordan's method, but the logic of degradation exposed in their work points to an unmistakably American product—in the words of historian Ariela Gross, "an extreme form of slavery that had existed nowhere in the world."[30] She continues, "For the first time in history, one category of humanity was ruled

26. SIR THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND 46 (Leonard Alston ed., 1906).

27. *Id.*

28. *See id.* For English patterns of racialized legal debasement and the creation of harsh mechanisms of the state to enforce control, see David Thomas Konig, *'Dale's Laws' and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 AM. J. LEGAL HIST. 354 (1982). England's earlier colonization of the West Indies offered a model for the transformation of the Irish system of social control into one based expressly on race. *Id.* For a description of the evolution of these Tudor penal statutes into the Antebellum slave patrols as "the creation of racially focused law enforcement groups in the American South," which then transitioned into the Ku Klux Klan, see SALLY HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 4 (2001).

29. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968). For a penetrating and appreciative review essay of Jordan's book on its reissue in 2012 with essays by Christopher Leslie Brown and Peter H. Wood, see Annette Gordon-Reed, *Reading White Over Black*, 69 WILL. & MARY Q. 853 (2012). Brown and Wood, wrote Gordon-Reed in 2012, "make clear that more than forty years after Jordan's book first challenged scholars to think more intentionally and intently about the origins of America's racial conundrum and the central role that slavery played in helping to create it, *White Over Black* remains a signal achievement in American historiography, a rich analytical and stylistic bequest to early American scholarship." *Id.* at 853.

30. ARIELA GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 22 (2008)

out of the 'human race' and into a separate subgroup that was to remain enslaved for generations in perpetuity."[31]

The story of Black aspirations to freedom and equality in Antebellum America has suffered from the same willful distortions. Both narratives were, to return to Ellison's observation, "left out," crafted to justify their successors' ideology of inevitable, natural triumph by a superior race of people, whether by territorial dispossession and confinement or by enslavement.[32] Both narratives were based on the alleged racial superiority of the European, and both insisted that the peoples of North America or Africa were unworthy of inclusion in the grand narrative of a triumphalist American history. With separation from Britain came a need to define the attributes of a new American citizenship, one that defined what it meant to be an "American" in terms, it was believed, necessary to sustain a political order without a king and hereditary nobility, and with a social order lacking an established church and hereditary landed elite. When the creators of the canon of American history turned to writing about the dispossession of the Indigenous peoples of North America, they did so within tropes—albeit more sentimentalized—that would serve equally well to enslave the captive laborers of Africa.[33]

The African American contribution to the ongoing quest to realize the nation's founding ideal that "[a]ll men are created equal" is a story as old as our nation, and so, too, is the effort to remove it from its rightful place as part of the common cause of nationhood. The irony of this omission was all the more apparent on the occasion of the bicentennial of the Constitution, as noted by historian Vincent Harding in 1987:

> Certainly the argument can be made that no segment of this nation's citizenry has so actively wrestled with the meaning, purpose, and our view of the Constitution than those who were originally enslaved with the permission of that document and its Framers and who have suffered serious injuries because of its periodic misuse.[34]

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31. *Id.* at 22–23.

32. ELLISON, THE COLLECTED ESSAYS, *supra* note 11.

33. Vincent G. Harding, *Wrestling Toward the Dawn: The Afro-American Freedom Movement and the Changing Constitution*, 74 J. AM. HIST. 718, 718–19 (1987).

34. *Id.*

Robert G. Parkinson has explained how the "common cause" became a white man's cause as "a drastic change occurred when the American Revolution became a Revolutionary War."[35] For decades preceding the Declaration of Independence, Americans had read of political conspiracies against American liberty hatched in London,[36] which upon independence were swiftly translated into suspicions of internal conspirators—Red and Black—among them. Two almost simultaneous events illustrate one of the many ironic parallels of the frenzied days when the common cause was being forged.[37] Within days of the "midnight ride of Paul Revere" immortalized by Henry Wadsworth Longfellow's poem, there occurred in Norfolk, Virginia, an event largely ignored and consigned to invisibility—the hanging of two enslaved Virginians convicted of conspiring to incite servile insurrection.[38]

Patriotic calls for "liberty" only sharpened the contradiction between the Revolutionary rhetoric of rights and the obvious degradation of human chattel, especially when leaders like John Dickinson compared their own political subjection to arbitrary British rule to "the most abject slavery."[39] It was impossible, asserted "a citizen of Philadelphia" to "reconcile the exercise of SLAVERY with our *professions of freedom*."[40] Nevertheless, Southern slaveholders tried their best to do so. Some, like Patrick Henry, admitted the contradiction but took refuge in "the general inconvenience of living here without them," while expressing hope for a future when "this lamentable evil" might be abolished.[41] Ultimately, the most potent excuses were the most racist, which derided Blacks as a separate inferior species incapable of fulfilling the duties of citizenship. When the Reverend Samuel Hopkins posed the question in 1776 of why American whites deemed

35. ROBERT G. PARKINSON, THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION 7 (2016). Parkinson's exhaustive and compelling account of the recasting of Revolutionary rhetoric reveals how a theme that at one time dominated popular awareness could be diminished and ultimately rendered historically insignificant.

36. The classic study of this aspect of the eighteenth-century American political thought is BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992).

37. PARKINSON, *supra* note 35, at 83.

38. *Id.*

39. BAILYN, *supra* note 36, at 238 (citing JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES (1774)).

40. *Id.* at 239 (citing RICHARD WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES (1774)) (emphasis in original).

41. *"The Slave Trade", An Original Letter from Patrick Henry*, N.Y. TIMES, JULY 9, 1860, at 2 (Henry's letter was written in 1771).

Blacks as "fit for nothing but slaves," he was told that "we have been used to look on them in a mean, contemptible light," and "as quite another species of animals, made only to serve us and our children . . . ."[42]

As the colonies moved toward declaring independence, the outbreak of armed hostilities gave rise to fears of Black insurrection. Future President James Madison, who owned more than a hundred slaves at his Montpelier plantation, expressed the widespread fear that "an Insurrection among the slaves may and will be promoted" with the outbreak of war.[43] Enslaved Virginians, in fact, had good reason to cast their lot with the British, and Virginia's royal governor took full advantage of deep-seated white racist suspicion and Black aspiration by proclaiming freedom for any able-bodied enslaved male Virginian who would join British armed forces to suppress the rebellion.[44] Dread of such an action reflected the all-too-plain awareness of the Black desire for freedom and in reaction produced a racialized caste, which historian Kate Masur aptly describes as a "period of retrenchment that followed, as states increasingly adopted laws that construed free Black people as an unwanted class."[45] No sooner had independence been secured than it was overtaken by a recasting of the narrative of American liberation without Black participation. As historian Ira Berlin has so powerfully shown, post-Revolutionary America was witnessing "The Origins of the Free Negro Caste."[46]

In building new communities in a republic, the elimination of Black citizenship from "We, the People," inscribed a line of separation seen as necessary to preserve the racial purity of the republic. It was race—an artificial category of biologically defined characteristics—that provided the basis for the division of the United States into the two nations. These separate nations existed centuries before political scientist Andrew Hacker's

42. JORDAN, *supra* note 29, at 276 (citing SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS; SHEWING IT TO BE THE DUTY AND INTEREST OF THE AMERICAN COLONIES TO EMANCIPATE ALL THEIR AFRICAN SLAVES 34 (1776)).

43. PARKINSON, *supra* note 35, at 82.

44. *Id.* at 59. For newspaper coverage of the proclamation and the "exceedingly incensed" public reaction to Dunmore's "diabolical schemes, against the good people of this government," see *id.* at 157.

45. KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO THE CIVIL WAR xiii (2021).

46. Berlin uses the term as the title of Chapter 8 of his magisterial work, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1975). Readers familiar with Berlin's work will appreciate how much this present Article has benefited from it. *See also* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (1998); *and* IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES (2003).

1992 study built on Myrdal's examination of racial division in the "two nations" that constitute the (not-so) United States of America.[47] Race, he found, had persisted throughout American history as the most powerful basis for a caste system "surpassing all others even gender in intensity and subordination."[48] When John Trumbull painted his grand historical rendering of the "Battle of Bunker's Hill" in 1786, he included the figure of a Black soldier holding a musket amid the chaos of the death of Major General Joseph Warren.[49] By the middle of the next century, the figure had disappeared from popularly distributed engravings of Trumbull's work.[50]

The removal of the Black militiaman could not destroy the memory of the idealistic promises of Revolutionary rhetoric, which survived among Americans as both inspiration and warning. As George Tucker keenly observed in warning the Virginia legislature in 1801, "[i]t is an incontrovertible maxim that man will never be content with lesser liberty when he has sufficient intelligence to perceive, and enough power to demand the greater."[51] Black antislavery advocates had used the former to augment the latter in a vigorous assertion of rights even as the war for independence began. William Cooper Nell, considered by many to be America's first Black historian, devoted much of his career to chronicling Black participation in the founding of the nation, which, he made clear, began with the martyrdom of Crispus Attucks in the Boston Massacre. But significantly, in his account of the event in his *Services of Colored Americans in the Wars of 1776 and 1812*, Nell chose not to emphasize Attucks's bravery as more conventional accounts did. Rather, he gave voice to an African American perspective, insisting that his subject's significance lay in the fact "that the colored man, Attucks, was *of* and *with* the people, and was never regarded otherwise."[52] To drive home his point, Nell quoted remarks made by the eminent Garrisonian poet John Greenleaf Whittier at

47. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992).

48. *Id.* at 4. *See also* WILKERSON, *supra* note 7, at 20.

49. JOHN TRUMBULL, BATTLE OF BUNKER'S HILL (1786).

50. For an illuminating account of the erasure of the Black figure, see SIDNEY KAPLAN & EMMA N. KAPLAN, THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION 21–23 (rev. ed. 1989).

51. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 46, at 103 (citing Letter from Attorney George Tucker, to the General Assembly). Berlin adds, "The war ended too quickly to damage slavery permanently, but the spirit of liberty it inspired outlasted the fighting." *Id.* at 20.

52. WILLIAM C. NELL, SERVICES OF COLORED AMERICANS IN THE WARS OF 1776 AND 1812 5 (1851).

a Fourth of July celebration in 1847, who declared his "attempt . . . to rescue from oblivion the name and fame of those who, though 'tinged with the hated stain,' yet had warm hearts and active hands in the 'times that tried men's souls.'"[53] Like Whittier, Nell was linking Black service to the nation to a claim of citizenship despite the fact that "a combination of circumstances has veiled from the public eye a narration of those military services which are generally conceded as passports to honorary lasting notice of Americans."[54]

Nell's project to remove that veil and claim the rights of Black Americans to full citizenship kept alive a project that began decades earlier, when memories of the Revolution were beginning to fade. Writing in the 1830s, William Yates provided a robust rebuttal to the "perversion of the public sentiment" in standard histories in his *Rights of Colored Men to Suffrage, Citizenship, and Trial by Jury* "to call to mind, from the records of the past, some of the many testimonials to be found of the rights and services of colored men. The exclusion of this class from social intercourse," he reminded his readers, "throws them into the shade . . . ."[55] Yates was writing at a time when the struggle over slavery was intensifying and pushback against assertive antislavery activism was removing Black claims to citizenship from the master narrative of American history. "[W]hen the services and sufferings of men of color were fresh in the memory," Yates asked rhetorically, what white veteran could possibly have said, "*[y]ou* are not to participate in the rights or liberty for which you have been fighting?"[56] It is among the many grating ironies of American history that Andrew Jackson, the last American President who actually was a veteran of the war, answered Yates's question by taking a prominent role in the repudiation of Black rights and liberties.

The "exclusion of this class" that motivated Yates in 1838 referred to a growing class of free Blacks that was increasing faster than any other

53. *Id.* at 3–4.

54. *Id.* at 4.

55. WILLIAM YATES, RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP, AND TRIAL BY JURY: BEING A BOOK OF FACTS, ARGUMENTS AND AUTHORITIES, HISTORICAL NOTICES AND SKETCHES OF DEBATES iii (1838).

56. *Id.* To Historian Martha Jones we owe a major debt for her study of Yates, which she uses to great effect in her masterful monograph. MARTHA JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 1–8 (2018).

segment of the nation's population.[57] Though still a small minority, its growth generated enough pressure on alarmed white legislatures to roll back the gains toward Black freedom made in the flush of post-Revolutionary idealism[58] and, in some states, to consider removing all Blacks from the country. A private association, the American Colonization Society, began raising funds in 1817 to establish a Black colony in Africa and finally sent its first contingent of colonists to Liberia in 1831.[59] Among its leaders seeking to remove all Blacks from the United States was Octavius Taney, brother of future Supreme Court Justice Roger Brooke Taney.[60] "A racist, largely ineffectual body of well-intentioned Christians," as Anne Twitty describes them, "[t]he ACS acknowledged slavery as a curse but embraced the notion that people of color had no place in America's divinely ordained future."[61] Its goals were thoroughly grounded in anti-Black racism, but its benevolent paternalism and its veneer of humanitarian concern for the well-being of Black Americans managed to attract even many white Americans who opposed slavery but were unable to accept the possibility of a large free Black population among them, or who feared a bloody "war between the castes."[62] As late as 1860, one of its vice-presidents was St. Louisan Edward Bates, who would soon be named Abraham Lincoln's Attorney General.[63] Few Black Americans accepted the Society, although others saw little choice between leaving—whether by colonization or their own voluntary emigration to Canada—and living the degraded and fearful life of a subordinate caste.[64] The issue was especially divisive in Baltimore, where Martha Jones has studied the most vociferous repudiation of the idea. There,

57. In Missouri, the free Black population increased more than ten-fold from 1820 to 1860. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 46, at 136.

58. SMITH, *supra* note 20, at 178–79.

59. MASUR, *supra* note 45, at 47.

60. JONES, *supra* note 56, at 37–38. On the brothers Taney, see *id.* at 47.

61. TWITTY, *supra* note 3, at 112.

62. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 46, at 355. Nicholas Guyatt argues that "racial separation served as a rallying cry for slavery's opponents for more than seventy years" before the Civil War. "For much of the nineteenth century," he writes, "the most respectable way to express one's loathing for slavery was to endorse the logic of colonization." NICHOLAS GUYATT, BIND US APART: HOW ENLIGHTENED AMERICANS INVENTED RACIAL SEGREGATION 5 (2016).

63. HARRISON A. TREXLER, SLAVERY IN MO. 1804-1865 231 (1914). On Bates's representing freedom suit petitioners, see TWITTY, *supra* note 3, at 110–11.

64. JONES, *supra* note 56, at 39.

a defiant Black antislavery group met and toasted, "[e]mancipation without emigration, but equal rights on the spot."[65]

One free Black in St. Louis expressed the ambivalence toward colonization shared by many: that the method to be followed in the pursuit of freedom was less important than achieving what freedom meant: "I believe that a man of color must seek and obtain a home[,] a peace [sic] of earth he could call his own and water it with the sweat of his brow, he must plant the tree of liberty and build a temple sacred to Religion and Justice."[66] Although St. Louis colonizationists generally followed the national society's goal of Black removal, the mixed motives of those who founded the "Auxiliary Society of St. Louis" to assist colonization in 1827 are revealed in its leadership, which included George Tompkins, who later sat on the Missouri Supreme Court and, we shall see, joined with Judge Mathias McGirk in the "golden age" of freedom suits.[67] The Auxiliary had little success, and in 1839 a Missouri Colonization Society formed. Its position was unequivocal. Meeting in Jefferson City in 1845 while a state convention was debating a new constitution, its secretary recommended a resolution to remove all free Blacks from the state to prevent further "injury to our country" by their agitating for freedom that tended to "corrupt our slaves."[68]

The Jackson presidency normalized belief in Black racial inferiority and gave voice to the new generation's aggressive national expansion, a period that Smith aptly labels the "High Noon of the White Republic."[69] Jackson's Secretary of State from 1833 to 1836, Louis McLane, regarded Blacks and Indigenous peoples as subordinate populations, supporting the dispossession and removal of Native Americans while extending his exclusionary racism to African Americans. Despite his aversion to slavery as an institution, McLane rejected "'any possibility' that the 'weaker caste' of Blacks could 'assimilate' with whites, any more than 'oil with water.'"[70] As Smith accurately summarizes McLane's adamant racism, "[n]ot just positive law but also 'reason' and 'nature' had 'drawn a line of discrimination which can never be effaced.' America was at its core and would always be a 'white community,' in which even free blacks must

65. *Id.*
66. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 46, at 356.
67. TREXLER, *supra* note 63, at 227.
68. *Id.* at 229–30.
69. SMITH, *supra* note 20, at 197–242.
70. *Id.* at 176.

belong to an 'inferior order.'"[71] His position had been clear since the debates over Missouri statehood, when he had grouped Blacks and Indigenous peoples as unfit for membership in a nation intended as an "association . . . of white people – Europeans and their descendants."[72]

Nell and Yates were not alone in challenging the new order as a perversion of history, law, and morality, as the battle moved to state constitutional conventions, where delegates pushed for greater democratization of politics and expanded voting rights of whites even as they restricted the rights of Blacks. Contests raged as delegates refused to protect the voting rights of free Blacks or liberate those who remained enslaved. At New York's convention in 1821, Peter Augustus Jay, son of the Supreme Court Justice and contributor to *The Federalist*, warned against repudiating "all those principles upon which our free institutions are founded, or to contradict all the professions which we so profusely make, concerning the natural equality of all men." Jay was fighting a rear guard action against a proposal to add the word "white" as a qualification to vote. To limit the suffrage that way, he warned, would be "odious" and lead to "the establishment of a large, a perpetual, a degraded *caste*, in the midst of our population." His impassioned plea succeeded by a vote of 63-59, but a select committee revised the bill by increasing the property qualification for Blacks while abolishing it for whites.[73]

That same year, the crisis over slavery in the newly admitted state of Missouri reignited when it drafted a proslavery constitution, dredging up an issue left unsolved by the so-called Missouri Compromise of 1820, whose preservation of sectional balance in the Senate by pairing Missouri (slave) and Maine (free) has kept historical focus on the high politics and constitutional debates of the period.[74] Thomas Jefferson famously warned that the crisis over Missouri statehood was like a "fire bell in the night," and the "knell of the Union."[75] But there lay a more ominous crisis within it—the status and future of free Blacks within a biracial republic. At his death in 1826, Jefferson's long life in a slave society left him with no illusions

71. *Id.*

72. MASUR, *supra* note 45, at 49.

73. Jay's antislavery speech, along with others at the convention in 1821, is cited in full by YATES, *supra* note 55, at 23.

74. ARON, *supra* note 1, at 177–85.

75. Letter from Thomas Jefferson to John C. Holmes (April 22, 1820), *in* THOMAS JEFFERSON, WRITINGS 1434 (Merrill Peterson ed., 1984).

about the depth of feelings held by whites and Blacks that divided the nation. When asked in 1781 why the nation could "not retain and incorporate the blacks into the state," the first reason he gave was the "[d]eep rooted prejudices entertained by the whites," followed by the "ten thousand recollections by the blacks, of the injures they have sustained." He concluded that "the real distinctions, which nature had made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end, but in the extermination of the one or the other race."[76] These fears haunted him to the end of his life, and reflected a widespread dread of race mixing or insurrection that stood in the way of freedom.

Jefferson's fire bell, the issue of slavery's expansion, was "hushed, indeed, for the moment. But," he added, "this is a reprieve only, not a final sentence."[77] In fact, the struggle for Black freedom had been building momentum outside the discourse of high politics or constitutional doctrine. As Vincent Harding observed at the bicentennial of the federal constitution, the nation had not answered the fundamental question of "Who were 'we the People of the United States?'"[78] The question would not be settled until 1857, in the *Dred Scott* case, when Chief Justice Taney stated that African Americans "were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it."[79]

For decades before *Dred Scott*, Black Americans had sought to break the barriers of exclusion, steadily establishing their claim to citizenship in ways largely hidden from the evolving narrative of the Black freedom struggle, but which confirm Harding's observation about the "essential questions" they raised: "The issue of whose Constitution it was, of who we the people were, was not to be resolved by constitutional arguments alone," wrote Harding. "Here, as always, the black community established its

76. THOMAS JEFFERSON, *Query XIV: The Administration of Justice and Description of the laws?*, *in* NOTES ON THE STATE OF VIRGINIA 264 (1787). For his guarded optimism about the future course of "justice in conflict with avarice and oppression," see Letter from Thomas Jefferson to Richard Price (Aug. 7, 1785), *in* THE PAPERS OF THOMAS JEFFERSON (James P. McClure & J. Jefferson Looney eds., digital ed. 2021).

77. Letter from Jefferson to Holmes, *supra* note 75.

78. HARDING, *supra* note 33, at 721.

79. Dred Scott v. Sandford, 60 U.S. 393, 406 (1857).

claims through its public actions."[80] A significant part of that movement, which is the focus of the present Article, lay hidden in plain sight in dusty archives when he wrote, preventing him from including the efforts of ordinary Black Americans whose chosen path to freedom was buried in the records of the trial courts where they sought orders declaring them to be free. The trial records would have answered another of his "essential questions"—"What did it mean 'to establish justice,' for whom, at what cost?"[81] In them we find the voices and aspirations of the four thousand enslaved Black Americans who brought freedom suits in Antebellum America.

These two questions are intertwined in the thousands of freedom suits that spoke truth to power in the courtrooms of the Antebellum South.[82] Speaking truth to power, however, meant speaking law to power. The "freedom suits" were not unknown to historians; many points of law raised by the peculiar circumstances of their cases had been decided and published by appellate courts across the South.[83] But among the most difficult, as Martha Jones has shown us, was "[w]ere black Americans citizens?"[84] The answer is not so simple, however, and Roger Taney's blunt answer in *Dred Scott* sought to impose a simple binary of white citizen/Black noncitizen that served the needs of a court but which belies historical reality. To the question posed, her answer is "yes and no."[85] She explains, "[s]ometimes citizenship was defined in constitutions and statutes, although most of the time it was not. Courts disagreed and even changed their minds over who was a citizen and what rights might attach to that status."[86] Formal, positivist

80. HARDING, *supra* note 33, at 721.

81. *Id.* at 721–22. Their connection is the subject of Martha Jones's splendid book, which presents one of the most compelling analyses of the link between citizenship and rights. This connection, she writes, "is a thorny matter, foremost because not all Antebellum Americans saw the relationship between rights and citizenship in the same way." JONES, *supra* note 56, at 11.

82. The best calculation of freedom suits in the South is LOREN SCHWENINGER, APPEALING FOR LIBERTY: FREEDOM SUITS IN THE SOUTH 3–4 (2018), which finds four thousand suits initiated by 2,023 plaintiffs, largely in the Upper South. An accurate count of cases or plaintiffs is virtually impossible, as capably explained by Twitty in her meticulously researched *Before Dred Scott*. TWITTY, *supra* note 3, at 15–16, 28. "Calculating the number of plaintiffs in the freedom suits filed in the St. Louis circuit court," she warns, "is a fraught endeavor." *Id.* at 15–16 n.33.

83. Until recently, historical inquiry into freedom suits was confined to appellate cases. TREXLER, *supra* note 63; JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1937).

84. JONES, *supra* note 56, at 10.

85. *Id.*

86. *Id.*

definitions mattered less than what emerged from their long struggle for freedom: "Black Americans' efforts were aimed at securing the *rights that evidenced their citizenship*."[87] Not until Reconstruction—and then only imperfectly—was there positive law and a Constitutional amendment to define that relationship.[88]

Even so, the freedom suits express the meaning of "the rights that evidenced their citizenship" from the perspective of those who were denied it, not that of Roger Taney nor, for that matter, of the slaveholding planter who derided the "wild notions of rights and freedom" demanded after Emancipation.[89] The demand for "perfect equality" predicted by Tucker in 1801 remains unfulfilled, but we can hear its expression in freedom suits, where Blacks could not testify on their own against white defendants but where white witnesses testified to the ways that that petitioners' demands for rights otherwise reserved to free persons amounted to a community's acknowledgment of rights ownership. Despite Taney's statement in the *Dred Scott* case that Black Americans "had no rights which the white man was bound to respect," the laws that compelled slaveholders to appear in court in front of their neighbors and answer the demands of those held in slavery, writes legal scholar Alfred Brophy, "suggest . . . that African Americans *did* have some rights that white men (and courts) were obligated to respect."[90] What is flattened out of the appellate record is the reality of filing a freedom suit. "In suing for freedom, the slave defies his or her master," writes VanderVelde. Though only a fragment of the reality behind it, slave testimony could be "enough of the truth to be upsetting to the master, to make a sound discordant with the legitimacy of her master's dominion, and enough of the truth to meet the elements legally necessary to

87. *Id.* at 11 (emphasis added).

88. At the constitutional level the struggle to bring Black Americans under the protection of the Privileges and Immunity Clause involves too many issues to discuss in the present Article. Though central to defining citizenship, other historians have covered its origins and tortuous progress through the courts. *See generally* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981); MICHAEL KLARMAN, THE FOUNDERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016).

89. Hendrik Hartog, *The Constitution of Aspiration and "The Rights that Belong to Us All"*, 74 J. AM. HIST. 1013, 1016 (1987).

90. Scott v. Sandford, 60. U.S. 393, 404–05 (1857). Alfred L. Brophy, *Slaves as Plaintiffs*, 115 MICH. L. REV. 895, 896 (2017) (review of LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014)).

redemption."[91] Omitted—nearly invisible, that is—were the details of the Scotts' family, whose daughters Eliza and Lizzie appear in the appellate records only as "negro slaves, the lawful property of the defendant," a fact whose importance will be discussed below.[92]

As evidence that the freedom implied by such acts was acknowledged, Martha Jones analogizes the experience of noncitizens in other nations where the "assumption of rights and privileges by outsider subjects" constituted "the ways in which those said to be without rights make claims and 'room for themselves.'"[93] The "search for meaning in the rights and claims of free peoples of color" was fraught with uncertainty, and the widely varying circumstances of their lived experiences led to different and often contradictory examples.[94] But all petitions reveal a similar goal—to shed the "badges and incidents of slavery" and replace them with the badges of freedom embodied in "an alternate, rights conscious, interpretation of the federal constitution."[95] This "rights consciousness" emerged slowly, from thousands of freedom suits, successful or not; no ringing decision announced the gains embodied in decisions, and no great doctrinal statement emerged to serve as precedent. "Only later," writes Jones, "did those rights become enshrined in text."[96] Enshrinement in text was the product of the aggregated efforts of hundreds of Missouri freedom suits litigants,[97] but the process was just as important for empowering a

91. LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT 1 (2014).

92. *Scott*, 60 U.S. at 399. *See infra*, text accompanying note 105.

93. JONES, *supra* note 56, at 11. For the purposes of her study, Jones prefers to use the term "badges of citizenship." *Id.* at 10 (citing BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 98–106 (2001)).

94. JONES, *supra* note 56, at 11.

95. Hartog, *supra* note 89, at 1017.

96. JONES, *supra* note 56, at 11. In expressing my debt to Jones for her important contributions to the present Article, I must also note her acknowledgment of this formulation of rights consciousness to political scientist Bonnie Honig. *Id.* at 11 (citing BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 98–106 (2001)).

97. Historian Lea VanderVelde, whose work has led the rediscovery of the freedom suits, describes the excitement of serendipitous discovery in the basement of the St. Louis Circuit Courthouse of thousands of trial court documents in 1997 that contained first-hand accounts of slave life in Missouri and the way that enslaved petitioners and their lawyers assembled the facts needed to sustain a claim to freedom. After her discovery, Missouri State Archivist and historian Kenneth Winn applied for and obtained a "Save America's Treasures" grant (#PT-20013-02) managed through the National Endowment for the Humanities. Additional funding came from Washington University in St. Louis. On the hurdles that these efforts had to surmount, see VANDERVELDE, *supra* note 91, at ix-xii; and Kenneth Winn, *Making the Case: Using Court Records to Win Friends and Influence Politicians*, *in* MANY

community and bequeathing to subsequent generations the tenacity to challenge the formidable powers of a protean caste system that would endure in new forms after Emancipation.

Three important studies[98] now make full use of the newly accessible archives to bring the experiences of enslaved St. Louisans—most known only by a first name—into the narrative of the Black freedom struggle, filling a gap alluded to more than a half century ago by activist lawyer Arthur Kinoy when he suggested that

> one of the most fascinating areas of the evolution of our constitutional law yet to be exploited is the catalyzing effect of the myriad forms of struggle for Negro freedom and equality upon the development of constitutional rights and liberties applicable to all citizens – white and black alike.[99]

The nearly three hundred lawsuits brought by enslaved St. Louisans challenging their unlawful enslavement open the past to reveal what until recently had remained a nearly invisible element in those "myriad forms of struggle."[100] Reliance on the appellate record of even such a landmark case as that of Dred and Harriet Scott has left vital human elements of the protagonists invisible to us. Pointing us to a more proper appreciation of what was happening between 1846, when the case was first filed, and its final decision announced in 1857, VanderVelde has explained, "[b]y the time that the case reached the U.S. Supreme Court, it had been screened and studio-worked by the advocates to the point that the facts had become

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HAPPY RETURNS: ADVOCACY AND THE DEVELOPMENT OF ARCHIVES 279–96 (Larry J. Hackman ed., 2001).

98. TWITTY, *supra* note 3; VANDERVELDE, *supra* note 91; KELLY M. KENNINGTON, IN THE SHADOW OF DRED SCOTT: ST. LOUIS SUITS FOR FREEDOM AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA (2017). Also essential is Loren Schweninger's wide ranging *Appealing for Liberty*. *See* SCHWENINGER, *supra* note 82. Judith Kelleher Schafer's work on slave law in Louisiana, which was heavily influenced by its French civil law legacy, also makes superb use of trial court records and provides an excellent comparison of slave agency with Missouri. JUDITH KELLEHER SCHAFER, BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846-1862 (2003). *See also* Judith Kelleher Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 50 MISS. Q. 204 (1996).

99. Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L.R. 387, 389 n.6 (1967).

100. Lea Vandervelde, *The Dred Scott Case in Context*, 40 J. SUP. CT. HIST. 263, 265 (2015).

flattened representations of the dispute."[101] Hidden behind such barriers, "[t]he actual parties' motives were so blunted in the course of the trial and appeals process as to present starkly highlighted competing claims instead of the many extenuating circumstances in which the controversy was embedded."[102] What is missing beyond the stipulated facts in the Supreme Court—that is, invisible in the record as found in opinions of the court—is what the trial court record reveals of the realities of the Scotts' lives and the human features behind their resistance, or what the "badge of freedom" meant.

What, precisely, did their enslavement (and, conversely, their freedom) mean to the Scotts, and what right were they seeking? Missing is the fact that the Scotts had two daughters who, by the matrilineal rule of slave descent, followed the status of their mother. When Dred and Harriet filed their freedom suits in 1846, they were the parents of two young girls.[103] Dred was in his late forties and in poor health, while Harriet, twenty-three years younger, was still of child-bearing age. Moreover, two years earlier their owner, Dr. John Emerson, had died and Dred had unsuccessfully offered to buy his freedom from the estate. Dred and Harriet knew that the death of a slaveowner often meant the liquidation of his estate through the sale of his slaves.[104] The Scotts' marriage was not recognized by law, and Dred faced the possibility that Harriet and his daughters would be sold, quite probably individually, a common practice to gain a greater sale price.[105] For the hundreds of thousands of Blacks who wished to marry and establish families, the right to marry epitomized the difference between freedom and unfreedom. Freedom would not destroy the subjugation of a free Black caste, but the threshold between freedom and unfreedom was significant: it separated those who possessed the fundamental right of marriage and family formation. As a newly liberated corporal in the United States Colored Troops told his fellow freedmen, "[t]he Marriage Covenant is at the

101. *Id.*
102. *Id.*
103. RUTH ANN HAGER, DRED AND HARRIET SCOTT: THEIR FAMILY STORY 5, 9 (2010).
104. LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER 227 (2009).
105. *Id.* at 230–31. Eliza was eight years old at the filing of the Scotts' two lawsuits in 1846, and at that age she could be hired out. Lizzie was several years younger. VanderVelde adds the ominous fact that female slaves were often advertised for sale as "likely to bear offspring." *Id. See* Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161 (1996). Precise dates do not exist for the ages of Dred and Harriet nor for their wedding. The best approximations are by Ruth Ann Hager. HAGER, *supra* note 103, at 5, 9.

foundation of our rights. In slavery we could not have *legalized* marriage; *now* we have it . . . and we shall be established as a people."[106]

Of course, the trial records of the freedom suits did not literally include the voices of plaintiffs, nor all the background information about their lives in bondage, but they describe the elements of unfreedom that gave voice to their quest. Orlando Patterson explains that "freedom was generated from the experience of slavery."[107] They identify the cast of characters and realities of life whose presence shaped the outcome, directing the legal historian to investigate the contingent factors at work. Like other evidence consulted in the effort to hear the suppressed voices of subordinate peoples, trial records can present evidentiary pitfalls, often tending to follow the scripted narrative of facts that could sustain a claim of prior free status.[108] In his attempt to uncover the hidden realities of the slave markets and the inherent biases contained in the "[h]ighly formalized" testimony presented in court and "recorded amidst heated debate at a distance of time and space from the events they describe," historian Walter Johnson confesses, "[i]ndeed, I have generally read the docket records as if they contain only lies."[109] The suits he examines, however, were largely disputes over the sale of slaves, between white property owners arguing according to Louisiana's civil law rules, especially its unique category of warranty law known as redhibition. The evidence submitted in support of claims to freedom by residence, however, offer more trustworthy evidence, given the nature of what facts were necessary to sustain a plea of unlawful enslavement. As a result, we have the voices of Black petitioners, even if spoken through the white witnesses who testified on their behalf.[110]

The depositions supporting testimony in Missouri freedom suits, therefore, can bring a higher level of reliability to support Schweninger's comment that "it is apparent—but only extremely rarely—that occasionally plaintiffs fabricated some aspects of their lives to gain freedom."[111] At issue

106. LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 47 (1997).

107. ORLANDO PATTERSON, FREEDOM, VOLUME 1: FREEDOM IN THE MAKING OF WESTERN CULTURE xii (1991).

108. VANDERVELDE, *supra* note 91, at 4.

109. WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 12 (1999).

110. *Id.* at 12, 131–33, 207–13.

111. SCHWENINGER, *supra* note 82, at 5.

were not subjective perceptions or the details of cruelty inherent in a system based on violence and dehumanization. Nor, as we shall see, could they follow formulaic language. Rather, they were the product of the varying circumstances that brought them to court, which differed according to the origin of the claim, and which judges (at least until the 1840s) left to juries who were given considerable latitude as to interpreting matters of fact. The evidence revealed in the freedom suits was as varied as the grounds for the action and myriad narratives that brought plaintiffs to court. Plaintiffs based their claims to freedom on having once been free, a status that could not be degraded to enslavement—whence the principle, "once free, always free," which became controlling precedent in 1824, when Supreme Court Judge George Tompkins upheld St. Louis Circuit Court judge Nathaniel Beverly Tucker's refusal to instruct a trial jury that Winny's residence as a slave in Illinois "did not render the said Winny free" under the Northwest Ordinance.[112]

Instead, Judge Tucker, a most unlikely source of support for an antislavery petition, "charged the Jury that said ordinance did in law set the said Winny free if it should appear to the satisfaction of the jury that the said defendant & her then husband resided there within intent to make the territory the home of themselves and of the said Winny."[113] Tucker's role in the *Winny* case—his signature appears only once, affixed to his instructions that the Northwest Ordinance permanently freed Winny—has been overlooked, but McGirk's upholding it on appeal remains a landmark because of its articulation of the "once free, always free" doctrine. But it is no less remarkable for how a judge who sought to preserve the system of enslavement in Missouri could follow the law. Tucker was the son of the distinguished Virginia jurist St. George Tucker, whose edition of a republicanized version of Sir William Blackstone's *Commentaries on the Laws of England* had become the preeminent authority on the common law.[114] He was also an ardent supporter of slavery and had moved to

112. Winny v. Whitesides (alias Pruitt), St. Louis Circuit Court Records (1819). In setting the precedent for this principle in 1824, however, Judge George Tompkins did not use this term. Winny v. Whitesides, 1 Mo. 472, 473 (Mo. 1824).

113. *Winny*, St. Louis Circuit Court Records.

114. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONST. AND LAWS OF THE FED. GOV'T OF THE U.S. AND THE COMMONWEALTH OF VA. (St. George Tucker ed., 1803).

Missouri to replicate in fresh soil the plantation society that was declining in Virginia.[115]

Justice Mathias McGirk, in denying the defendant's bill of exceptions, was upholding that rule without using the term "once free, always free," but was drawing on the long common law tradition:

> The common law judges of England, without any positive declaration of the will of the legislative body, availed themselves of every indirect admission of the master or lord, in favor of the liberty of his slave or villein, and the lord having once answered the villein by plea, in the courts of common law, was never after permitted to claim the benefit of his services as a slave.[116]

In a brief opinion, McGirk established the rule that would sustain scores of freedom suits, undercutting the conflicting doctrine of reattachment, by which a return to slave territory would mean a re-attachment of enslavement.[117] Rejecting the appellant's plea that her right "revived so soon as the slave was found in Missouri," McGirk made clear that once Winny became free, she would always be free: "We are clearly of opinion that if, by a residence in Illinois, the plaintiff in error lost her right to the property in the defendant, that right was not revived by a removal of the parties to Missouri."[118] Making clear that status of enslavement was not reattached, he went on,

> personal rights or disabilities, obtained or communicated by the laws of any particular place, are of a nature which accompany the person wherever he goes. If this be the case in countries altogether independent of each other, how much more in the case of a person removing from this common territory of all the States, to one of those States.[119]

Other sources of that freedom, such as birth to a free mother, prior manumission by deed of purchase, testamentary manumission, or mistaken

115. On Tucker's avid support of slavery and states' rights while in Missouri, see ROBERT J. BRUGGER, BEVERLEY TUCKER: HEART OVER HEAD IN THE OLD SOUTH 45–82 (1978).

116. *Winny*, 1 Mo. at 475–76.

117. *Id.*

118. *Id.* at 473.

119. *Id.* at 475.

identity, all present different problems in the evaluation of the evidence submitted.[120] But Black Missourians' claims to freedom generated a body of litigation unlike that of other claims. Far more typically than other suitors for freedom, they based their claims as Winny did, on freedom by residence on free soil.[121] Their freedom suits were the product of the state's unique geographical location, a "confluence" of cultures, as Twitty aptly describes it,[122] or, as Kennington refers to it, a region at the center of a "world in motion."[123] More than any other booming commercial city or fertile swath of farmland, its central location between North and South, East and West, made it a "crossroads of slavery and freedom"[124] and a destination or entrepot for a booming internal slave trade. Its rich river bottomlands became a contested terrain for the transplantation of competing cultures, building on a proslavery French legacy and an exodus from states to the east that brought with it clashing attitudes about whether free or enslaved labor would predominate. Of the resulting land rush, observes historian Kenneth H. Winn, "lawyers rushed in faster than farmers."[125] St. Louis became a major center for the internal slave trade, whose slave pens stood as an affront and threat to the large number of free Blacks who lived and worked in the city or stopped there when their steamboats put in for cargo.[126] One, whose dread Harriet Beecher Stowe included in her *Key to Uncle Tom's Cabin*, commented, "[t]he trader was all around, the slave pens at hand, and

120. In Virginia, for example, the predominant basis for freedom claims rested on the contested testamentary promises of freedom or promises made to the enslaved in the lifetime of their masters. Michael L. Nicholls, *The Squint of Freedom: African-American Freedom Suits in Post-Revolutionary Virginia*, 20 SLAVERY & ABOLITION 47 (1999).

121. KENNINGTON, *supra* note 98, at 84–86, describes these and the nature of the factual matter presented.

122. For Twitty's use of the term and the uniqueness of this "vast region where the Ohio, the Mississippi, and the Missouri Rivers converge," see TWITTY, *supra* note 3, at 2–7. Twitty cites ARON, *supra* note 1, noting that he pioneered use of the term, but that she has used the term more broadly than he has. *Id.* at n.5.

123. KENNINGTON, *supra* note 98, at 93–115.

124. *Id.* at 95–97.

125. *Introduction* to MISSOURI LAW AND THE AMERICAN CONSCIENCE: HISTORICAL RIGHTS AND WRONGS 1 (Kenneth H. Winn ed., 2016). On the clash of French and English legal traditions, see STUART BANNER, LEGAL TRADITIONS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860 (2000). Phillip Hamilton captures the clash of cultures in his account of the public spat between former Virginian and proslavery Judge Nathaniel Beverley Tucker and "'Yankeys' with their calculating values and antislavery sentiments." PHILLIP F. HAMILTON, THE MAKING AND UNMAKING OF A REVOLUTIONARY FAMILY: THE TUCKERS OF VIRGINIA, 1752-1830 185–89, 187 (2003).

126. BANNER, *supra* note 125; HAMILTON, *supra* note 125.

we did not know what time any of us might be in it."[127] Free Blacks came to St. Louis in search of urban jobs and, despite the prejudice they suffered, they sought to enjoy what freedom offered them—the fruit of their labor. Missouri was also a destination for pro-slavery planters moving west with their human chattel, seeking to preserve slavery and revive a declining plantation economy, as well as for emigrants from the North also hoping to transplant their fading agriculture in free soil and European immigrants who shared their antipathy toward slavery. Kidnappings of free Blacks to be sold at auction and spirited south were not uncommon. There would be no shortage of lawyers to litigate property claims, whether they be over land or human beings. But the law was not only an instrument of whites competing to reap the rewards of an expanding economy. The legal culture of St. Louis demands a broader brush and cannot be fully comprehended without the perspective of those who were themselves property and who learned to use the law to escape enslavement.

And learn they did, as hundreds of enslaved St. Louisans would file suits for freedom in the years after 1817, when "Labon, a free person of color" petitioned for freedom in an "action of assault Battery and false imprisonment" against Risdon H. Price, who had purchased him from "one William Clarke."[128] Clarke, he alleged, had bought Labon in Kentucky before moving with him to Illinois, where Price purchased Labon and moved with him to St. Louis. There, Labon declared, Price "claims and holds your petitioner as his property."[129] In filing his lawsuit with the territorial court in 1817, Labon made his claim to freedom on the grounds that "by virtue of his aforesaid residence in the Illinois, territory and under an ordinance, of the Congress, of the United States for the government of the North western Territory he is entitled, to his freedom and by law is free," which, he had been informed in St. Louis, barred the introduction of slavery.[130] The jury found Price guilty, and the court ordered "that the said Leban [sic] be liberated, from the said Risdon H. Price and all persons claiming by person, or under him." The court granted Price's request for a new trial. "Because the court erred," Price submitted, "in not instructing the jury, that the plaintiff was not entitled, to recover in this form of action upon

127. JOHNSON, *supra* note 109, at 22.
128. Labon v. Price (Mo. N. Cir. 1818).
129. *Id.* at 3.
130. *Id.*

the case which he proved before the court." Price's new suit also failed.[131] Despite the additional evidence presented at the new trial in 1821, a second jury held fast to the initial verdict: "We all the jurors, find that the plaintiff is free."[132] Labon and those who followed him were the vanguard of nearly three hundred women and men who went to court to demand their freedom between 1814 and 1860, and who should be regarded as among America's first civil rights litigants.[133]

While Labon's suit progressed, the territorial legislature in 1818 specified that freedom suits "shall be in form, trespass, assault and battery, and false imprisonment."[134] Their freedom suits took the form—and substance—of prosaic actions of trespass by force and arms, which Blackstone explained as embracing the "inchoate violence" of assault as well as the "unlawful beating of another."[135] The Louisiana territorial statute "to enable persons held in slavery to sue for their freedom" was applied to Missouri and followed the contours of this ancient writ in 1807, providing for "an action of assault and battery; and false imprisonment, to be instituted in the name of the person claiming freedom against the person who claims the petitioner as a slave, to be conducted as suits of the like nature between other persons."[136] According to Blackstone, "[t]he least touching of

131. *Id.* at 50, 65.

132. *Id.* at 55. Judicial instructions to juries are not easily determined from the trial record. In Missouri practice, attorneys submitted points of law to judges to accept or reject as jury instructions. Unless these are appealed, historians are fortunate when some survive, often with lines drawn through those that a judge rejected; otherwise, they must be sought in appellate decisions when the court gave its reasons for upholding or reversing the trial court. No record survives of instructions actually given in Labon's two trials before presiding judge Silas Bent. Bent, on Price's request for a new trial, granted it to permit him to submit evidence of an indenture contract. Bent was a New Englander by birth who chose to seek his fortune in the West, studying law in Virginia as he made his way west. He arrived in St. Louis in 1807 and rose through Missouri's territorial and state judicial systems to become chief justice of the state Supreme Court. WILLIAM VAN NESS BAY, REMINISCENCES OF BENCH AND BAR IN MISSOURI 203–05 (1878).

133. Freedom suits date to periods before the Louisiana Purchase. Robert Moore, Jr., *A Ray of Hope Extinguished: Saint Louis Slave Suits for Freedom*, 14 GATEWAY HERITAGE 4 (1994). Robert Moore, Jr. is one of the earliest historians to draw attention to the potential of the freedom suits and to demonstrate their importance. *See id.* For the tangled history of a freedom suit based on a Spanish colonial governor's decree banning the enslavement of Indigenous people, see VANDERVELDE, *supra* note 91, at 39–56.

134. A DIGEST OF THE LAWS OF MISSOURI TERRITORY 210–11 (Henry S. Geyer ed., 1818) [hereinafter DIGEST]. In the alphabetical arrangement of the laws, "Freedom" could be found between "Fraudulent Pretences" and "Gaming (See Vice and Immorality)." *Id.* at 227.

135. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK III OF PRIVATE WRONGS 120 (1765).

136. DIGEST, *supra* note 134, at 210–11.

another's person willfully, or in anger is a battery; for the law cannot draw the line between different degrees of violence . . . ."[137] Enslavement made the pain of genuine physical battery an everyday reality for the enslaved, and for all practical purposes a nonrebuttable presumption. But that was not the issue being litigated: rather, the records show that at issue was the justification for the assault and battery—namely, to defeat the defendant claimant's affirmative defense that holding the plaintiff in bondage was, as Blackstone qualified the gravamen of the offense, "justifiable or lawful" as by "one who hath authority" to do so.[138]

Although the court was to "instruct the jury that the weight of proof lies on the petitioner," it was to "have regard not only to written evidence of the claim to freedom, but to such other proofs either at law or in equity as the very right and justice of the cause may require." If the jury returned a verdict for the petitioner, the court was authorized to "render a judgment of liberation from the defendant or defendants, and all persons claiming by, from, or under him, her, or them."[139] The court recognized several grounds for a successful claim of freedom, all of them arguing that the individual or group seeking freedom was illegally enslaved, but residence on free soil predominated. Arguing the unlawfulness of the system was not an option, as freedom suits did not challenge the legality or immorality of the system, but rather sought to prove to the jury "that before and after the time of the committing of the grievances he or she was and still is a free person, and that the defendant held and detained him or her and still holds and detains in slavery."[140]

Juries were to follow the instructions of the presiding judge as to what constituted "residence" on free soil, and, until the 1840s, the decisions of a state Supreme Court with justices such as McGirk and Tompkins allowed trial juries broad latitude in determining what demonstrated that the time spent on free soil was not merely transit. For that reason, the evidence that plaintiffs presented to demonstrate their free status ranged freely through the narratives in their petitions and affords a unique and penetrating look at slave life in the localities from which they came, revealing the norms and

137. BLACKSTONE, *supra* note 135, at 120.

138. *Id.*

139. LAWS OF THE STATE OF MO.; REVISED AND DIGESTED BY AUTHORITY OF THE GEN. ASSEMB. 405–06 (E. Charless ed., 1825).

140. *Id.*

boundaries of enslavement and the behavior of a person recognized as free by the white witnesses who testified in their behalf.[141]

From the ever-growing population of free Blacks who came to St. Louis bringing accounts of successful freedom suits by free Black neighbors and fellow laborers, enslaved St. Louisans learned of the legal path to their own freedom. Most commonly they pleaded that before entering Missouri they had resided in states of the Northwest Territory (usually Ohio, Indiana, or Illinois) where slavery was forbidden, or had been hired to labor in Illinois by St. Louisans. Because the requirement of having been "once free" was a factual issue, petitioners had to convince a jury of twelve property-owing white men that they had resided in a free state or territory and were treated as enslaved while there. In response, slave owners opposing a freedom suit would either deny the fact of the petitioner's "residence" or "domicile" there or allege that it was merely "transient" and insufficient to qualify for freedom. By law, the burden of proof lay with the plaintiff, producing ingenious arguments by both parties about the intent and length of time spent on free soil—two issues that were clarified in *Winny* and nine years later in *Julia v. McKinney*.[142] Petitioners were well aware of the need for "advice by competent persons," and many were able to engage an attorney of their choice.[143] Slaveholders, for their part, also engaged those with reputations for success in defeating freedom suits by identifying legal technicalities such as failure to name the actual person holding the defendant in slavery. When a key witness was cross-examined in 1847 at the first freedom suit brought by Dred and Harriet Scott against Irene Emerson, he had to admit that it was not he, but his wife, who had hired the Scotts from Mrs. Emerson and kept them as enslaved. The witness's testimony as to the Scotts' ownership was thus hearsay, and no proof was shown that Mrs. Emerson was the true owner. As Don Fehrenbacher describes the outcome of the suit when the jury found for Mrs. Emerson, "[t]he decision produced the absurd effect of allowing Mrs. Emerson to keep

141. On freedom suits before the Louisiana Purchase, see Moore, *supra* note 133, at 4–15.

142. KENNINGTON, *supra* note 98, at 84–86.

143. TWITTY, *supra* note 3, at 90, and more generally at 96–125. Twitty's sensitive account of Lucy Delaney's freedom litigation provides insight into the dilemmas of choosing a lawyer, but also the difficulty historians confront in fully comprehending how an enslaved woman bore the weight of her children's future. TWITTY, *supra* note 3, at 90 n.50, 219–22. Twitty also addresses how autobiographies like Delaney's can "take liberties" with the facts. *Id.*

her slaves simply because no one had proved that they *were* her slaves."[144] Many attorneys represented both plaintiffs and defendants. There existed a small but dedicated plaintiffs' bar that became skilled in steering petitioners' cases through the fact-finding process, and whom enslaved plaintiffs sought out to pursue their petitions. Historian Anne Twitty, who has carefully studied them, notes that three of these lawyers, Gustavus Bird, Ferdinand Risque, and Francis Murdoch, handled more than a quarter of all freedom suits—seventy-five in all—but only once went to court to oppose one.[145]

Bird argued the case for freedom in *Julia v. McKinney*,[146] which set the precedent giving juries broad discretion in determining if the length of time spent by a plaintiff on free soil was tantamount to residence for the purpose of applying the ban on slavery in the Northwest Territory. McGirk's opinion in *Winny* had asked the jury to decide defendant's "intention to make that place the home of themselves and of the said Winny,"[147] but *Julia* raised the question of time spent. In 1829 Lucinda Carrington and her son Joseph were living in Kentucky. Like many other small slaveholders, Mrs. Carrington decided to move west to improve her lot in Illinois, and to take Julia, her enslaved servant, with her. Before departing, they were approached by someone who offered to buy Julia and warned Joseph that if they settled in Illinois, Julia would become free. Undaunted, they moved there anyhow, and shortly after arrival Joseph announced that "he had a Black girl he wanted to hire out if he could safely do it." He found a local man who expressed an interest in hiring Julia, but who "told him he would examine the law and hire her if the law would justify him afterwards." Carrington was informed of what he had been told in Kentucky before moving: "I became satisfied," the prospective hirer reported in declining to hire Julia, that "he could not safely do it." Lucinda had difficulty finding work for Julia in Illinois but finally did so—for "one or two days," testified her employer,

144. DON FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 253–54 (1978). KENNINGTON, *supra* note 98, at 142–46, summarizes the variety defense strategies employed.

145. TWITTY, *supra* note 3, at 104–05. Twitty devotes Chapter Three, "By the Help of God and a Good Lawyer," to a more general discussion of the relationship between litigants and their counsel. *Id.* at 96–125. On lawyers representing both petitioners and defendants, see KENNINGTON, *supra* note 98, at 71, 75.

146. Julia (A Woman of Color) v. McKinney, 3 Mo. 270 (1833).

147. Winny v. Whitesides, 1 Mo. 472, 473 (Mo. 1824).

but when no one in Pike County, Illinois, was willing to hire her for a longer period, she sent Julia, with her young daughter Harriet, to work across the Mississippi River in Louisiana, Missouri. Mrs. Carrington took sick, however, and ordered that Julia—without Harriet—return to Illinois to care for her. On her recovery Lucinda sold Julia in St. Louis to Samuel McKinney, whom Julia then sued at the St. Louis Circuit Court, claiming her freedom on the basis of her residence in Illinois.[148]

Julia's time in Illinois and then in Missouri exposed her to the legal knowledge that animated her freedom suit in 1831. It also exposed her to the pain of forcible separation from her daughter. Kennington's account of the legal wrangling in a suit that dragged on through a second trial and an appeal that gave Julia her freedom in 1834 exemplifies the best in legal historical sleuthing. It involves too many parties and raises too many issues for the present Article, but two additional points must be made. One is the wealth of rich historical material about life and the law contained in the trial court records but not in the appellate report. Among the many facts we would never know from the appellate report alone is that when Julia was hired out to work in Missouri, Harriet was also sick.[149] The experience of a mother separated from a sick child she might never see again casts a different light on her, the motivations she might have had to sue for freedom, and the impact it made on sympathetic jurors.[150]

The other vital point appears in the appellate decision by Judge Mathias McGirk, who overturned the trial court verdict that had followed instructions given to the jury by Judge William C. Carr. According to Carr, "if the jury believe from the evidence that the plaintiff, Julia, was taken into the State of Illinois by her owner without any intention on the part of such owner to make that State the residence of Julia, that the plaintiff is not entitled to recover in this action." McGirk patiently explained his reasoning as to why Carr's instructions were erroneous:

148. The St. Louis Circuit Court database lists this case as *Julia v. Samuel M. Kinney*.

149. Julia v. Kinney, St. Louis Circuit Court Records (1831).

150. A child's temporary separation could easily become permanent, and Julia, like other enslaved mothers, might have feared that her child might be sold while she was away. On winning her freedom suit, Julia obtained the help of Gustavus Bird to act as her minor child's "next friend" and successfully sue for Harriet's freedom in 1833. Harriet, an infant, v. Samuel T. McKenney, St. Louis Circuit Court Records (1833).

> [T]he instruction assumes that if the owner did not intend to make Illinois the residence of the slave, then there is no violation of the Constitution. Is it true that if a person says he does not intend to do an act and yet does it, that the act is not done? The Constitution of Illinois does not regard the intention to introduce or not to introduce slavery, but prohibits the act. If a person says he does not intend to introduce slavery, yet if he does introduce it *de facto*, can the innocent intent save him from the forfeiture? We think it cannot . . . .[151]

McGirk continued, "the owner did hire the slave to a person to labor for one or two days, and received the pay for the hire. The court instructed the jury that this hiring is not a hiring within the prohibition above cited." He then made a crucial distinction: "We suppose the Circuit Court thought the degree or quantity too small." On the contrary, the length of time did not matter, he wrote:

> The Constitution makers have therefore prohibited the thing in every possible degree. Here was a hiring of a person bound to labor in Kentucky, whilst in Kentucky, brought into Illinois (not to reside there say if you will), and hired to labor for one or two days by the owner. What difference can it make if the hiring had been for one hundred days? We can see none, except in the degree or quantity of time.[152]

Until this decision, no court or legislature had specified the length of time that would constitute residence. Rather, it had been widely assumed that sixty days was the threshold separating legal residence from sojourning, as when one owner of an enslaved woman was advised to follow "a plan to prevent her from becoming free. It was to send her to Missouri for a term of time & then to take her back so that she should not be in Illinois for more than 60 days at a time."[153]

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151. *Julia (A Woman of Color)*, 3 Mo. at 274.

152. *Id.* at 276. On the commonly held assumption that sixty days was the threshold after which a slave "would be free according to the laws of Illinois," see TWITTY, *supra* note 3, at 149–50.

153. Wash v. Magehen (Mo. Cir. 1839). The transcription of the deposition in the online source is incorrect. The quotation used here corrects that.

Both petitioners and their opponents knew the court system well and accordingly adapted their arguments to conform to the law as set out in appellate decisions.[154] Even so, the decisions of the state's highest court did not immediately reach slaveholders attempting to evade what they thought was law, or judges not following the precedent. Daniel Wilson's freedom suit against Edmund Melvin in 1835 demonstrates the ways that only the trial record can reveal how petitioners, slave owners, lawyers, and judges cunningly navigated the law, custom, and racial attitudes embedded in freedom suit litigation.[155] Melvin, who brought two enslaved laborers with him from Tennessee to farm in Belleville, Illinois, attempted to evade that state's ban on slavery with a clever ruse. Learning that if he remained there for a year "he could not keep his slaves in Illinois," he stopped there without unloading his wagon and that spring put his two men to work planting a crop. Along with his wife and two children, they remained there until the fall harvest, when Melvin moved the entire group to St. Louis. When Wilson sued for his freedom, Melvin replied that "he was merely a transient in that state of Illinois" and had "sojourned only a reasonable time with his children . . . and without any intention of domesticating himself therein."[156] The trial judge agreed with Melvin's attorney, Henry Geyer, that the facts did not suffice to emancipate Wilson and instructed the jury to find for Melvin. On Wilson's appeal, as argued by Gustavus Bird, Judge George Tompkins refused to accept the ruse and, with Chief Justice Matthias McGirk concurring, held that the trial court's "instruction seems calculated to mislead a jury, and therefore wrong," and "[i]f the jurors believed Melvin's argument they must have been very incredulous indeed."[157] Moreover, they found that "the instructions had not only assumed facts within the province of the jury only, but were of a character to mislead the minds of the jury from the real circumstances in evidence." Emphatically stating the exclusive authority of the jury, Tompkins concluded, "[t]hat if any doubts existed as

154. KENNINGTON, *supra* note 98, at 68, 158-60.

155. Wilson v. Melvin, 4 Mo. 592 (1837).

156. *Id.* at 595, 598.

157. *Id.* at 597, 599. In its list of cases, the St. Louis Circuit Court website lists the defendant as Edmund Millard. *Daniel Wilson, a Man of Colour v. Edmund Millard* (St. Louis Cir. Ct. 1836) (available at St. Louis Cir. Court Records, http://digital.wustl.edu/c/ccr/ccrweb/ccr1834-06726.016.html [https://perma.cc/U8X4-6WGF]).

to the bearing of the facts, the slave Daniel should have had the benefit of such doubts."[158]

Despite the stratagems of determined slaveholders, St. Louisans petitioning for freedom had a remarkable success rate: approximately one out of every three freedom suits ended with the liberation of the plaintiff. The scholars who have studied the freedom suits agree that this proportion demands explanation. Kelly Kennington observes:

> Although these numbers present more questions than they an answer, they suggest that enslaved plaintiffs managed to definitively win freedom in more than a third of their suits in St. Louis, a somewhat surprising number when one considers that all judges, attorneys, jurors, and most witnesses were white men and that early American legislatures often designed the law of slavery to protect enslavers and to uphold white supremacy above people of African descent.[159]

Lea VanderVelde is no less impressed. "It is amazing," she writes, "to find so many successful suits decided against the prevailing grain of wealth, race, and class: where people so completely subordinated as slaves sought to use the law to change their status, to sue their masters, and to win their freedom."[160] Alfred Brophy agrees, calling this phenomenon "surprising," even "impressive and astonishing." Even if their suits failed, writes Brophy, the filing of a freedom suit "could draw powerful slave owners into court and thus upend traditional power structures."[161]

When Daniel Wilson secured his freedom in 1835, he did so at the height of the "golden age of judicial decisions" in freedom suits between 1824 and 1844.[162] The success of his petition marked the high point of a long series of opinions upholding the doctrine of "once free, always free," by which plaintiffs, supported by the factual arguments ruled material by McGirk and Tompkins, were developing a "rights consciousness" that would endure after Emancipation. Surely it was more than what one clerk

158. *Wilson*, 4 Mo. at 593.
159. KENNINGTON, *supra* note 98, at 10.
160. VANDERVELDE, *supra* note 91, at 20.
161. Brophy, *supra* note 90, at 895, 901–02.
162. Moore, *supra* note 133, at 4, 11.

grudgingly acknowledged as the "wiley art and seducing strategies of the slave."[163] Rather, such success could not have been achieved without petitioners themselves taking an active role in the case. Even so, freedom suits were endangered by changes taking place. Hostility to antislavery took a violent turn in the 1830s, and in 1836, St. Louis witnessed the lynching and burning of a free Black man, Francis McIntosh, steward of a steamboat, who had intervened in the attempted arrest of two free Black fellow crew members. A St. Louis Circuit Court grand jury failed to indict anyone of the gruesome crime, which was witnessed by a large mob.[164] By the time the Scotts lost the first round in their legal struggle in 1847, the most active and skilled petitioners' attorneys—Bird, Murdoch, and Risque—were no longer in St. Louis, leaving the cause of freedom in the hands of less experienced advocates.[165] Moreover, two of the high court's staunchest pro-freedom justices retired: McGirk in 1841 and Tompkins in 1845. Success in freedom suits would become even more difficult after 1851, when a constitutional amendment provided for popular election of judges, which returned a proslavery bench.[166]

Both the legislature and the highest court in the state hobbled the pursuit of freedom through litigation. In 1845, the legislature required petitioners to post "security satisfactory . . . for all costs that may be against him or her," a heavy burden for any petitioner, and it barred recovery of damages by a successful plaintiff. The new statute on "Freedom" also omitted the 1825 provision that had expanded the admissibility of evidence in the plaintiff's favor and replaced it with a rule that aided the defense: "The defendant may plead as in other like cases, or he may plead the general issue, and give any special matter in evidence."[167] In 1847, William Napton, a pro-slavery judge appointed in 1839, rejected a jury's factual

163. VANDERVELDE, *supra* note 91, at 106.

164. For context and a fuller account, see David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Freedom Suits*, 75 UMKC L. REV. 53, 64–65 (2006). Janet S. Hermann covers the episode in detail in *The McIntosh Affair*. Janet S. Hermann, *The McIntosh Affair*, 26 MO. HIST. SOC'Y BULL. 123 (1969).

165. VANDERVELDE, *supra* note 91, at 201.

166. BAY, *supra* note 132, at 536, 31. William F. Swindler, *Missouri Constitutions: History, Theory and Practice*, 23 MO. L. REV. 32, 49–50 (1958). *Supreme Court Judges*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=133 (last visited Nov. 1, 2021). FEHRENBACHER, *supra* note 144, at 262–63.

167. Compare the 1825 statute, *supra* text accompanying note 138, with that of 1845 in *The Revised Statutes of the State of Missouri; Revised and Digested by the Thirteenth Assembly* 283–84 (1845).

determination as insufficient to establish plaintiff's claim "at the time spoken of by the witnesses." Holding that the plaintiff's claims lacked "certain other facts necessary to exist" to satisfy the statutory burden of proof, Napton let loose a withering attack that presaged the court's rejection of Dred's and Harriet's petition:

> Their general spirit is not in conformity to the policy of our laws or the principles heretofore adjudicated by our courts. Whatever may be the policy of other governments, it has not been the policy of this State, to favor the liberation of negroes from that condition in which the laws and usages have placed the mass of their species. On the contrary, our statute expressly throws the burden of establishing a right to freedom upon the petitioner, and the provision is both wise and humane.[168]

Endorsing the increasingly restrictive "spirit" of Missouri statutes, he wrote,

> Neither sound policy nor enlightened philanthropy should encourage, in a slaveholding State, the multiplication of a race whose condition could be neither that of freemen nor of slaves, and whose existence and increase, in this anomalous character, without promoting their individual comforts or happiness, tend only to dissatisfy and corrupt those of their own race and color remaining in a state of servitude.[169]

The impact of the new rules is evident in the fact that only thirty-seven freedom suits were filed from 1846 to 1860. Although no defendant won a decision, only nine petitions succeeded (while a tenth ended in defendant's default); the rest were dismissed, nonsuited, or voluntarily withdrawn.[170]

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168. Charlotte (of Color) v. Chouteau, 11 Mo. 193, 195, 200 (1847). Plaintiff's claim was based on her enslaved mother's residence in Canada before its acquisition by the United States and its incorporation into the free soil of the Northwest Territory. The legal question was unsettled as to whether that part of Canada had been slave or free while her mother Rose had lived there before moving to St. Louis. The jury had been instructed to decide from the facts presented whether that "the custom and usage of slavery" had existed there. On the facts presented, the jury found that slavery "did not exist" there. *Id.*

169. *Id.* at 200.

170. KENNINGTON, *supra* note 98, at 178–79.

With proslavery gaining control of Missouri law and politics, and fearing for the future of his wife and daughters, Dred Scott attempted to buy his freedom as a first step toward their manumission. Denied that, he and Harriet filed their petitions for freedom in 1846. With "once free, always free" a well-established precedent in Missouri courts, they had every reason to expect success. But unprecedented problems—a fire that destroyed much of the city and an epidemic of cholera—overtook what began as an ordinary freedom suit.[171] Not until 1850 did the case come to trial again, when a Missouri jury followed precedent in the instructions given them:

> If the Jury believe from the evidence that the plaintiff was held in Slavery by the deceased Doctor Emerson at situated in the Territory of the United States North West of the river Ohio, as defined by the act of Congress of July 12 1787. entitled "An Ordinance for the Government of the Territory of the North West of the River," at any time after said ordinance went into effect, and at the time was the property of Said Emerson, then Said Plaintiff is entitled to his freedom.[172]

Emerson appealed to the state supreme court, whose judges' intent was no secret. William Napton had been expected to write its decision, but he was not returned by the voters in 1851, and the task fell to Judge William Scott, another pro-slavery judge who outdid Napton in his desire to overrule the precedents before him. Repudiating decades of the "once free, always free" precedent, Judge William Scott wrote:

> Times are not now as they were when the former decisions on this subject were made. Since then not only individuals, but States, have been possessed with a dark and fell spirit in relation to slavery whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of

171. FEHRENBACHER, *supra* note 144, at 250–57.
172. Emerson v. Scott (Mo. Cir. 1850).

> Missouri to show the least countenance to any measure which might gratify this spirit.[173]

The path of the case to the Supreme Court of the United States is well known, but our purposes lead us to recognize that the silencing of the voices of the enslaved was incomplete and temporary. The Scotts' freedom suit was only one of thousands of expressions of a rights consciousness that propelled the movement for Black liberation into the courtroom and into the twenty-first century.

Which brings us back to Ralph Ellison and invisibility. In concluding *Invisible Man*, he asked "[w]hy do I write?" and answered, "[w]ithout the possibility of action, all knowledge comes to one labeled 'file and forget,' and I can neither file nor forget." Despite his self-doubt, he nevertheless concluded that "there's a possibility that even an invisible man has a socially responsible role to play." The freedom suits launched by those invisible actors are now rescued from the forgotten files of history, and their impact continues. [174]

173. Scott v. Emerson, 15 Mo. 576, 586 (1852).
174. ELLISON, *supra* note 10, at 579, 581.