

RACE, SEX, EDUCATION AND MISSOURI JURISPRUDENCE: *SHELLEY v. KRAEMER* IN A HISTORICAL PERSPECTIVE*

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I. A HISTORICAL VIEW BROADER THAN *SHELLEY V. KRAEMER*

Forty years ago the United States Supreme Court courageously confronted one aspect of racial segregation in housing in America: the use of private racially restrictive covenants. In my view, the six Justices who sat in the *Shelley v. Kraemer*¹ case made the proper decision. However, I do not think that the ultimate success in the 1948 case was as inevitable as many now seem to believe. We meet with a sense of celebration because the Supreme Court issued a decree and proclaimed a doctrine that deterred one form of virulent racism²—restrictive covenants—which had been sanctioned almost universally by the American rule of law in practi-

1. 334 U.S. 1 (1948). Other articles in this volume detail the facts and legal doctrines involved in *Shelley v. Kraemer*. For the purpose of my article it is sufficient to note that, in *Shelley*, the Supreme Court held that judicial enforcement of private restrictive covenants which have as "their purpose the exclusion of [blacks] . . . from the ownership or occupancy of real property" was a violation of the equal protection clause of the fourteenth amendment. 334 U.S. at 1.

2. When defining racism, perhaps Justice Stewart's comment in the context of obscenity is particularly applicable: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . .*" *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (emphasis added).

Most sensitive observers recognize racism when they "see it." Yet institutional racism is so subtle that sometimes the perpetrator is not aware of his racism. For example, I once heard a well-meaning white federal judge in a social setting describe a lawyer as "the dumbest white man he had ever known." This judge, now long deceased, did not understand the racist implications of this statement.

For a more scholarly definition, see George M. Frederickson's description:

During the nineteenth century, race-thinking emerged for the first time as a central current in Western thought. Previously whites had encountered other races in the course of "the expansion of Europe" and had characteristically subjugated, enslaved, or exterminated them. Out of these brutal and crassly exploitative contacts developed a set of attitudes about dark-skinned peoples which were 'racist' if racism is regarded as synonymous with race prejudice and discrimination, but which might be considered preracist or protoracist, if one defines racism in a more restricted way—as a rationalized pseudoscientific theory positing the innate and permanent inferiority of nonwhites. Racism in this second sense had some roots in the biological thinking of the eighteenth century but did not come to fruition or exert great influence until well along in the nineteenth.

G. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND* xi (1971).

A more practical definition of racism was proffered by the United States Commission on Civil Rights as: "any attitude, action or institutional structure which subordinates a person or group because of his or their color." A. DOWNS, *RACISM IN AMERICA, AND HOW TO COMBAT IT* 5-6 (1970). As Derrick Bell suggests, "implicit in any definition of racism is the assumption that the majority group has a political and economic dominance necessary to translate its racial biases and prejudices into racial discrimination." Bell, *Racism and American Courts: Cause for Black Disruption or Despair*, 61 CALIF. L. REV. 165 n.2 (1973).

Of course there can be racism by blacks in their advocacy or implementation of invidious discrimination against whites. While undoubtedly the latter has occurred in some instances, the focus of this article is on racism by whites against blacks.

cally every state until 1948.³ Since victories in the extension of human

3. It is easy to overestimate the pragmatic impact of *Shelley*. Professor Bell has noted:

But while the legal scholars were concerned with the principle in *Shelley*, whites, determined to bar blacks from their neighborhoods, devised a seemingly inexhaustible list of restrictions, many of which took advantage of the *Shelley* holding that restrictions were valid between the parties. All manner of self-operating cooperatives, associations, and leasing arrangements were devised to protect the racial exclusiveness of white residential areas. Such arrangements were not foolproof, but they added to the barriers facing those few blacks in a position to take advantage of the *Shelley* decision.

D. BELL, RACE, RACISM AND AMERICAN LAW 479 (1980).

Professor Drake noted:

In 1948, the Supreme Court declared racial restrictive covenants unenforceable in the courts, but this action tended to accelerate rather than reverse the process of ghettoization, for many whites proceeded to sell to Negroes at inflated prices and then moved to the suburbs, or they retained their properties, moved away, and raised the rents. The Court's decision was based partly upon a reevaluation of the concept of civil rights and partly upon a recognition of the fact that serious economic injustice was a by-product of residential segregation, a situation summed up by Thomas Pettigrew:

While some housing gains occurred in the 1950s, the quality of Negro housing remains vastly inferior relative to that of whites. For example, in Chicago in 1960, Negroes paid as much for housing as whites, despite their lower incomes. . . . This situation exists because of essentially two separate housing markets; and the residential segregation that creates these dual markets has increased steadily over past decades until it has reached universally high levels in cities throughout the United States, despite significant advances in the socio-economic status of Negroes. . . .

The trend has not yet been reversed despite F.H.A. administrative regulations and Supreme Court decisions.

Drake, *The Social and Economic Status of the Negro in the United States*, 94 J. AM. ACAD. ARTS AND SCIENCES 771, 774-76 (1965).

Professor Swinton has made the most recent economic analysis of the housing problem as follows:

Overall, the mean or per household net worth for black households was less than one-fourth of the mean holdings of white households. In the aggregate blacks held about 211 billion dollars in all types of assets. These aggregate holdings fell about \$687 billion short of parity. We might note also that the Census data understate wealth holdings by a great deal and so as large as this figure is it nonetheless understates the true black disadvantage in wealth holdings.

D. SWINTON, *The Economic Status of Black Americans*, in THE STATE OF BLACK AMERICA 26 (1989).

The most recent thoughtful articles on discrimination in housing are in Yale Law and Policy Review. Professor Drew S. Days, III states:

The marking of the 20th anniversary of the Fair Housing Act of 1968 strikes me as having a more bittersweet quality to it than the others I have mentioned. Certainly, there have been successes in providing decent homes for many Americans previously denied such access because of their race or national origin or some other irrelevant characteristic. But I think that it is widely acknowledged that America is more segregated today than it was twenty years ago. The two societies that the Kerner Commission talked about in 1968 are still with us.

So commemorating twenty years of the Fair Housing Act suggests some painful parallels. I feel pain each year when we commemorate—in 1988 it will be the 34th anniversary—Brown vs. Board of Education, yet racial isolation in our public schools has taken on shocking proportions. More perversely—and it just shows you how my mind works—it is like the reminders we received on the T.V. network news programs each night of how

rights protection have been so rare in recent years, it is appropriate to reflect on the fleeting moments of past successes. *Shelley v. Kraemer* has had a significant impact on improving the quality of justice for black America. As Thurgood Marshall said the day the Supreme Court delivered the opinion, it gave "thousands of prospective home buyers throughout the United States new courage and hope in the American form of government."⁴

Though I applaud the Court's decision in *Shelley v. Kraemer*⁵ and the

many days the Americans hostages had been held in Iran. Many blacks and other racial minority group members are counting the days of being hostages, in effect, to the housing segregation that exists in this country.

Days, *Introductory Remarks*, 6 YALE L. & POL'Y REV. 332, 332-33 (1988). Prof. Karl Taeuber states:

From a third perspective, institutionalized racism and the web of discrimination are persistent features of American society. Current and past discrimination in school systems, labor markets, health services, neighborhood environments, and other life settings perpetuate racial segregation. The vicious circle that Gunnar Myrdal identified nearly fifty years ago continues to restrict successive generations. For example, many thousands of black families were excluded by race from participation in the FHA, VA, and government-regulated private banking programs that made home ownership and suburban residence possible for whites. Therefore, while home equity has become the major form of capital investment for most American families, black families have little of it. According to this view, the fact that black families are less able than white families to purchase homes reflects a lack of inherited wealth that resulted from past racial discrimination. Similar arguments can be made about components of human capital such as education, job skills, health, and political experience. Human capital investments in black children are still restricted by the heritage of blatant discrimination.

The continuation of racism in institutional and personal behavior matches the persistence of the effects of past racism. Racial testing of behavior in housing markets repeatedly reveals differential treatment of blacks. The fact that blacks are disproportionately employed in jobs requiring that they live in the central city is not a neutral fact but a direct consequence of the discriminatory exclusion of blacks from other jobs and from suburban housing. The fact that some blacks are hesitant to move into predominantly white areas is not a simple cultural preference but a direct consequence of the cross-burnings, window-smashings, and name-calls experienced by other blacks. Discrimination in employment and other domains may be less visible and more subtle than in the past, but it continues to make a difference in people's lives.

Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 344-45 (1988).

The classic studies on racial discrimination in housing include: CLARK, *DARK GHETTO* (1965); DRAKE & CAYTON, *BLACK METROPOLIS* (1962); LAURENTI, *PROPERTY VALUES AND RACE* (1961); LIEBERSON, *ETHNIC PATTERNS IN AMERICAN CITIES* (1963); MENDELSON, *DISCRIMINATION* (1962); PETTIGREW, *A PROFILE OF THE NEGRO AMERICAN* (1964); WEAVER, *THE URBAN COMPLEX: HUMAN VALUES IN URBAN LIFE* (1964).

4. N.Y. Times, May 4, 1948, at 2, col. 5.

5. 334 U.S. 1 (1948). The Supreme Court had before it three cases: *Kraemer v. Shelley*, 35 Mo. 814, 198 S.W.2d 679 (1946); *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638 (1947); and *Hurd v. Hodge*, 162 F.2d 233 (1947). For the purposes of this article I will discuss only the *Shelley* case and related Missouri jurisprudence.

companion case of *Hurd v. Hodge*,⁶ I fear that a focus primarily limited to *Shelley v. Kraemer* and housing, or even to the state action doctrine, may be far too narrow a perspective to comprehend fully the totality of racism in America, both past and present. I worry that we may lose sight of the magnitude of the underlying problem of racism in the American legal process that was so interwoven with *Shelley v. Kraemer*. We must understand the courts' prior failures to appreciate their later limited successes. With your tolerance I want to discuss *Shelley v. Kraemer* and *Hurd v. Hodge* from the perspective of the prior century, a view that encompasses far more than merely discrimination in housing or racially restrictive covenants.

Perhaps the most fundamental race relations question of the last three centuries is the one that Thurgood Marshall raised in his oral argument to the Supreme Court in *Brown v. Board of Education*.⁷ He asked, "why of all of the multitudinous groups of people in this country [do] you have to single out Negroes and give them this separate treatment?"⁸ Thus, the issue which we must explore here is more than housing as reflected in *Shelley*; more than public accommodations as reflected in *Plessy v. Ferguson*⁹ and *Morgan v. Virginia*¹⁰; more than voting as reflected in *Smith v. Alwright*¹¹; and more than American education as reflected in *Brown v. Board of Education*. Despite our platitudes about the land of the free and the home of the brave, for three centuries the American legal process administered a more pernicious treatment to blacks in almost every aspect of life than to any other group, with the possible exception of Native Americans.¹²

In his classic treatise, *The Nature of the Judicial Process*, then Judge Cardozo wrote of those issues for which there could be no progress without an understanding of history.¹³ Similarly, Judge Hastie, the first black federal judge, and later Chief Judge of the United States Court of

6. *Hurd v. Hodge*, 334 U.S. 24 (1948) involved restrictive covenants in the District of Columbia and was argued at the same time as *Shelley v. Kraemer*.

7. 347 U.S. 483 (1954).

8. L. FRIEDMAN, ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA* 1952-55 at 239 (1969).

9. 163 U.S. 537 (1896).

10. 328 U.S. 373 (1946).

11. 321 U.S. 649 (1944); see D. HINE, *BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS* (1979).

12. See *infra* note 16.

13. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

Appeals for the Third Circuit,¹⁴ concluded in his seminal 1973 article¹⁵ that to understand the progress in the area of race relations required such a historical perspective. Judge Hastie analyzed the period from 1930 to 1950 during which the foundations were being laid for the school desegregation cases of the 1950s. He stressed that the "struggle can be viewed in perspective only if the *antecedent status* of the Negro is comprehended, and such realization is not easy today, particularly for the many millions of Americans who have reached maturity since 1950."¹⁶

It is for this reason—lack of historical perspective—that recent generations find it difficult to understand the clamor concerning past racial

14. See G. WARE, WILLIAM HASTIE, GRACE UNDER PRESSURE (1984).

15. Hastie, *Toward an Equalitarian Legal Order, 1930-50*, 407 ANNALS 18 (1973).

16. *Id.* at 19 (emphasis added). Other scholars have stressed the importance of history in understanding America's present racial tensions. See D. BELL, AND WE ARE NOT SAVED (1987); D. BELL, RACE, RACISM AND AMERICAN LAW (1980); M. BERRY & J. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA (1981); M. BERRY, BLACK RESISTANCE/WHITE LAW (1971); D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823 (1975); D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1975); S. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE (1976); J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (1988); G. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971); E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE (1971); E. GENOVESE, ROLL, JORDAN, ROLL (1974); L. GREEN, THE NEGRO IN COLONIAL NEW ENGLAND (1968); A. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD (1978); W. JORDAN, WHITE OVER BLACK (1977); R. KLUGER, SIMPLE JUSTICE (1977); L. MILLER, THE PETITIONERS (1966); E. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM (1975); O. PATTERSON, SLAVERY AND SOCIAL DEATH (1982); B. QUARLES, THE NEGRO IN THE MAKING OF AMERICA (1969); C. WOODSON & C. WESLEY, THE NEGRO IN OUR HISTORY (1966); C. WOODWARD, THE STRANGE CAREER OF JIM CROW (1974); E. B. Higginbotham, *Beyond the Sound of Silence: Afro-American Women's History*, 1 GENDER & HISTORY 50 (1989).

See also the following articles by A. Leon Higginbotham, Jr.: *The Impact of the Declaration of Independence*, CRISIS MAGAZINE, Winter, 1975; *To the Scale and Standing of Men*, 60 J. NEGRO HIST. 347 (1975); *From Racism to Affirmative Action—Will Universities Span the Gap?*, 4 BLACK L.J. 230 (1975); *Dream of Freedom*, 13 J. HUM. REL. 166-77 (1965); *From Presidential Fact Finding Commissions to Justice for Blacks—Can We Bridge the Gap?*, Pursuit of a Culture and Human Dignity, SCHOLARS/STATESMEN LECTURE SERIES, No. 2, Dillard University, 1970-71; *What Kind of Vaccine?*, 143 AM. J. PHARMACY 77-80 (1971); *As If Bound With Them*, THE HOURGLASS 4 (1971); *The Black Prisoner, America's Caged Canary*, in VIOLENCE: THE CRISIS OF AMERICAN CONFIDENCE 103-25 (1971); *Channel Change Through Law—Reason*, 2 TEX. S.U.L. REV. 180-186 (1971); *Racism and the American Legal Process: Many Deeds Cry Out to be Done, Progress in Africa and America*, SCHOLARS/STATESMEN SERIES, No. 3, Dillard University, 1971-72; *Dream Deferred*, 18 CRIME AND DELINQUENCY 30-34 (1972); *The Relevance of Slavery: Race and the American Legal Process*, 54 NOTRE DAME LAWYER 171-80 (1978); *Is Slavery Relevant to Corrections Today?*, 41 CORRECTIONS TODAY 8 (1979); Foreword to *Roles of the Black Lawyer: A Symposium*, 7 BLACK L.J. 1-4 (1981); Forward to G. SEGAL, BLACKS IN THE LAW: PHILADELPHIA AND THE NATION (1983); and Forward to G. McNEILL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

injustice in America. It is also for this reason that college students today, familiar with such athletic heroes as Herschel Walker of the University of Georgia or Ralph Sampson of the University of Virginia, find it hard to believe that as recently as thirty-five years ago blacks could not even matriculate at those universities. Students are often not aware that a force of 300 marshals and 28,000 troops was required to assure the admission of one black student, James Meredith, to the University of Mississippi.¹⁷ They are not aware of the pressures that were exerted to get blacks admitted into Washington University in the 1940s.¹⁸

Certainly, as we seek true racial justice in our nation, there will be either minuscule progress or, worse yet, regression if Americans fail to understand the lessons of history, and fail to appreciate the importance of a federal judiciary that is committed to the eradication of racism in America's public life through a fair and vigorous application of the Constitution and the appropriate rules of law.

II. MISSOURI JURISPRUDENCE

Three cases that span almost a century provide insight on the legacy of the Missouri racial jurisprudence that preceded *Shelley v. Kraemer*. Though the cases do not involve housing, their issues concern race, sex and education—branches from the same trunk of racism that gave forth the housing issues in *Shelley v. Kraemer*.¹⁹

A. Dred Scott v. Sanford

When American historians think of American slavery law, they usually cite Missouri's most famous slave case, *Dred Scott v. Sanford*.²⁰ In 1846, Dred Scott filed suit against his owner, Mrs. Emerson, seeking freedom for himself, his wife, and his children. The Missouri Supreme Court, reversing a long line of its prior cases, held in a two to one decision that Scott and his wife and daughters were still slaves. The court denied freedom to the Scott family even though they had been in free

17. See R. BARRETT, *INTEGRATION AT OLE MISS*. (1965); J. MEREDITH, *THREE YEARS IN MISSISSIPPI* (1966); J. SILVER, *MISSISSIPPI: A CLOSED SOCIETY* (1965); A. Higginbotham, unpublished monograph.

18. Langsdorf, *The Washington University Story 1853-1953* 21 (unpublished manuscript on file at Olin Library, Washington University).

19. For a more detailed analysis of the interrelationship between the issues of sex and housing in racial discrimination cases, see A. Higginbotham & F. Higginbotham (unpublished manuscript).

20. 60 U.S. (19 How.) 393 (1857).

territories, pursuant to both the Missouri Compromise of 1820 and the Northwest Ordinance of 1787.²¹

The United States Supreme Court affirmed the Missouri court in an opinion containing the most famous line in the *Dred Scott* case. Chief Justice Taney, himself a former slaveowner, declared that under the United States Constitution and the Declaration of Independence, blacks had “no rights which the white man was bound to respect.”²² It is with this very issue that our society has struggled: whether blacks have any rights which whites are bound to respect or, as modified in the twentieth century, whether blacks have the same or equal rights as those assured to whites.

B. State v. Celia

1. The Case

As Scott’s case was working its way to the United States Supreme Court, there occurred another case involving a Missouri slave that has received little scholarly attention with the exception of a superb article by Professor Williamson of Lincoln University.²³ The case of *State v. Celia*²⁴ demonstrates how hostile to blacks the Missouri rule of law was in the antebellum period. Even the caption of the case—“The State of Missouri against Celia, a slave”²⁵—indicates such hostility: the law had given Celia no last name.²⁶

Celia was a black slave girl, who, when she was fourteen years old, was purchased in 1850 by Robert Newsom, a successful Callaway County

21. *Scott v. Emerson*, 15 Mo. 576 (1852). For the related aspects of the *Dred Scott* case see *Dred Scott v. Sanford*, 13 Am. St. Trials 243 (C.C.D. Mo. 1854); see also *Emerson v. Dred Scott*, 11 Mo. 413 (1848).

For an authoritative discussion of the *Dred Scott* case, see D. FEHRENBACHER, *THE DRED SCOTT CASE* (1978); V. HOPKINS, *DRED SCOTT’S CASE* (1957); Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrine*, 17 AM. HIST. REV. 52 (1911); Mendelson, *Dred Scott’s Case—Reconsidered*, 38 MINN. L. REV. 16, 28 (1953).

22. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857).

23. See Williamson, *The State Against Celia, A Slave*, THE MIDWEST J. 408 (1956).

24. *State of Missouri v. Celia*, Vol. 2 Index to Court Cases of Callaway County, File No. 4,496 at 13 (1855). The Clerk of Callaway County paginated solely the front of each page. Thus, citation to page numbers may include either the front or the back of that page.

25. *Id.* at 7.

26. When she died, the lower court recognized no last name. The first page of the case file reads: “A Bill of Costs in the Case of the State of Missouri against Celia a slave Indicted for Murder in the first degree, convicted, sentenced [and] Hung . . .” *Id.* at 1. However, the Missouri Supreme Court assigned her the last name of her master: “State of Missouri [v.] Cely, otherwise Celia, Otherwise Celea [sic] Newsom a Slave.” *Id.* at 4.

farmer. She was a mere adolescent and he was seventy years old and a grandfather.²⁷ The record suggests that Newsom forced her to have sexual intercourse with him often and always against her will, even on the way home after he had purchased her.²⁸ Celia said that he was the father of her second child.

On the date in question, June 23, 1855, while she was still a teenager, Celia was pregnant for the third time and ill, having been sick since February.²⁹ One witness testified that she threatened to hurt her slavemaster if he continued to force her to have sexual intercourse with him while she was sick.³⁰ From the summarized testimony,³¹ one could find that on that date, Celia told him that she would hurt him if he would not stop sexually abusing her.³² The master had told her that he was "coming down to her cabin that night."³³ She told him not to come and that she would hurt him if he came.³⁴ Celia then "armed herself with a stick."³⁵ He came down that night, and she struck him with the stick twice.³⁶ He apparently died immediately. She then burnt his body in the fireplace and spread his ashes the next morning on the pathway.³⁷

Did Celia, as a black slave woman, have the right to resist her master's sexual advances, or was it first degree murder as charged in the indictment? The instructions given by the court and those requested by her

27. In 1855 in Callaway County there were approximately 13,000 whites, 4,500 black slaves and 30 free blacks. *See supra* note 23.

28. The following excerpt of the cross-examination of Colonel Jefferson F. Jones supports this suggestion:

She [Celia] said the old man had had sexual intercourse with her. Her second child was his. The deceased bought her in Audrain County. Can't say positively whether Celia said that deceased had forced her, on the way home from Audrain County. Have heard that he did, but do not know with certainty whether she told me so.

Celia, File No. 4,496 at 33.

29. The deceased's daughter, Virginia Wainscott, testified as such. *See id.* at 34.

30. *See infra* note 32 and accompanying text.

31. At the time of Celia's trial in 1855, and for some twenty-six years following, the testimony of witnesses was summarized by the Clerk of the Court. Thus the accuracy of the reporting depended wholly upon the ability, diligence, and integrity of the Clerk. Not until about 1881 did word-by-word (shorthand) reporting of testimony become the practice.

Williamson, *supra* note 23, at 409 n.3.

32. *See Celia*, File No. 4,496 at 34 (testimony of Virginia Wainscott).

33. *Id.* at 33 (testimony of Colonel Jones at the inquest).

34. *Id.*

35. *Id.*

36. *Id.* *See also id.* at 21 (sworn affidavit of Celia).

37. *Id.* at 33, 34 (testimony of Harvey Newsom, son of the deceased and testimony of "Coffee" Wainscott, 11-year-old grandson of the deceased) and 19 (Celia's inquest testimony).

counsel reveal the polar perceptions as to the rights of a slave woman. The defense asked that the following instruction be given:

If the jury believe [sic] from the evidence that Celia did kill Newsom, but that the [k]illing was necessary to protect herself against a forced sexual intercourse with her on the part of said Newsom, and there was imminent danger with such forced sexual connection being accomplished by Newsom, they will not find her guilty of murder in the first degree.³⁸

In substance, Celia's counsel asked the court to instruct the jury that the rape of a slave woman was not a property right of the master, that the master's economic privileges did not include the right of sexual molestation of his slave, and that the right to force her to work in the fields did not include the right to sleep in her bed and violate her at his will. Celia's counsel asserted that Celia had the same right of self-defense that was assured all free white women under the Missouri laws.³⁹ In short, the court was asked to recognize that Celia, despite her involuntary servitude, was a human being entitled to some semblance of dignity and that she had the same right to resist sexual harassment as did white women.⁴⁰ This humanist, rational request was rejected by the court.

Missouri statutes were explicit in protecting women from attempts to ravish, rape, or defile. In at least two statutes, they assured women the protections of the law against such abuse. Section 29 of the Missouri criminal statutes provided: "Every person who shall take *any* woman, unlawfully, against her will, with intent to compel her by force, menace or duress . . . to defile [her] upon conviction thereof shall be punished by imprisonment . . ."⁴¹ Another Missouri statute provided: "Homicide shall be deemed justifiable when committed by any person [who is] resisting [attempts] to commit any felony upon . . . her."⁴²

38. *Id.* at 12, no. 8.

39. Indeed, all of her counsel's requests for jury instructions to that effect were refused: [Requested Instruction No. 10.] An attempt to compel a woman to be defiled by using force, menace, or duress is a felony within the meaning of the fourth section of the second [article] concerning crimes & punishments in Missouri statutes for 1845.

[Requested Instruction No. 11.] The using of a slave to be by him defiled, is using force, menace, and duress, within the meaning of the 29 section of the 2nd article of Missouri statute for 1845 concerning crimes and punishments.

[Requested Instruction No. 12.] The words any woman in the first clause of the 29th section, of second article of laws of Missouri for 1845, concerning crimes & punishments, embrace slave women, as well as free white women.

Id. at 12-13 (emphasis added).

40. See *supra* note 39.

41. MO. REV. STAT. ch. 47, § 29 (1845) (emphasis added).

42. MO. REV. STAT. ch. 47, § 4 (1845). A "justifiable homicide" is not a crime even though a person intentionally kills another person.

When the Missouri legislature intended to limit the privileges of blacks or expose them to harsher penalties, it used the express term "negro," "slave" or "mulatto." Similarly, when it intended to protect only white females, it used the language "white female." For example, in section 31 of the criminal code, the legislature, in an attempt to deter relationships between black males and white females, noted with specificity that it was a crime for any negro or mulatto to attempt to commit a rape on a white female, or to marry or to defile a white female.⁴³ The failure to limit section 29 to white females suggests that the legislature meant to criminalize the rape of "any woman."

However, instead of recognizing that Celia, as a woman, was entitled to the aforementioned statutory right of self-defense, and that it was a crime to defile her by duress or force, the trial judge rejected her lawyer's requests for jury instructions that assumed that she was protected by these statutes. Instead, he gave the following instruction submitted by the state:

If Newsom was in the *habit of having intercourse* with the defendant who was his slave and went to her cabin on the night he was killed to have intercourse with her *or for any other purpose* and while he was standing in [sic] the floor talking to her she struck him with a stick which was a dangerous weapon and knocked him down, and struck him again after he fell, and killed him by either blow, it is murder in the first degree.⁴⁴

What did the trial judge mean by "habit of having intercourse with the defendant who was his slave?" Was he not suggesting that Celia had no right to resist if the master wanted to have sexual intercourse with her? By the very nature of the master-slave woman relationship—in which the master had the right to whip her or beat her without provocation, or give

43. If any *negro* or *mulatto* shall either, *First* commit, or attempt to commit a rape on a *white female*, as hereinbefore declared; or, *Second*, By force, menace, or duress, compel, or attempt to compel any *white female* to marry him, or any *negro* or *mulatto* to be defiled by him, or another *negro* or *mulatto*; or, *Third*, Marry or defile, or attempt to defile any *white female*, who shall have been compelled thereto by force, menace or duress, employed or used by him or any other; or, *Fourth*, Take away any *white female* under the age of eighteen years, as specified in the last preceding section, for the purpose of prostitution, concubinage, or marriage with him, or any other *negro* or *mulatto*, he shall on conviction, instead of the punishment declared in the preceding section, be sentenced to castration, to be performed under the direction of the sheriff, by some skillful person, and the expense shall be adjusted, taxed and paid as other costs.

MO. REV. STAT. ch 47, § 31 (1845)(emphasis added).

The concept of *ejusdem generis* supports my hypothesis as to how the Missouri statutes should be construed. See C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1984).

44. State of Missouri v. Celia, Vol. 2 Index to Court Cases of Callaway County, File No. 4,496 at 14 (1855) (emphasis added).

her inadequate food or housing—any request by the slave master should have amounted to duress within the meaning of the statute. The master's "habit of having intercourse with his slave" was a habit predicated on the implicit coercive power of his status; it was duress that I submit would have been illegal under the Missouri law had the court understood what Sojourner Truth meant in her plea, "Ain't I a woman?"⁴⁵ My reading of the record and the instructions suggests that the trial judge believed that under Missouri law a slave woman had no sexual rights over her own body and thus had to acquiesce to her master's sexual demands.

The jury followed the court's dehumanizing instruction, which made Celia a person without any rights over her body. She was convicted of murder in the first degree, and the court ordered that she be executed by hanging. The Missouri Supreme Court affirmed, stating it saw "no probable cause for [an] appeal," and denied a stay of execution on December 14, 1855.⁴⁶

Celia escaped from the jail but was subsequently returned. The court demonstrated its "mercy" by delaying her execution until after her baby was born. Query whether the delay was truly out of mercy, or whether it was because the baby would have been an asset of Celia's master's estate. The taking of Celia's life was not even of sufficient importance for the clerk of the court to note the day she was hanged. Her death was noted solely by: "Bill of Costs: Executing Death Warrant paid 15.00."⁴⁷ Professor Williamson estimates her date of death to be December 13,⁴⁸ on which date she was taken from the prison to the gallows and there "hanged until she died."⁴⁹ If this date is correct, she was hanged one day before the Supreme Court of Missouri acted on the petition by her counsel "that an order might be made staying the execution of the [s]entence of the Court until the appeal might be heard in the Supreme Court at the next term thereof in January next, at Jefferson City."⁵⁰

One of the ironies is that the master's estate was denied a profit from Celia's rape. Despite the court's "mercy" in delaying execution until the birth of the child, the record reflects that a Doctor Carter delivered Ce-

45. See *infra* note 55 and accompanying text.

46. *Celia*, File No. 4,496 at 4.

47. *Id.* at 1.

48. The bill of costs reflects "Boarding prisoner from 25th June 1855 until she was executed. 171 days at 40 cents per day." *Id.* From this, Professor Williamson computed 171 days from June 25th to be December 13th. See Williamson, *supra* note 23, at 420.

49. Williamson, *supra* note 23, at 420.

50. *Celia*, File No. 4,496 at 4.

lia's child, who was born dead.⁵¹

Celia's plight of sexual harassment was not unusual. A narrative of a former slave reveals what Celia's options might have been if she had simply refused to have sex with her master. Minnie Fulkes, a former slave described both the harsh treatment black women suffered in slavery as well as the experience of a child who witnessed the abuse of her mother:

Honey I don't like to talk about dem times 'cause my mother did suffer so's. You know der waz an' overseer who used to tie her up in de barn with a rope aron her arms up over her head, while she stood on a block. Soon as dey got her tied, dis block was moved an her feet dangled; yo know — couldn't touch de flo. Des old man, now, would start beaten her nekked til the blood run down her back to her heels. I took and seed the whelps and scars for my own self wid dese here two eyes. Was a whip like dey use on horses . . . after dey had beat my mama all day . . . Well honey des man would bathe her in salt and water . . . Lord, lord, I hate white people . . . I asked my mother what she done for em to beat and do her like dat? She said nothin tother than she refused to be wife to him.⁵²

2. "Ain't I a Woman"⁵³ — *Different Perceptions of Black Women*

At issue in *State v. Celia* was one of the questions that leading scholars on Afro-American women have been asking⁵⁴: Were black women, and in particular slave women, women in the eyes of the law? Of course, they were women biologically, but when the law made them property, did they lose their legal status as women?

Sojourner Truth, once a slave and later a legendary abolitionist, raised this issue and described the plight of black women at the 1851 Woman's Rights Convention in Akron, Ohio:

51. The bill of costs lists "Medical attendance of prisoner during sickness & delivering her of dead child by Dr. Carter allowed by court." *Id.* at 1.

52. THE AMERICAN SLAVE—A COMPOSITE AUTOBIOGRAPHY 11 (G. Rawick 1977) [hereinafter SLAVE NARRATIVES].

53. The question, "Ain't I a Woman?" was asked by Sojourner Truth, a former slave and a legendary abolitionist while speaking at the 1851 Woman's Rights Convention in Akron, Ohio. See *infra* note 55 and accompanying text.

54. Historians of black women call into question the concept of a universal womanhood by underscoring the unity of white men and women in determining American racial thought and policy . . . Race and sex discrimination, along with structural changes in the economy over time, combined to make the labour participation and domestic expectations of black women different from all other groups . . . the preponderant emphasis on differences between black and white women testifies to the overarching historical reality of racist oppression and the exclusion of blacks from a large part of American life.

E. Higginbotham, *supra* note 16 at 53-56 (citations omitted).

That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! *And ain't I a woman?* Look at me! Look at my arm! I have ploughed, and planted, and gathered into barns, and no man could head me! *And ain't I a woman?* I could work as much and eat as much as a man—when I could get it—and bear the lash as well! *And ain't I a woman?* I have borne thirteen children, and seen them most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! *And ain't I a woman?*⁵⁵

Four years later, Celia's counsel attempted to relieve the plight of one slave woman, illustrated in Sojourner Truth's plea, by arguing that the court recognize that Celia was a woman, and that the relevant statute which said "any woman" meant a slave woman as well as a free white woman.⁵⁶ The court, however, refused to extend the protection of the statutes to slave women.

The court's holding was typical of American slavery jurisprudence considering the degraded status of black women under slavery law. In other writings, I have explored in greater detail the issue of white male domination and interracial sexual relations.⁵⁷ In addition, several prominent historians—particularly Elizabeth Fox-Genovese,⁵⁸ Eugene Genovese,⁵⁹ Jacqueline Jones,⁶⁰ Deborah G. White,⁶¹ Margaret A. Burnham,⁶² and Evelyn Brooks Higginbotham⁶³—have noted numerous instances of the frequent practice of sexual exploitation of slave women by white masters.

For example, the master's sexual rights over his slave women was apparent from Professor Jones' summary of the testimony in an 1848 Virginia divorce case:

55. BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE: THEIR WORDS, THEIR THOUGHTS, THEIR FEELINGS 235-36 (J. Loewenberg & R. Bogin eds. 1976) (emphasis added).

56. See *supra* notes 41-43 and accompanying text.

57. A.L. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 40-47 (1978); Higginbotham and Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial Antebellum Virginia*, 77 GEO. L.J. (in press); Higginbotham and Kopytoff, *In the Matter of Slaves: Property First, Humanity Second, Recognition of the Slaves' Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. (in press).

58. E. FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH (1988).

59. E. GENOVESE, ROLL, JORDAN, ROLL (1974).

60. See *infra* note 64 and accompanying text.

61. D. WHITE, A'RN'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH (1985).

62. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW AND INEQUALITY 187 (1987).

63. See *supra* note 54 and accompanying text.

A master one morning told his favorite slave to sit down at the breakfast table "to which Mrs. N [his wife] objected, saying . . . that she [Mrs. N] would have her severely punished." The husband then replied "that in that event he would visit her [Mrs. N] with a like punishment. Mrs. N then burst into tears and asked if it was not too much for her to stand." Like at least some other masters, Mr. N freely admitted that his initial attraction to his future wife stemmed from her "large Estate of land and negroes." (Thus a favorable marriage became one more consideration for the ambitious slaveholder.) However, this particular husband went out of his way to demonstrate his "strong dislike and aversion to the company" of his bride by sleeping with the slave woman "on the pallet in his wife's room" and by frequently embracing her in the presence of his wife. Mrs. N's first response was to lay "her hands in an angry manner on the said servant." Her husband, besides threatening his wife with bodily harm, "told her if she did not like his course, to leave his house and take herself to some place she liked better."⁶⁴

Further, Professor Burnham, in her important article, cites many examples of the law's denigration of black slave women, which she describes as "the perversion of the human soul, wrought by American slavery."⁶⁵ She begins her article with three typical excerpts from the jurisprudence of the slave era:

[T]he father of a slave is unknown to our law⁶⁶

[T]he young of slaves . . . stand on the same footing as other animals⁶⁷

[Slaves could not legally marry, for] to fasten upon a master of a female slave, a vicious, corrupting negro, sowing discord and dissatisfaction among all his slaves; or else a thief, or a cut-throat, and to provide no relief against such a nuisance, would be to make the holding of slaves a curse to the

64. J. JONES, LABOR OF LOVE, LABOR OF SORROW, BLACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT 26 (1985).

When reading about Mrs. N's plight, some scholars suggest that there was equal oppression of both black and white women. To suggest a commonality between Mrs. N and Celia is tantamount to suggesting that any sane person who had a choice of the plight of Mrs. N or of Celia would have been willing to choose the status of Celia over Mrs. N. Yet under the law, the Celias had insurmountable barriers that Mrs. N never knew. Mrs. N had the right under the law to get some vindication—a divorce—for the cruelty of her husband. Celia had no remedy in the courts against her master. These differences explain why many black scholars suggest that they "must call into question the concept of a universal womanhood" for both black and whites. *See supra* note 54.

65. Burnham, *supra* note 62, at 187.

66. Burnham, *supra* note 62, at 187, quoting *Frazier v. Spear*, 5 Ky. (2 Bibb) 385, 386 (1811).

67. Burnham, *supra* note 62, at 187, quoting *M'Vaughers v. Elder*, 4 S.C.L. (2 Brev.) 7, 12 (1809).

master.⁶⁸

3. *Slave Narratives*

Around 1936, there was a federal writers' project sponsored by the WPA in which unemployed writers collected narratives of former slaves.⁶⁹ These narratives are essential in putting cases such as *State v. Celia* in fuller context. They reveal the complete harshness of the slavery system which cannot be captured by case law. For most of the conditions about which the slaves complained there was no legal remedy. Thus, the reported cases reflect only scant instances of the plethora of tragic human events that constituted the slaves' daily plight and fears under the plantation justice system.

The most repeated themes in the narratives were the fear of separation from family, the cruelty in remediless whippings and killings, the denial of an education, and the horror of the auction block. The following discussion presents a fair sample of the slave narratives.

a. *Break Up of the Family*

The narratives reflect the fear of a possible separation from family and the pain of such separations. Former Missouri slave Malinda Discus recalled:

I remember that my mother used to gather us children around her and pray that we would not be separated. She was separated from her parents when eleven years old and brought to Missouri from Tennessee. She never saw any of her folks again and the last words her mother said to her was: "Daughter, if I never see you again any more on earth, come to heaven and I will see you there."⁷⁰

68. Burnham, *supra* note 62, at 187, quoting T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVE IN THE UNITED STATES OF AMERICA 246 (1858).

69. See SLAVE NARRATIVES, *supra* note 52.

70. *Id.* at 168 (interviewed February 1, 1938). The following excerpt is also from the interview with Malinda Discus:

"My name as a slave was Rowena Malinda Sloan, and I was born November 4, 1859."

"Was Sloan the name of your parents?"

"It was my mother's name. She was Ellen Sloan. You see it was this way; my mother was a house servant and belonged to a man named Sloan. But my father belonged to a man named Clopton and lived on another place. His full name was Emanuel Clopton. They were married and had three children when my mother and we three children were sold to a man named Nate McCluer. I was a babe in my mother's arms so I don't know anything about the sale except what I have been told. I have been told though, that my mother, sister and brother and I brought sixteen hundred dollars. Later my brother was resold and sent down south somewhere and I never saw him again until he was almost grown. My mother

Malinda's husband Mark, when asked if he saw his family after he was sold, responded: "Yes Suh, sometimes I did. I seen my brothers and sisters but they had different names. Then I heard my Pappy had died. I don't remember him. My Mammy was sold down South and I never seen her again 'til after the war was over."⁷¹ Many other former slaves recounted similar stories of long, sometimes permanent separations from their families.⁷²

b. Cruelty

While the laws of Missouri theoretically required masters to treat their slaves humanely,⁷³ the narratives reveal how powerless the slaves were in

and I were traded in on land to Ned Discus, the same man that owned Mark, my husband."

Id. at 168.

71. *Id.* at 171-72. (interviewed February 2, 1938).

72. For example, Charles Johnson of Vernon County, Missouri testified:

"Yes Ma'am, I was a born slave. My Master's name was Caleb Goodlow. My Mistress, Mrs. Goodlow she cared for me and raised me from a little fella."

"Parents?" he replied. "I don't know nothin' bout no parents; can't remember ever seein' 'em."

Id. at 200 (Interviewed Sept. 8, 1937). Emma Knight of Hannibal, Missouri, said:

My father was taken away. My mother said he was put up on a block and sold because master wanted money to buy something for the house. My mother told me she came from Virginia or down south some place. They brought her in a box car with lots of other colored people. There were several cars full, with men in one car, women in another, and the younger ones in another, and the babies in another with some of the women to care for them. They brought them to Palmyra and sold them. Master Ely bought my mother. I don't know where my father came from.

Mistress always told us that if we run away somebody would catch us and kill us. We were always scared when somebody strange came. The first we knew there was a war was when some soldiers come through. We were sure scared then. Once a man came and we thought he was a patroller but he asked for something to eat.

Mother took him to the mistress. She gave him something to eat wrapped in a paper and told him to get off the place.

Some Union soldiers came and told us that we were free like they were and told us not to be afraid, they wouldn't hurt us. They told us the war was over.

The master told mother not to go away, that if she stayed a while he would give her a couple hundred dollars. We stayed a while but never got any money.

Id. at 203. Margaret Nickens of Hannibal, Missouri, stated:

My father came from Virginia and my mother from Kentucky when they were little. They never saw their parents any more. They watched for a long time among the colored people and asked who they were when they thought somebody looked like their parents, but never could find them. They were so small when they left, they didn't even remember their names.

Id. at 212.

73. The constitution of 1820 required the legislature "to oblige the owners of slaves to treat them with humanity, and to abstain from all injuries to them extending to life or limb." MO. CONST. of 1820, art. III, § 26.

fact. Ed Craddock of Marshall, Missouri stated:

Stories told me by my father are vivid . . . one especially, because of its cruelty. A slave right here in Marshall angered his master, was chained to a hem-brake on a cold night and left to freeze to death, which he did. My father said slaves had to have a pass to go places. "Patrollers usually went in groups of three. If they caught a slave off his plantation without a pass the patrollers often would flog them."⁷⁴

Similarly, a former slave from Dade County, Missouri testified under questioning thus:

"Did your master ever whip you?"

"Yes Suh, sometimes. Once I remember he whooped me 'til the blood run offen my heels for breakin' an ax handle. We knowed to step when he yelled at us."⁷⁵

74. SLAVE NARRATIVES, *supra* note 52 at 158 (statement of Ed Craddock, July 14, 1937).

75. *Id.* at 173 (testimony of Mark Discus, February 2, 1938). The responses were not unique. Eliza Overton was born a slave in 1849. When her three children living in Farmington, Missouri, were interviewed, they gave the following statement:

Our mother, Eliza, was born a slave in 1849 on the farm of her boss, Mr. Madden, in New Tennessee, Ste., Genevieve County, Mo. Eliza's mother was also a slave. Mother was sold with our grandmother to John Coffman of Acres. He had three plantations, and one plantation was at Libertyville, Mo. He had possibly two hundred slaves. The negroes were transferred from one plantation to the other and our grandmother worked at all three places. Old man Coffman was a mean old slave holder. He was afraid of his slaves and had someone else to do the whipping. They were rougher on my aunt Eleanor, because she was stubborn. They would punish the slaves severely for remembrance. They whipped with a rawhide whip and trace chains. Wilson Harris was whipped at a tree once and when they got through he said he would fight. They whipped him some more until he was weak and bleeding. The other slaves had to grease his shirt to take it off his back to keep from tearing off the flesh. We can go down there and pick out trees where the slaves were tied and whipped. The trees died on the side where the slaves were tied. There are three trees on the Coffman farm that I saw dead on one side and there is one close to the Houck Railroad Station there. Some of them were in the yard.

When John Coffman was sick he said he was going to ride Jap, a roan horse, into heaven. So he asked us to take good care of Jap. I know Coffman didn't go to heaven cause he died and left Jap here.

Mr. Coffman had a whole row of slave cabins. Our cabins were small and we had a corded bed, trundle bed to slip under the big bed to save room, home made split bottom chairs, tin-plates, wooden boxes and a fire-place. John Coffman gave us an allowance of food. We had hog heads and jowls. Many times we ran short on food so one night mother went out to where the hogs were. Mr. Coffman had so many hogs he didn't know how many he had. She had the water hot and the hogs were a long way from Mr. Coffman's house. So she hit a hog in the head with the ax and killed it. After killing it she went to the cabin to get the water and when she came back one of the other slaves had stolen her dead hog. So she hit another one in the head and after fixing it hid the hog under the puncheon floor of the cabin. This was done quite a bit.

Id. at 215-216.

c. *Denial of Education*

Slaveowners routinely denied slaves an education. Many slaveowners then used the slaves' resultant ignorance to justify their harsh treatment of the slaves. Former slave, Richard Bruner, ninety-seven years old at the time of his interview, testified to his lack of learning: "No, I never went to no school, de Colonel's daughter larnt me to write my name, that was after de wah."⁷⁶

Another slave described his preclusion from an education as follows: "Did you go to school?"

"Laway no, chile. I just worked. I don't know nothin' about larnin. When I was nine years old, I cut all the corn stalks offen a forty-acre field with a hoe. We had to work from sun up 'til dark to."⁷⁷

d. *The Auction Block*

Finally, the narratives of former slaves are replete with the heartbreak of slave families being separated and sold on the auction block. The traditional horror picture of the slave trade depicts a mother with a small child clasping her hand, waiting at the mercy of the auction block to discover the fate of her family. Viewing these portraits, one becomes angry both with the slave trader, his whip in his hand, and with the planters examining a frightened, nearly nude black woman as if they were inspecting a horse for strengths or defects.

Charles Crawley, an ex-slave described the sale of a slave child: "Lord, Lord I done seen dem young uns fought and kick like crazy folks. Child it was pitiful to see 'em. Den dey would handcuff and beat 'em unmerciful. I don't like to talk 'bout back dar. It brun a sad feelin' up me."⁷⁸

76. *Id.* at 154 (statement of Richard Bruner, July 14, 1937). This aged negro had been for many years a highly respected preacher of the gospel. He continued:

Yas'm I remembers befo de wah, I remember bein a water-boy to de filed hands before I wer big enough to wuk in the fields. I hoed tobaccer when I was about so high.

Yas'm dey threshed me once, made me hug a tree and whup me, I had a tarrible temper, I'm part Choctaw Indian . . .

Id.

77. *Id.* at 172-73 (statement of Mark Discus, Feb. 2, 1938).

78. *Id.* at 7. Frederick Douglass describes similar incidents and his emotional reaction to them in each of his autobiographies. In *MY BONDAGE AND MY FREEDOM*, he theorizes on the destruction of the black family and the plight of the black woman: "The practice of separating children from their mothers and hiring out the latter but at distances too great to admit the meeting, except at long intervals, is a marked feature of the cruelty and barbarity of the slave system." F. DOUGLASS, *MY BONDAGE AND MY FREEDOM* 29 (1987). In his *NARRATIVE OF THE LIFE OF FREDERICK*

Ex-slave Mark Discus also had vivid memories of Missouri's practices at the auction block. His discussion of his memories with a nephew revealed the horror:

"Tell me, Uncle Mark; they say when slaves were marketed off they were sold like cattle, is that right?"

"Well now, I kain't remember much about hit, only what I was told. I remember my mammy cryin' and I was scared. They stood me on a big stump and auctioned me off. They told me they stuck pins in the older ones felt their muscles and looked at their teef, but kain't remember that."

"Is it true, Uncle Mark, that they greased the bodies of the older ones before they sold them?"

"Yes, Suh, they did. And they fed'em up and din't work'em for awhile. They took wool cards and combed the kinks outer their hair too."

"Uncle Mark, do you know who bought you first?"

"Yes Suh, a man by the name of Miller bought me first and then I was sold to ol' master Ned Discus. This sale was just a trade, so I just changed homes, so to say."⁷⁹

Frances E.W. Harper accurately described the tensions and the cruelty of the auction block in her poem *The Slave Auction*:

The sale began — young girls were there,
Defenceless in their wretchedness,
Whose stifled sobs of deep despair
Revealed their anguish and distress.

And mothers stood with streaming eyes,
And saw their dearest children sold;
Unheeded rose their bitter cries,
While tyrants bartered them for gold.

And woman, with her love and truth—
for these in sable forms may dwell—
Gaz'd on the husband of her youth,
with anguish none may paint or tell.

And men, whose sole crime was their hue,
The impress of their Maker's hand,
and frail and shrinking children, too,
Were gathered in that mournful band.

Ye who have laid your love to rest,

DOUGLASS, he declared that "more than any one thing [the mistreatment of his grandmother] had caused his unutterable loathing of slaveholders." F. DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS*.

79. *SLAVE NARRATIVES*, *supra* note 52, at 172.

and wept above their lifeless clay,
 Know not the anguish of that breast,
 Whose lov'd are rudely torn away.

Ye may not know how desolate
 are bosoms rudely forced to part,
 And how a dull and heavy weight
 Will press the life-drops from the heart.⁸⁰

Yet, the slave auction block that pressed "the life-drops from the heart" was not a creation of the venal slave trader. It was made possible by lawyers and others who, in the calmness of the legislature and in the serenity of the courtroom, represented the most genteel portion of Missouri's slave master aristocracy. They were the leaders who drafted and passed the laws and issued the decrees that sanctioned the cruelty of which Frances Harper spoke.⁸¹

4. *Before the Law She Had No Standing That Would Interfere with the "Master's Joy"*

Undoubtedly, Professor Williamson was familiar with the narratives and slave poems that I have cited describing the plight of the black slave woman. In his moving article on Celia, he summed up the case as follows:

Such was the brief life of Celia, the slave girl. She lived in a hard and cruel world, which held her in only slightly higher regard than it did the beasts of the field and forest. Before the law she had no standing, and from it she had no protection simply because the law did not regard her as a human being.⁸²

Professor Williamson recognized that *State v. Celia* was not unique for slavery jurisprudence, and we must not forget that in many ways, *State v. Celia* was a basic root of *Shelley v. Kraemer*.⁸³ Thus, *Shelley* must not be viewed as an aberrational incident of racism by the Missouri state courts.

80. COMPLETE POEMS OF FRANCES E.W. HARPER 10 (M. Graham ed. 1988).

81. Some narratives suggest that certain Missouri masters, such as the Danforths, were genuinely humane to their slaves. See SLAVE NARRATIVES, *supra* note 52, at 160-61 (statement of Nelson Danforth born on the farm of Erskine Danforth, of Springfield, Missouri). However the general tone of the experiences of most slaves was one of cruelty unchecked by the law. When one interviewer attempted to put slavery in a more pleasant setting he received the following curt response:

"Then, you spent your childhood much as other children did?"

"No Sir, we always knew we were slaves and made to feel inferior to the white folks."

SLAVE NARRATIVES, *supra* note 52, at 167.

82. Williamson, *supra* note 23, at 420.

83. 334 U.S. 1 (1948).

It must be viewed simply as a twentieth century example of the Missouri courts adjudicating that blacks are less significant than other human beings.

Celia's case is just one of the many aspects of cruel racial treatment embraced by the rule of Missouri law. For instance, slaves could not marry and their children became the property of their masters, giving slave mothers no rights to determine their children's options.⁸⁴ Judge Ruffin of North Carolina gave the most succinct summary of the slaves' nonrights and the rationale of the slavery system: "The end is the profit of the master, his security and the public safety; the subject, one doomed in [her] own person, and [her] posterity, to live without knowledge, and without the capacity to make anything [her] own, and to toil that another may reap the fruits."⁸⁵ By denying Celia's requested instructions and granting the State's request, the Missouri courts augmented Judge Ruffin's analysis, and in effect, held that the end of the slavery system is not merely "the [economic] profit of the master" but also the *joy* of the master in sexual conquest of his slave. One of the paradoxes is that, had Newson wanted to provide an education for Celia, he would not have been allowed to do so because it was a crime to "keep or teach [in] any school for the instruction of negroes or mulattoes, in reading or writing."⁸⁶ Thus, under Missouri law, masters could sexually exploit a slave's body but could not provide an education for a slave's mind.

In my view, Missouri's most venal racist case was not the well publicized *Dred Scott v. Sandford*⁸⁷—Dred Scott was ultimately freed and died a natural death from tuberculosis. The most venal case was *State v. Celia*, in which the Missouri courts in effect held that a slave woman had no virtue that the law would protect against a slave master's lust. Thus, unlike Scott, Celia died at the gallows because she had on one occasion the temerity to defend herself against further sexual molestation.

Another fascinating case, exhibiting the racism of *Celia* and arising in the same county in which Celia was prosecuted is *Jane (a slave) v. The State*.⁸⁸ Jane was convicted of the murder of her infant child, Angeline.

84. For a comprehensive treatise on the absence of rights for slaves see H. TREXLER, *SLAVERY IN MISSOURI 1804-1865* (1914).

85. *State v. Mann*, 13 N.C. (1 Dev.) 263, 264 (1829). For a more detailed discussion of this case, see A. L. Higginbotham, Jr., *The Black Journey: From Slavery to 'Freedom' and Inequality* 1-40 (1983) (on file at the libraries of the University of Pennsylvania and Harvard Law School).

86. MO REV. STAT., ch. 114, § 1 of laws enacted February 16, 1847 (1855).

87. 60 U.S. (19 How.) 393 (1857).

88. 3 Mo. Rep. 45 (1831).

She was charged with “knowingly, willfully, feloniously and of her malice aforethought” mixing “a certain deadly poison” and giving it to her infant child to drink on December eighth and ninth.⁸⁹ The indictment alleged that on December eleventh, so “that she might more speedily kill and murder said Angeline,” with “malice aforethought” she wrapped and covered Angeline in bed clothes and then “choked, suffocated and smothered” her, and that, as a result of the poisoning and the smothering, the infant died.⁹⁰

Thus, the state prosecuted the mother vigorously for taking the life of her slave child. Did the state prosecute because it cared about the dignity and life of a child born into lifetime slavery with the concomitant disadvantages of Missouri’s law? Or did the state prosecute because Jane’s master was denied the profit that he would have someday earned from the sale or exploitation of Angeline? Was the state fearful that if mothers started to kill their slave infants it might jeopardize the potential wealth of slave masters?

Perhaps the mother, Jane, anticipated that her daughter would be as devoid of human rights as Celia was later held to be by the Missouri courts.⁹¹ Perhaps the mother recognized that someday her daughter would be snatched from her and put on the auction block and that a master would use Angeline as a breeder to increase his economic wealth. Perhaps the mother anticipated that someday her daughter’s body would be laced with scars from the whips of brutal overseers and masters, with the type of vengeance that Missouri law sanctioned against blacks. Perhaps the mother felt that the taking of her daughter’s life was an act of mercy compared to the cruelty she might confront in Missouri’s jurisprudence.

While the conviction of Jane was reversed because of a technical deficiency in one count of the indictment,⁹² there is an extraordinary human nexus between the cases of Jane and Celia. Both of them must have felt, as Celia faced the gallows and as Jane was prosecuted for murder, that the Missouri law, as Professor Williams suggested,⁹³ did not regard them as human beings. And Jane probably wondered why she should subject her daughter to such a cruel future, since the law of Missouri denied her

89. *Id.*

90. *Id.*

91. *See supra* notes 23-52 and accompanying text.

92. 3 Mo. Rep. at 46-47.

93. *See supra* note 23.

any semblance of the right to life, liberty and the pursuit of happiness that Jefferson described so eloquently for whites in the Declaration of Independence.

C. *Gaines v. Canada*⁹⁴

Some may feel that I have been unfair to Missouri in discussing two cases that preceded the mighty mandates of the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution.⁹⁵ Those not familiar with the post-reconstruction jurisprudence of Missouri might suggest that *Celia* and *Dred Scott* were aberrational cases, the byproducts of the slave codes and prevailing attitudes, and that the racist jurisprudence inherent in the slavery cases was eradicated after the passage of these important amendments and the federal civil rights acts from 1866 to 1875. In his classic book, Loren Miller predicted what the situation following these profound changes—the constitutional amendments and civil rights acts—should have been:

The long sickness had come to end; now the majestic rhetoric of the Declaration of Independence had full meaning: 'All men are created equal [and] are endowed by their Creator with certain unalienable Rights, that among these are Life, *Liberty* and the pursuit of Happiness.' The 'Government . . . instituted among men' in the United States of America was committed to 'secure these rights' and to safeguard them against the aggressions of individuals, of the states, and of their agent and servants. By constitutional fiat and statutory direction, the national writ would run to guarantee privileges and immunities, due process, and equal protection of the laws for every man, white and black. In spirit, 'in all of our legislation,' there was 'no such word as black or white . . . only . . . citizens'. . . . There was neither color nor caste; there were only Americans.⁹⁶

Loren Miller's hypothesis that there would no longer be such words as black or white but only citizens can perhaps be tested by a series of events involving Lloyd L. Gaines, a black citizen of St. Louis, Missouri. Gaines graduated from Lincoln University, a state-supported black uni-

94. *State ex rel. Gaines v. Canada*, 342 Mo. 121, 113 S.W.2d 783, *rev'd sub nom. Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

95. For a documentary account of the men and forces that shaped our legal cornerstone for civil rights through the 14th and 15th Amendments see J. TENBROEK, *EQUAL UNDER LAW* (1951). See also D. BELL, *RACE, RACISM AND AMERICAN LAW* ch. 1 (1980); E. FONER, *RECONSTRUCTION-AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988).

96. L. MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 101 (1966).

versity. On June 12, 1934, Gaines wrote to the University of Missouri registrar asking him to send a copy of the current catalog. The registrar responded, "I am pleased to learn that you are interested . . . in the University of Missouri." Pursuant to subsequent correspondence from Gaines, who stated that he would "like to enter the School of Law at Missouri University this fall," the registrar began to process Gaines' application in the same manner as all others.⁹⁷ But, the registrar soon received the painful news that Gaines was black and immediately sent a telegram to him on September 18, 1935 as follows:

Regarding your admission to Law School, President Florence and Member Board, Lincoln University will confer this afternoon in Jefferson City about the matter. Suggest you communicate with President Florence regarding possible arrangements and for further advice. . . . [signed] S.W. Canada, Registrar University of Missouri.⁹⁸

Gaines then wrote to the president of the University of Missouri stating:

For a long time prior to my graduating from Lincoln University, Jefferson City, Missouri, August 8, 1935, law was [my] choosen [sic] field for further study. . . . I selected Missouri University School of Law because of its particular emphasis upon Missouri law. [I have been advised that you desire] to call my attention to Section 9622 of the 1929 Revised Statutes of Missouri offering tuition to a school of any adjacent state carrying a graduate program of study parallel to the one offered by Missouri University.

President Williams, I'm a student of limited means, but [of] commendable scholastic standing. May I depend upon you to see that I am admitted to Missouri University, where I am sure of getting what I want at a cost that is most reasonable? An immediate reply would be highly appreciated. Very Sincerely Yours, Lloyd L. Gaines.⁹⁹

The fall and winter passed with Gaines receiving no acceptance to the

97. The registrar wrote to Gaines as follows:

In response to your letter of August 19, I am sending you under separate cover a copy of the general catalog. Beginning on page 63 you will find information concerning fees and expenses. You should have the Registrar of the college or university which you've attended send me an official transcript of your record including a statement of your high school credits. When this is received, I shall be glad to notify you regarding your admission to our School of Law.

Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (Appellant's abstract record, Exhibit "E", p. 63).

98. *Id.* at Exhibit "I", p. 65. President Florence was the President of the black college, Lincoln University—President Williams was the President of the University of Missouri.

99. *Id.* at Exhibits "J-1" to "J-2", p. 65-66.

University of Missouri and finally, on March 27, 1936, the Board of Curators of the University of Missouri passed the following resolution:

Lloyd L. Gaines, colored, has applied for admission to the School of Law of the University of Missouri, and WHEREAS the people of Missouri both in the Constitution and in the Statutes of the State, have provided for the separate education of white students and Negro students . . . and [that] WHEREAS the legislature . . . ha[s] further provided, pending the full development of Lincoln University, for the payment, out of the public treasury, of the tuition at universities in adjacent states, of colored students desiring to take any course of study not being taught at Lincoln University, and WHEREAS, it is the opinion of the Board of Curators that any change in the state system of separate instruction which has been heretofore established, would react to the detriment of both Lincoln University and the University of Missouri.

THEREFORE, be it resolved, that the application of said Lloyd L. Gaines be and it is hereby rejected and denied¹⁰⁰

Gaines then filed suit seeking a writ of mandamus to compel his admission to the University of Missouri.¹⁰¹ The state opposed his admission "on the ground that it is contrary to the Constitution, laws and public policy of the State to admit a Negro as a student in the University of Missouri."¹⁰²

The lower court denied Gaines' admission to the University of Missouri even though it was the only state-supported law school in the state. This decision was not surprising in light of prior Missouri precedent. In 1891, in *Lehew v. Brummell*,¹⁰³ a black parent had four children of school age residing in School District No. 4 in Grundy County. They were the only black children in the school district and attended the district's sole school. The court enjoined their attendance at the white school and required them to attend a school 3 1/2 miles from their home in another district. On appeal, the Supreme Court of Missouri affirmed:

But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social re-

100. *Id.* at 69-71.

101. *State ex rel Gaines v. Canada*, 342 Mo. 121, 127, 113 S.W.2d 783, 785, *rev'd sub nom. Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

102. *Id.*

103. 103 Mo. 546, 15 S.W. 747 (1891).

lations, recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage.¹⁰⁴

Five years later, *Brummell* was cited by the Supreme Court majority in *Plessy v. Ferguson* as persuasive precedent to separate blacks from whites on intrastate railway trains.¹⁰⁵

Building on its prior precedent in *Brummell*, the Supreme Court of Missouri held in *Gaines* that the exclusion of Lloyd Gaines from the University of Missouri was not a violation of equal protection because law schools in Illinois, Iowa, Kansas, and Nebraska accepted blacks. The court found it irrelevant that the University of Nebraska was 463 miles from Gaines' home city of St. Louis while the University of Missouri Law School, located in Columbia, was only 146 miles from that city. The court held that "the opportunity offered appellant for a law education in a university of an adjacent state is substantially equal to that offered to white students by the University of Missouri" and therefore there was no violation of his equal protection rights.¹⁰⁶ In so holding, it

104. *Id.* at 547, 15 S.W. at 766.

105. 163 U.S. 537, 545 (1896). Because it sanctioned the continuing oppression of black people, *Plessy* was one of the most catastrophic racial decisions ever rendered by an American appellate court. The decision reincorporated into the fabric of the post-Reconstruction legal system the invidious declaration of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), that black people were "so far inferior, that they had no rights which the white man was bound to respect." *Id.* at 407. *Plessy* signifies the continued resistance of white America, notwithstanding the Civil War, the post-Civil War amendments, and the related civil rights acts, to accepting blacks as whole and equal citizens of the United States.

Since my days in law school, in the pre-*Brown* era, I have maintained that *Plessy* was an erroneous construction of the fourteenth amendment. Although that construction prevailed for over a half-century, the overwhelming consensus today is that *Plessy* was an untenable statement of the law that set in motion an era of oppression from which our nation still has not fully recovered. This view is shared by jurists with varying philosophies of federalism. Dissenting in *Fullilove v. Klutznick*, 448 U.S. 448, 552 (1980), Justice Stewart, joined by now Chief Justice Rehnquist, expressly stated that "*Plessy v. Ferguson* was wrong" and cited with approval Justice Harlan's famous dissent. *Id.* at 523 (Stewart, J., joined by Rehnquist, J., dissenting). I cite the *Fullilove* dissent solely for the proposition that *Plessy* was wrongly decided. The remainder of the dissent, which dealt with the vexing contemporary issue of affirmative action, is beyond the scope of this Essay. Thus, I read their opinion as embracing Justice Harlan's construction of the fourteenth amendment.

Even W. Bradford Reynolds, former Assistant Attorney General of the Civil Rights Division of the Justice Department and a noted conservative, now concedes that "racial classifications [such as those found in *Plessy*] are wrong — morally wrong — and ought not to be tolerated in any form or for any reason." Reynolds, *Individualism v. Group Rights: the Legacy of Brown*, 93 YALE L.J. 995, 1000 (1984).

106. *State ex rel Gaines v. Canada*, 342 Mo. 121, 137, 113 S.W.2d 783, 790, *rev'd sub nom Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).

disregarded a completely analogous case, *Pearson v. Murray*.¹⁰⁷ There, the Supreme Court of Maryland ordered the admission of a black to the University of Maryland Law School even though he could have attended Howard University Law School in Washington, D.C., which was relatively close.

The *Gaines* case reveals a level of racism by the judiciary which is not distinguishable, in my view, from that in *Dred Scott*¹⁰⁸ and *Celia*.¹⁰⁹ The judges sanctioned racist laws that treated blacks more harshly than all other people.

The direct examination in *Gaines* of S. Woodson Canada, registrar of the University of Missouri, by Charles Hamilton Houston¹¹⁰ revealed the racial nexus to *Dred Scott* and *Celia*.

Q. Is the University School of Law the only publicly supported law school in the state of Missouri?

A. I believe it is, sir.

Q. In the admission of students you make no geographical distinction as to where the student comes from, is that correct?

A. That is correct.

Q. You admit white students from other states.

A. Yes sir.

Q. Do you admit foreign students?

A. Yes sir.

Q. Do you allow the admission of such students to the entire University?

A. Yes sir.

Q. Do you admit Chinese students to the University?

A. Yes sir.

Q. Japanese students?

A. Yes sir.

Q. Hindu students?

A. Yes sir.

Q. The only students you bar would be students of African descent, is that right?

A. Other things being equal, I think so, yes, sir.

107. 169 Md. 478, 182 A. 590 (1936). For a discussion of the significance of this case see G. MCNEIL, *GROUNDWORK* (1983); R. KLUGER, *SIMPLE JUSTICE* (1977).

108. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

109. *State of Missouri v. Celia*, Vol. 2, Index to Court Cases of Callaway County 13, File No. 4,496 at 13 (1857).

110. See G. MCNEIL, *GROUNDWORK* (1983) (a scholarly and fascinating appraisal of Charles Hamilton Houston as the chief architect of the twentieth-century civil rights litigation strategy in race relations cases).

Q. That is regardless of whether they are natives or non-natives of Missouri.

A. Yes sir.¹¹¹

On November 9, 1938, Charles Houston, a brilliant black lawyer and former member of the prestigious Harvard Law Review, argued the *Gaines* case before the Supreme Court of the United States. In an opinion of profound importance written by Chief Justice Hughes, the Court held that

[t]he basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.¹¹²

Missouri claimed that there was "a limited demand in Missouri for the legal education of Negroes" which justified the discrimination in favor of whites. The Court concluded that Gaines' right was

a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.¹¹³

The opinion was not unanimous. Justice McReynolds wrote a dissent which placed him in the despicable shadow of Chief Justice Taney, author of *Dred Scott*. McReynolds declared that the opinion of the Court admitting Gaines to the University of Missouri would "damnify both races."¹¹⁴ While the case was being argued by Houston, McReynolds further tarnished the prestige of the Court by turning his back to Hous-

111. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (Appellant's abstract record, testimony of S. Woodson Canada at 120).

112. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50 (1938).

113. *Id.* at 351.

114. *Id.* at 353 (McReynolds, J., dissenting).

ton and staring at the rear walls of the Supreme Court chambers.¹¹⁵

Thus, *Gaines* appears in the middle of a spectrum of cases, from *Dred Scott* to *Celia* to *Shelley v. Kraemer*. Others in this convocation will discuss the significance of *Shelley v. Kraemer*, but let us fantasize a bit. Would it not be gratifying if today in the audience Lloyd Gaines was present so that we might commend him for his willingness to seek equal justice in America? It would be joyous if he had entered the University of Missouri Law School, graduated and thereafter made profound contributions to the administration of justice in our land.

Unfortunately, the anticlimatic, yet poignant truth is that shortly after Lloyd Gaines received the mandate of the United States Supreme Court for his admission to the University of Missouri Law School, he disappeared after taking a walk one evening on Chicago's south side. He has not been seen or heard from since.¹¹⁶ All efforts to locate him or learn of his whereabouts have failed and his disappearance is still a mystery. Some suspect that he may have been murdered by a vigilante group, while others speculate that he is still alive today.¹¹⁷

III. PRECEDENT OF OTHER STATES

Again, in fairness to Missouri, blacks in many other states who wanted a quality education faced the same type of unmitigated racism and hostility from judges that Gaines endured.¹¹⁸ Indeed, a full decade *after* Gaines' victory before the Supreme Court, another black, G.W. McLaurin¹¹⁹ applied to the University of Oklahoma for admission to its post-graduate course in education. That university conceded that he possessed all the scholastic and moral qualifications required for admission "except that he's a member of the Negro race."¹²⁰ McLaurin's application was denied solely on the grounds of his race and color.¹²¹

115. Videotape statement of Judge Robert Carter before Judge A. Leon Higginbotham, Jr. (August 1987) (reviewing his observation of the 1938 argument before the Court).

116. Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOC. 241 (1959); Clayton, *The Strange Disappearance of Lloyd Gaines*, EBONY MAGAZINE, May, 1951 at 27-34; Kelleher, *The Case of Lloyd Lionel Gaines: The Demise of the Separate But Equal Doctrine*, 56 J. NEGRO HIST. 262 (1971).

117. Clayton, *supra* note 109, at 34.

118. For the most exhaustive and thoughtful review on graduate school education cases see Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5TH. REV. OF LIT. (1986). See also J. GREENBERG, JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION ch. 7 (1977).

119. McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950).

120. *Id.* (Record at 20-21).

121. *Id.* at 638.

In the course of the conversation between counsel for the plaintiff, Thurgood Marshall, and District Court Judge Vaught of Oklahoma, the white jurist appeared confused as to what blacks meant by equal educational opportunities. The following dialogue took place:

Q (Judge Vaught): What is it that you want? Just put it in plain English. What is it that you want?

A (Mr. Marshall): We [want] McLaurin admitted just like any other student, [to] take his seat in the same way as any other student.

Q: In other words, you want him in the same room with the other students.

A: Well, yes sir. That is the only way he can get an equal education. That is our point.¹²²

Several years after *McLaurin*, in his closing argument in *Brown*,¹²³ Thurgood Marshall cut to the heart of the segregationist rationale:

So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes, and we submit the only way to arrive at this decision is find that for some reason Negroes are inferior to all other human beings.

Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all of the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.

[The only way this segregationist argument can be explained] is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.¹²⁴

Similarly, in *McLaurin*, Thurgood Marshall framed the issue as being that all McLaurin wanted was to be treated “just like any other student.”¹²⁵ In hindsight, it is inconceivable that judges could not grasp the simple concept that blacks wanted liberty, education and justice just like white Americans without having to litigate, protest, or demand.

It is essential today that we not look upon the facts behind *Shelley v.*

122. *Id.* (Record at 50).

123. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

124. L. FRIEDMAN, ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA* 1952-55 at 239-240 (1969).

125. See *supra* note 122.

Kraemer as aberrational, without roots in our distant past. To eradicate the effects of centuries of racism, it is not enough to clip off a small branch, as the Court did in *Shelley v. Kraemer*. We must understand that the roots of racism pervade housing, education, jobs, public accommodation, the criminal justice system and most other aspects of American life.¹²⁶

IV. THE IMPACT OF PRIOR STATE CASES AND THE ROLE OF THE FEDERAL JUDICIARY

We have looked at three cases that preceded *Shelley*. What rationale can we draw from this selection of cases, scattered over a century? First, in *Dred Scott*, the federal courts of 1857 failed to recognize blacks as human beings despite the considerable precedent against the views expressed in Chief Justice Taney's opinion. I believe that most scholars today would agree that the dissenting opinions of Justices Curtis¹²⁷ of Massachusetts and McLean¹²⁸ of Ohio stated the better view of constitutional law: that even in 1858, blacks had some rights under the U.S. Constitution that whites were bound to respect.¹²⁹ The one commonality in all three cases is that in each instance the state courts failed to protect the human rights of blacks. Before the Missouri Supreme Court, blacks lost in *Dred Scott* in 1855, in *Celia* in 1855, and in *Gaines* in 1937. And, if

126. G. MYRDAL, *AN AMERICAN DILEMMA* (1944); NATIONAL URBAN LEAGUE, INC., *THE STATE OF BLACK AMERICA*, 1989 (1989).

127. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 564 (1856) (Curtis, J., dissenting).

128. *Id.* at 529 (McLean, J., dissenting).

129. D. FEHRENBACHER, *THE DRED SCOTT CASE* 403-14 (1978). As Professor Fehrenbacher explains:

If the two dissenting opinions seem more convincing than the opinions of the Court majority, it is not merely because they were, by modern standards, on the right side. Curtis and McLean, in spite of their differing styles, displayed a fundamental agreement on the major issues that contrasted sharply with the heterogeneity of the majority's reasoning. They were in many respects the sound constitutional conservatives, following established precedent along a well-beaten path to their conclusions. Taney and his southern colleagues were the radical innovators — invalidating, for the first time in history, a major piece of federal legislation; denying to Congress a power that it had exercised for two-thirds of a century; sustaining the abrupt departure from precedent in *Scott v. Emerson*; and, in Taney's case, infusing the due-process clause with substantive meaning. And even though McLean did indulge his weakness for playing to the antislavery gallery, the southern justices were by far the more idiosyncratic and polemical.

Curtis's opinion, especially when read head-on against Taney's, is very impressive. One cannot entirely suppress the suspicion that the intense hostility displayed by the Chief Justice in the aftermath of the decision was partly inspired by the realization that he had been badly beaten in the argument by his much younger colleague from Massachusetts.

Id. at 414.

we add *Kraemer v. Shelley*, blacks again lost before that court in 1946.¹³⁰

With the persistent losses in human rights cases before the Missouri Supreme Court, one could ask: In the post-Civil War period, what was the safety net in Missouri for the protection of the civil rights of blacks? What institution was the primary protection against the ravages of racism? Certainly it was not the Missouri legislature. It was never the Missouri executive. It was never the white business community. It was never the white educational community. It was never the advocates of states' rights. It was never the persons who would now call themselves "strict constructionists." Rather, the safety net for black citizens of Missouri was primarily the United States Supreme Court. Though composed of individuals who, in my view, were at best moderate on human rights, nevertheless the United States Supreme Court had a far better understanding of democracy, equal justice under the law, and what the Constitution should mean to all of its citizens than did the Missouri state courts.

For me, the message from these cases is quite clear. It is that we cannot leave our most precious human rights to the exclusive vagaries of state court protection. The deficiency of state protection of the human rights of blacks was demonstrated clearly in footnote three of the petitioner's Supreme Court brief in *Gaines*. That footnote chronicles that "states which exclude Negroes from a state university solely because of race or color are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia."¹³¹ At the time of *Gaines*, every supreme court in those southern states—where probably more than seventy percent of the nation's black population then resided—would have denied a black citizen of the state the right to go to the white graduate school that was supported by the tax dollars of all of the state's citizens.

The capriciousness of the state universities and state courts was demonstrated in the testimony of the registrar for the University of Missouri.¹³² It was the United States Supreme Court, and *only* the United States Supreme Court, which gave some semblance of recognition to blacks as equal human beings who were entitled to the benefits of the

130. 35 Mo. 814, 198 S.W.2d 679 (1946).

131. Missouri *ex rel Gaines v. Canada*, 305 U.S. 337 (Petitioner's brief at n.3).

132. See *supra* note 111, at 119.

equal protection clause of the fourteenth amendment.¹³³ The lesson from these cases is that though one cannot always rely on the United States Supreme Court or the federal courts for a total vindication of human rights of minorities,¹³⁴ nevertheless until now, the United States Supreme Court has been the institution of government that most consistently has checked governmental efforts to discriminate on the basis of race. With this historical insight, it is obvious that the most effective way to weaken the fabric of human and civil rights for minorities would probably be to change the balance of the court so that gradually, in a slow but determined process, the court would repudiate its historic role in the protection of individual and minority rights.¹³⁵

Finally, but for the United States Supreme Court, America would be today similar in many ways to South Africa.¹³⁶ But for the United States Supreme Court, separate and unequal would be the governmental policy of many of our southern states. The legitimate question is: will the Supreme Court in the future sustain the egalitarian reading of the Constitution reflected in its decisions in *Gaines v. Missouri*, *Shelley v. Kraemer*, and *Brown v. Board of Education*, or will the Court of the current generation fail to be as effective with the new problems of race, class and gender

133. See generally L. MILLER, *supra* note 96.

134. Higginbotham, *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 804-07, 811, 814 (1987).

135. The text of this article was written in September, 1988 and it may appear to many to be too optimistic about the role of the Supreme Court. I did not know how the Supreme Court would evolve on many major civil rights and race relations issues during the 1989-90 term. However, long after I delivered my speech and towards the conclusion of the 1989-90 Supreme Court term, many commentators suggested that my hypothesis of potential retrogression in race relations matters by the Supreme Court had in fact taken place. Justice Blackmun, speaking about a seemingly consistent majority of five Supreme Court Justices on key civil rights and race relations cases, said on June 5, 1989: "Sadly, . . . [o]ne wonders whether the majority [of Supreme Court Justices] still believes that . . . race discrimination against nonwhites [] is a problem in our society, or even remembers that it ever was." *Wards Cove Packing Co., Inc. v. Frank Atonio*, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting) (citing *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989)).

Pulitzer Prize winning columnist Acel Moore, writing in *The Philadelphia Inquirer*, said:

The conservative five on the Court are Chief Justice William H. Rehnquist and Associate Justices Antonin Scalia, Sandra Day O'Connor, Byron R. White and Anthony M. Kennedy

There is no doubt in my mind that those five would have been on the wrong side in the 1954 school desegregation order. They would have voted with the majority in the 1896 *Plessy v. Ferguson* decision, which ruled that segregated public facilities were constitutional, and the 1857 *Dred Scott* decision.

The Philadelphia Inquirer, June 15, 1989, at 23A, col. 1.

136. Higginbotham, *Racism in American and South African Courts: Similarities and Differences* (Unpublished article).

as was its predecessor in dealing with the challenge of state imposed racism from 1938 to 1954?¹³⁷

V. BEYOND THE ISSUE OF RACE

Because of the nature of this convocation, I have focused solely on the aspects of race. But I do not mean to suggest that my view of the future of America is limited to improving race relations. As Franklin Delano Roosevelt once said, each generation must have its own "rendezvous with destiny."¹³⁸ I am deeply concerned about many of the unfinished tasks in this society for our generation. We have failed to eliminate discrimination against women and to give them full equality in every aspect of our society. I am concerned about our unfinished task in providing adequate care for the ill, the poor, the dispossessed and the homeless. Perhaps the visions and the values one must have to fully understand the magnitude of the unfinished tasks in America and the importance of proceeding with the business of solving these problems cannot be gleaned from a mere reading of cases. Perhaps it is impossible to put the issue in perfect perspective by using the language of the law. We will have greater insights if we understand the message of persons not trained in the law, but who are learned in the struggle for justice.

137. The difficulty in assessing the Supreme Court's impact on race discrimination is exemplified in the comments of thoughtful scholars. Derrick Bell notes that "[t]he contemporary question, raised more perfunctorily each year, . . . [is] why issues of racial justice no longer hold a priority position on the nation's agenda or on the Supreme Court's docket. . . ." Bell, *The Supreme Court, 1984 Term-Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985). Bell further asserts: "Because the [Supreme] Court is unable or unwilling to recognize and remedy the real losses resulting from centuries of race-based subordinate status, what relief the Court has granted . . . proves to be of less value than expected. . . ." *Id.* at 12.

Randall Kennedy has also recently spoken of the Supreme Court's failure in this area in the following manner: "Paralyzed by fear that seeing would entail doing, the Justices [of the Supreme Court in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987)] inflicted upon themselves a myopia reminiscent of the one that afflicted the Court during the reign of *Plessy v. Ferguson*. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1415-16 (1988) (citation omitted). Thus, Kennedy insists that "in *McCleskey*, there is no hint of solicitude for the feelings of Afro-Americans. . . . The rhetoric of the [Supreme Court] opinion displays a complacency disturbingly reminiscent of the Court's race relations opinions around the turn of the century." *Id.* at 1418.

With what many believe is the demise of the Supreme Court protection of basic human rights cases, one must recognize what may become the increasing importance of the state courts in vindicating human rights. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

138. Speech delivered at Franklin Field in Philadelphia, 1936. L.A. Times, Sept. 21, 1986, § 5, at 5, col. 2.

Let us put *Shelley v. Kraemer* in a fuller human rights perspective. Of course, it is essential that we eradicate racism in our society, but we should not look solely at issues pertaining to race. We should seek the goal as stated by Dr. Martin Luther King, Jr.:

I have the audacity to believe,
that people everywhere can have
three meals a day for their bodies,
education and culture for their minds,
and dignity, equality and freedom for their spirits.¹³⁹

139. THE WORDS OF MARTIN LUTHER KING, JR. 25 (C. Scott King ed. 1983).