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Remembering *In re Turner*: Popular Constitutionalism in the Reconstruction Era

ABSTRACT. This Note presents a historical account of the underexamined movement to end racialized apprenticeship laws in the post-slavery era. Original archival research from census records, Union Army files, and newspaper articles illustrate the contributions of formerly enslaved men, women, and children to the ultimately successful movement to declare Maryland's apprenticeship laws unconstitutional. Relying on the insights of Critical Race Theory and feminist legal theory, this Note fills a gap in existing legal history by producing a consideration of Reconstruction Era constitutional lawmaking "from the bottom." This Note argues that our shared constitutional memory has been artificially narrowed by an underconsideration of freedpeople's constitutional theories and claims. Restoring the anti-apprenticeship movement to our constitutional memory strengthens contemporary efforts to end racial discrimination in the child welfare system and to vindicate familial rights under the Thirteenth and Fourteenth Amendments.

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INTRODUCTION

On December 6, 1864, Mary Dare wrote to her mother with urgent instructions. She wished her mother to travel on her behalf to the Union Army station in Baltimore to explain to the provost marshals that her children were being held unlawfully by a white man in Prince Frederick.[1] Ms. Dare directed her mother to the newly enacted state constitutional provision which she believed would free her children: "If it should be necessary to refer to the Constitution, it can be found in the 24th Article of the Bill of Rights, which says, 'that hereafter in this State there shall be neither slavery nor involuntary servitude, except in punishment for crimes . . . .'"[2] Therefore, Ms. Dare reasoned, "it will be seen that [the children] are liberated because it is involuntary servitude."[3]

Mary Dare's legal acumen is notable in an era in which literacy amongst women born Black and enslaved was routinely criminalized,[4] but she was not at all alone in interpreting what the newly enacted state constitution meant for her family. Hundreds of Black mothers lodged complaints with agents of the federal government protesting a section of the state code that permitted ex-slaveholders to sign newly freed children into decades-long indenture contracts without their consent.[5]

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1. Letter from Mary Dare to Dinah Reid (Dec. 6, 1864), *in* COMMUNICATION FROM MAJOR GENERAL LEW WALLACE, IN RELATION TO THE FREEDMAN'S BUREAU, TO THE GENERAL ASSEMBLY OF MARYLAND 74-75 (Annapolis, Richard P. Bayly ed., 1865).

2. *Id.*

3. *Id.*

4. For an account of enslaved persons' persistence in finding access to literacy and education despite white opposition and violence, see Christopher M. Span, *Learning in Spite of Opposition: African Americans and Their History of Educational Exclusion in Antebellum America*, 131 COUNTERPOINTS 26, 26 (2005). Maryland was one of three slaveholding states that never passed a statute criminalizing Black education. The rest of the South criminalized education for enslaved persons by statute. *See, e.g.*, An Act To prevent the Introduction of Slaves into Alabama, and for other Purposes, § 10, 1831-1832 Ala. Acts 12, 16 (providing for the punishment of "any person or persons who shall attempt to teach any free person of color, or slave, to spell, read or write"); An Act to amend the act concerning slaves, free negroes and mulattoes, § 5, 1831 Va. Acts 107, 107 (instituting a fine for anyone teaching enslaved persons to read or write).

5. Accounts from the era tell of apprenticed children kept unfed and unclothed, forced to work, and beaten randomly. Other accounts tell of children kept in jail by bitter slaveholders. *See, e.g.*, *Letter from Joseph Hall, Maryland White Unionist to the District of Columbia Freedmen's Bureau Assistant Commissioner* (Sept. 14, 1865), FREEDMAN & S. SOC'Y PROJECT, https://freedmen.umd.edu/Hall-Smothers.html [https://perma.cc/4DEG-KTZY] (writing on behalf of Derinda Smothers, the mother of a young child beaten cruelly by a white man named Ira Young); Letter from J.A. Peck to J.A. Ross, *in* WALLACE, *supra* note 1, at 26 (reporting of a child of Mary A. Barnes who had been confined by her former owners in a jail for four months).

The persistence of these mothers moved the officials of the state: "Not a day passes," reported a military officer stationed in Annapolis, "but my office is visited by some poor woman who walked perhaps ten or twenty miles to . . . try to procure the release of her children."[6] Among these walking women was Maria Nichols, a young mother forced to watch in silence as an Orphans' Court judge indentured her young son to a former slaveholder.[7] Another mother, Fanny Thompson, traveled to the Army Corps Headquarters to report that a white man, Richard Smith, coerced her into signing a contract which required her children to live and work on his land until adulthood.[8] A third mother, Elizabeth Kennard, enlisted a neighbor to write to Colonel Ross on her behalf.[9] She quoted from the state governor's proclamation which stated that "all persons held in bondage . . . were made free whether they were minors or adults." "[A]ll persons," Kennard reasoned, plainly included her children, and so she begged the Colonel to heed the Governor's order and free her children from the apprentice masters who held them.[10]

These women began a movement which would ultimately shape constitutional law.[11] It took three years, one amendment, and two acts of Congress, but in an October 1867 circuit decision *In re Turner*, United States Supreme Court

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6. HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at 410 (1976).

7. Richard Paul Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland*, 62 AGRIC. HIST. 57, 65 & n.41 (quoting Letter from Maria Nichols to Oliver Otis Howard (Oct. 11, 1866) (on file with Nat'l Archives, Records of the Bureau of Refugees, Freedmen & Abandoned Lands, Record Group 105.5, Dist. of Columbia, Letters Received, Asst. Comm'r (Sept. 1865-Oct. 27, 1866)).

8. Letter from F.T. McKinley to Lieutenant Colonel S. B. Lawrence (Dec. 6, 1864), *in* WALLACE, *supra* note 1, at 72-73 (conveying the transcript of Fanny Thompson's deposition).

9. Letter from Elizabeth Kennard to Colonel Ross (Dec. 22, 1864), *in* WALLACE, *supra* note 1, at 66-67.

10. *Id*.

11. *See In re* Turner, 24 F. Cas. 337, 337 (C.C.D. Md. 1867).

Chief Justice Chase officially adopted Mary Dare's interpretation of the proscription against "involuntary servitude."[12] *In re Turner* struck down Maryland's apprenticeship laws for Black children as violations of the newly enacted Civil Rights Act and the Thirteenth Amendment.[13]

Despite their perseverance, Mary Dare, Fanny Thompson, and Elizabeth Kennard have not been recorded in the canon of constitutional theorists.[14] They devoted enormous intellectual labor towards deciphering the meaning of constitutional liberty, interpretations which were eventually upheld in federal court, yet their perspectives are not called upon today to help decipher the plain meaning of the Reconstruction Amendments.[15] This absence ought to strike us as counterintuitive; formerly enslaved people, and perhaps they alone, were experts on what the badges and incidents of American slavery entailed.[16] If we listen,

12. At the time of Mary Dare's letter, the Thirteenth Amendment had not yet been ratified. Ms. Dare interpreted the Maryland state constitution, which contained similar language. *Compare* MD. CONST. of 1864 art. 24 ("That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted and all persons held to service or labor as slaves, are hereby declared free."), *with* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

13. *Turner,* 24 F. Cas at 339 (holding, in near-perfect echo of Mary Dare's letter, that "[t]he alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the [Thirteenth] [A]mendment").

14. In recent years, there has been a growing interest in the Reconstruction Era as a source of a tradition of democratic constitutionalism which might help us find our way out of some of the more pernicious knots of our present. *See, e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 109-37 (2022).

15. *See* Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1361 (1994) (noting that "in *none* of the cases that ground civil freedoms in substantive due process or in the right of privacy has the Court sought guidance from the history of slavery, antislavery, or Reconstruction"); Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [https://perma.cc/FZ5E-BF7J] (noting "the erasure of Black women from the Constitution"); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 23 (2022) (writing, of the Nineteenth Amendment, that "[t]here is no method of interpretation that the Justices employ with sufficient consistency to account for this silence in our law").

16. In her recent history of sexual violence and Black women's survival in antebellum New Orleans, Emily Owens observes that enslaved women knew the nature of slaveholding violence "better than anyone else." EMILY A. OWENS, CONSENT IN THE PRESENCE OF FORCE: SEXUAL VIOLENCE AND BLACK WOMEN'S SURVIVAL IN ANTEBELLUM NEW ORLEANS 17-19

their words and advocacy could guide us in the ongoing efforts to define the contours of constitutional liberty today.

In re Turner and the social movement that preceded it represent a rich and largely forgotten narrative from our constitutional history. This overlooked constitutional story provides several insights for our present. First, *In re Turner* invites consideration as to the means by which social movements led by everyday individuals without economic or political power engaged in constitutional interpretation and effected durable change. Second, *In re Turner* enriches our understanding of the Thirteenth and Fourteenth Amendments' meaning at the time of their ratification. The anti-apprenticeship movement offers a vision of familial integrity as a key civil right, a tradition which practitioners may draw from today.

This Note proceeds in five parts. Part I situates this contribution to existing scholarship in the fields of legal history and constitutional theory. Part II traces the origins of the apprenticeship system though English common law and American slavery's contortions. Part III documents the early efforts of freedpeople to attack apprenticeship through habeas petitions and traces the previously unstudied influence of freedpeople on the celebrated Maryland judge, Hugh Lenox Bond. Part IV details *In re Turner*, the federal circuit court opinion which ultimately affirmed the constitutionality of the Civil Rights Act and declared Maryland's apprenticeship laws unconstitutional. Part V suggests several means by which the apprenticeship movement and *In re Turner* may fortify movements for racial justice and family rights today.

I. CONSTITUTIONAL HISTORY FROM THE BOTTOM

This Note uses alternative source material to tell a new constitutional story, one which locates freedpeople, and particularly freedwomen, as constitutional theorists of the Reconstruction Era. Through the excavation of previously obscure sources including historical newspapers, freedpeoples' letters, union army files, and census records, this Note tessellates a portrait of 1860s constitutional engagement "from the bottom."[17]

Looking to the bottom is a methodological orientation first coined by Critical Race Theorist Mari J. Matsuda. In the decades since, many legal scholars have contributed to a body of scholarship which engages the legal claims and theories

(2023). Owens identifies one of the many contributions of Black feminist theory as the recognition of Black women as "organic intellectuals" who have, across American history, "used the tools at their disposal to theorize their world." *Id.* (citing the work of Barbara Christian, Mia Bay, Farah Jasmine Griffin, Martha S. Jones, and Barbara D. Savage).

17. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

of nontraditional legal actors, particularly historically and politically disenfranchised populations.[18] A handful of legal historians have similarly embraced this bottom-up intervention, revising the field's traditionally narrow reliance on judicial opinions to include consideration of alternative perspectives—"everyday contests" on which legal rights were debated and construed apart from more traditional channels of power.[19]

Aiding this effort is the scholarship of historians of the Reconstruction Era, stretching back to W.E.B. Du Bois and continuing to the present, who document the immense political, economic, and social significance of the first years of emancipation,[20] and the contributions of people of color to this experimental era.[21] This work remains incomplete. While the Reconstruction Era contributions of Black lawmakers have received deserved attention, the constitutional engagement of nontraditional political actors, particularly Black women, remains an underdeveloped site of inquiry.[22]

This Note seeks to partially fill this gap through an original historical account of the anti-apprenticeship movement. A key methodological contribution of this

18. *See, e.g.,* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2574 (2014).

19. William E. Forbath, Hendrik Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 765. *See* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977). Arguing that constitutional historians need to be more inclusive in their concerns and sources, Wiecek maintains that "[c]onstitutional development was (and is) not a monopoly of a hieratic caste of judges and lawyers." *Id.* at 7. He also notes that "[m]uch of the scholarship on nineteenth-century racial history, both abolition and Reconstruction, until recently has been governed by 'something of a liberal internationalist framework,' one that doesn't fully envision enslaved, self-emancipated, or free-born Black people 'as political beings.'" *Id.* at 52.

20. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 (1935); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); DYLAN C. PENNINGROTH, BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS (2023); Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 L. & HIST. REV. 723 (2012); Giuliana Perrone, *"Back into the Days of Slavery": Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom*, 37 L. & HIST. REV. 125 (2019).

21. Randall Kennedy, *Reconstruction and the Politics of Scholarship,* 98 YALE L.J. 521 (1989) (reviewing FONER, *supra* note 20). Kennedy celebrates Foner for "delineat[ing the] ways in which Negroes defined for themselves what freedom should mean and revealing methods by which they sought to bring into existence their aspirations." *Id.* at 530.

22. A notable exception can be found in the scholarship of historian Elsa Barkley Brown, who documents the contribution of Black women to Fifteenth Amendment debates and the voting rights movement. *See* Elsa Barkley Brown, *To Catch the Vision of Freedom: Reconstructing Southern Black Women's Political History, 1865-1880*, *in* AFRICAN AMERICAN WOMEN AND THE VOTE, 1837-1960 at 66 (Ann Gordon, Bettye Collier-Thomas, John H. Bracey, Arlene Avakian & Joyce Berkman eds., U. Mass. Press 1997).

Note is the use of alternative source material, including the letters authored by mothers, journalistic accounts in local newspapers, Orphans' Courts records, and overlooked census data. Following William Forbath, Hendrik Hartog, and Martha Minow's call to legal historians to expand understandings as to what constituted law,[23] this Note challenges prevailing assumptions about where constitutional interpretation occurred. This Note expands its focus beyond judicial chambers and congressional halls to include the fields, roadways, and public buildings where freedpeople gathered to articulate, debate, and defend their newly gained constitutional rights. This reorientation highlights new sources as relevant sites of constitutional meaning-making, including freedpeople's private letters, local newspaper accounts, and transcribed oral complaints. Together, these materials piece together a fragmented but powerful portrait of how formerly enslaved persons both engaged and developed constitutional law in the years after slavery.

Maryland reflects a worthy cite. Maryland was among the first states to implement post-emancipation racialized apprenticeship laws, a practice which was subsequently replicated by states across the South.[24] Contemporaneous newspaper accounts from other states in the country reference Maryland's apprenticeship system as "infamous," suggesting the state's national reputation in conjunction with this practice.[25] Finally, as will be explored within this Note, Maryland was the state which launched the only federal court decision to assess the validity of the apprenticeship system, *In re Turner.*

This historical account of the anti-apprenticeship movement contributes to current scholarly conversations in three areas. Firstly, the anti-apprenticeship social movement bolsters our understanding of popular constitutionalism, a tradition which some believe we have lost and others say we never had.[26] Secondly,

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23. Forbath, Hartog & Minow, *supra* note 19, at 762 (noting that "at the heart of most legal history lies a bald presumption about the legitimating power of legal texts" and challenging the presumption that "the object of legal historical study is a known and distinctive body of texts, produced and possessed by a distinctive portion of the society, texts recognized by everyone else as 'the law"). The authors encourage a more expansive approach to law and legal sources, as well as the use of "a microscopic lens which can reveal the small, everyday contests, arguments, negotiations and understandings in which legal rights are constructed and exercised." *Id.* at 765.

24. See *infra* notes 181-185 for a discussion of apprenticeship legislation passed in other Southern states after Maryland.

25. *See, e.g.*, DAILY STANDARD, Oct. 24, 1867, at 2 (referring to "the infamous apprenticeship system of Maryland").

26. *Compare* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2005) (finding a long tradition of "ordinary citizens" engaging in constitutional interpretation and decision-making), *with* Keith E. Whittington, *Give "The People" What They Want?,* 81 CHI.-KENT L. REV. 911, 913 (2006) (accusing Kramer's historical account of being "inaccurate").

In re Turner provides an alternative vision for familial rights granted by the Constitution, one which places racial justice at its center. Lastly, this retelling contributes to emerging theories of constitutional memory work and constitutional storytelling developed by scholars, including Reva B. Siegel and Peggy Cooper Davis. Constitutional memory is a helpful concept because it reflects both the tangible and intangible ways in which the constitutional stories we tell about the past shape our present legal order. As historical analysis expands as a leading modality of constitutional interpretation, it is incumbent upon progressive scholars and practitioners to develop our own methods of historical fluency to ensure that our constitutional memory accurately includes the contributions of diverse voices from the past. This Note offers one blueprint for how legal historians might uncover and incorporate overlooked voices from our nation's history to develop claims for a more equitable future. In the following parts of this Section, each of these contributions is explored in turn.

A. Towards a Popular Constitutional Account of Reconstruction

The Reconstruction Era was a pivotal moment in America's constitutional evolution, but there is relatively little legal history scholarship asking how everyday people engaged with state or federal constitutional law during those crucial years.[27] Particularly glaring is an absence of scholarly consideration of freedpeople's interpretations of the Reconstruction Amendments.[28] In view of

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27. Michael Vorenberg writes, "With so much at stake, it would seem natural that the Reconstruction-era Constitution would be a favorite subject of historians." *Reconstruction as a Constitutional Crisis*, *in* RECONSTRUCTIONS: NEW PERSPECTIVES ON POSTBELLUM UNITED STATES 141, 142 (Thomas J. Brown ed., 2008). Vorenberg notes that, up until 1980, the constitutional history of Reconstruction was a rich, if enigmatic, field. However, constitutional history of Reconstruction largely failed to interpolate the insights and critiques of late-twentieth-century historians. *Id.* at 146. Notable exceptions can be found, of course, such as the work of Amy Dru Stanley and Laura Edwards, who combine social and legal history to document nuanced portraits of race, gender, and state power across the Reconstruction Era. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998) (exploring how thinkers and reformers including former slaves, feminists, and labor advocates used contract law to condemn slavery and advocate for a free society); *see generally* LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997) (illustrating how ideas about domestic gender roles shaped post-Civil War transformations in the public arena).

28. Davis has written persuasively that "the Court's understanding of privacy is less rich, less justified by national history and tradition, and less useful . . . than an understanding of liberty and citizenship that resonates with national traditions of feminist and antislavery resistance." Peggy Cooper Davis & Carol Gilligan, *Reconstructing Law and Marriage*, 11 GOOD SOCIETY 57, 58 (2002). *See also* Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28

this gap, scholars from Peggy Cooper Davis to Michael Vorenberg have called for a new legal history of Reconstruction, one focused on the constitutional engagement of freedpeople.[29] "For Reconstruction history to thrive," Vorenberg writes, "it must again take up the subject of the Constitution, though in ways that keep pace with larger trends in legal and constitutional history."[30] Such an approach requires widening the scope of archival materials and reorienting who traditionally gets classified as a subject of legal history, so as to document, as Vorenberg invites, "a view of the Constitution from the bottom."[31]

This Note responds to this call as it documents the critical role that freedpeople played in interpreting the Thirteenth Amendment's meaning for familial rights, providing a novel account of the anti-apprenticeship movement in Maryland as an act of popular constitutionalism. Several historians and legal scholars have authored important and careful accounts of postbellum apprenticeships, both in Maryland and elsewhere. The apprenticeship effort has been analyzed as one means through which courts and state legislatures reified features of slavery into postbellum law.[32] Other historians have studied the gendered elements of state court contestations and the ways in which the Black family was regulated by the state after the Civil War.[33] Others have considered apprenticeship from

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HARV. C.R.-C.L. L. REV. 299, 308 (1993) (addressing "those who deny that the history and traditions of this country support constitutional recognition of rights of family," and "offer[ing] refutation in the form of neglected stories of slavery and Reconstruction" including memoirs of freedpeople, abolitionist speeches, and congressional hearings all supporting the commonly held assertion that emancipation granted all people the rights of family).

29. Vorenberg, *supra* note 27, at 170 (calling for a history of Reconstruction which documents "expressions of popular constitutionalism — a view of the Constitution from the bottom").

30. *Id.* at 142.

31. *Id.* at 170.

32. Margaret Burnham explores apprenticeship laws to illustrate "the manner in which the legal system carried the old property in personhood principle into the new regime." Margaret A. Burnham, *Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum*, 18 CARDOZO L. REV. 433, 434 (1996). In her book on slavery and the transition to freedom in Maryland, historian Barbara J. Fields documents Maryland apprenticeship laws and the efforts of the freedmen's bureau in her chapter on Reconstruction. Fields casts apprenticeship laws as "a partial exhumation of the rotting corpse of slavery" one which flared up as a tool to assist slaveholders struggling to transition away from slavery but ultimately "collapsed under its own weight." BARBARA JEANNE FIELDS, SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY 153 (1985).

33. Karin L. Zipf investigates forced apprenticeships in North Carolina as a "constantly evolving system of social control," one shaped by "shifting constructions of gender, race and class." KARIN L. ZIPF, LABOR OF INNOCENTS: FORCED APPRENTICESHIP IN NORTH CAROLINA, 1715-1919, at 5 (2005). Zipf's interest in the gendered element of apprenticeships is further explored in an additional article in which she interrogates the ways in which Black women

the labor angle, considering freedpeoples' efforts to engage in subsistence farming, and the Thirteenth Amendment's reach into indentured servitude.[34] Additional considerations of the Freedmen Bureau's involvement explore these cases as an act of administrative constitutionalism[35] or an early experiment in legal aid.[36] These histories generally document the social and economic forces which conspired to create the apprenticeship system and the efforts of Freedmen's Bureau officials and Black parents to attack the indentures in state court.[37]

These accounts are each valuable, and their insights are cited and incorporated throughout this Note. However, the anti-apprenticeship activism as a popular constitutional movement has gone underappreciated. This omission is significant, for the freedwomen and freedmen who contested the apprenticeship laws were not only attacking the validity of the individual indenture contracts which restricted their own children, they were evincing a vision of constitutional

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were forced to navigate gendered constructions in their state-court level battles to gain custody of their apprenticed children. *See* Karin L. Zipf, *Reconstructing "Free Woman": African-American Women, Apprenticeship, and Custody Rights During Reconstruction*, 12 J. WOMEN'S HIST. 8 (2000). North Carolina apprenticeships are also investigated by Rebecca Scott, who analyzes Freedmen's Bureau records and finds subjective and uneven response, representing the Freedmen's Bureau's flagging commitment, wavering between the meritorious claims of Black people and the efforts of former masters to reestablish slavery. Rebecca Scott, *The Battle over the Child: Child Apprenticeship and the Freedmen's Bureau in North Carolina*, 10 J. NAT'L ARCHIVES 215, 227 (1978). In his book on the Black family in slavery and freedom, Gutman devotes several pages to apprenticeship system, documenting apprenticeship as it related to the postbellum familial structures of Black families. In his chapter on Reconstruction, Gutman carefully documents the resistance of Black parents to Maryland apprenticeship laws as evidence of the "very important familial and kin sensibilities and ties" of enslaved people sustained despite unremittent violence through the years of slavery and into the emancipation era. GUTMAN, *supra* note 6, at 431.

34. Richard Paul Fuke considers the anti-apprenticeship movement in Maryland from the perspective of agricultural history, and casts Black parents' efforts to control their children's labor "as a part of their general economic response to emancipation" one linked to "the aspirations of their 'subsistence-oriented peasantry.'" Fuke, *supra* note 7, at 59.

35. Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1618-21 (2019) (focusing on the involvement of the Freedmen's Bureau in attacking apprenticeship laws as an example of "administrative constitutionalism").

36. Laura Savarese, The Freedmen's Bureau in Maryland: An Early Experiment in Legal Aid 39 (2019) (unpublished comment) (on file with the Yale Law School Legal Scholarship Repository) (exploring the Freedmen's Bureau in Maryland as "an early experiment in legal aid").

37. The federal case *In re Turner* is mentioned in many of the above accounts, but the case narrative is not detailed in any of the sources cited. The most thorough scholarly treatment of *In re Turner* to date exists in Hyman's biography of Chief Justice Salmon P. Chase; the case is primarily examined as a demonstration of Chase's own vision of racial justice and constitutional interpretation in the Reconstruction Era. *See* HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: *IN RE TURNER* AND *TEXAS V. WHITE* (1997).

freedom which would apply to all Black families. In their claims and advocacy actions, it is possible to glimpse a bold vision of the Reconstruction Amendments' promise: the conviction that constitutional freedom necessarily included a recognition of familial integrity.[38]

The notion that ordinary citizens provided an important source of constitutional interpretation in the nineteenth century has been advanced by several scholars. Larry Kramer, perhaps the most cited popular constitutionalist, argues that the Constitution is a special form of law, one which was intended to be collectively interpreted. "[F]or most of our history," Kramer writes, "American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution."[39] Kramer provides a helpful metanarrative of popular constitutionalism since the eighteenth century, but in his sweeping account, he largely skims over Reconstruction.[40] A handful of scholars since Kramer have documented currents of popular constitutionalism during the Civil War and Reconstruction Era, but these accounts largely focus on the engagement of official, if nonjudicial, actors such as bureaucrats of Lincoln's cabinet,[41] the administrative officers of the Freedmen's Bureau,[42] or tracing populist imprints in the decisions of the Chase and Waite Courts.[43] The constitutional interpretations of freedpeople at the dawn of emancipation remains a rich area of inquiry still underexplored by constitutional historians.[44] It is here where this Note begins.

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38. Brown, *supra* note 22 (analyzing the Fifteenth Amendment activism of Black women and noting that freedpeople's vision of freedom "was not merely an individual one" but rather included the conviction that "[t]heir fates were intimately tied together; individual freedom could be achieved only through collective autonomy"); *see also* Thomas C. Holt. *Of Human Progress and Intellectual Apostasy,* 15 REV. AM. HIST. 58 (1987) ("Throughout much of human history the antithesis of slavery has not been autonomy but belonging; defining freedom as individual autonomy is a phenomenon of the modern era.").

39. KRAMER, *supra* note 26, at 8.

40. Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953, 955 (2006) (noting that "Kramer does not spend much time on the Civil War").

41. *Id.* at 962 (focusing on the executive branch as a source of constitutional interpretation and arguing that "[t]he frame of popular constitutionalism provides a new way to assess the importance of these constitutional bureaucrats.").

42. Tani, *supra* note 35, at 1618-21 (2019) (focusing on the involvement of the Freedmen's Bureau in attacking apprenticeship laws as an example of "administrative constitutionalism").

43. Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1436-38 (2005).

44. A recent article focuses on Black popular constitutionalism following the 1884 Civil Rights cases, but such accounts remain few and far between. Sean Beienburg & Benjamin B. Johnson, *Black Popular Constitutionalism and Federalism After the Civil Rights Cases*, 65 ARIZ. L. REV. 579, 583-84 (2023). Additional important scholarship documents freedpeople's activism to secure

B. Locating an Alternative Source of Familial Rights

A central contribution of Mari J. Matsuda's enduring call to look to the bottom is the insight that alternative epistemological sources, particularly the perspectives of those enduring the greatest brunt of state oppression, yield both substantive and normative clarity. In other words, disenfranchised voices from the past have much to teach, both as to what our shared legal culture *is* and what it still *could be*.

Several scholars have argued that the voices of freedpeople offer a particularly rich source of constitutional knowledge regarding the Reconstruction Amendments. Three decades ago, Guyora Binder called on constitutional historians to recognize freedpeople as "collective authors of their own liberation," a call with both moral and doctrinal implications.[45] This call has been further developed by Peggy Cooper Davis's work over the last three decades as she urges a return to the "neglected antislavery traditions" which help illuminate the meaning and promise of our Reconstruction Amendments.[46] Dorothy Roberts' concept of the abolitionist constitution similarly urges readers to "consider the abolitionist history of the Reconstruction Amendments as a usable past to help move toward a radical future."[47]

Courts have largely ignored this invitation. The constitutional understandings of freedpeople are not cited by the Supreme Court to help decipher the Reconstruction Amendments' meanings.[48] Courts have emaciated the Thirteenth

voting and marital rights. *See generally* STANLEY, *supra* note 27 (tracing the rise of contractarian thinking about labor and marriage relationships among freedpeople); FONER, *supra* note 20 (discussing, among other things, freedpeople's efforts to secure voting rights and marriage rights in connection with an overarching effort to provide "a coherent, comprehensive modern account of Reconstruction"); ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK (2001) (narrating African Americans' efforts to secure and protect their right to vote in the Reconstruction Era). Freedpeople's calls for familial self-definition reflect a comparatively less studied promise of the reconstructed Constitution.

45. Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 484 (1993).

46. Davis, supra note 15, at 1353 (calling for a return to "the history of slavery, antislavery . . . and [] the human rights traditions that drove antislavery and Reconstruction" to help "illuminate[]" the Fourteenth Amendment).

47. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 11 (2019).

48. *See* Binder, *supra* note 45, at 474 (arguing that "as long as consultation of 'framers' original intent' remains an important convention in constitutional interpretation, a misattribution of the Thirteenth Amendment dispossesses the slaves of their share of influence over the future meaning given emancipation"). Major Supreme Court rulings on the Thirteenth Amendment do not incorporate or cite to the writings or perspectives of enslaved persons regarding the

Amendment jurisprudence, interpreting far more narrowly than freedpeople themselves once did.[49] Moreover, substantive-due-process doctrine regarding parental rights, privacy, and bodily integrity do not cite slavery nor the abolitionist tradition, though these historical reference points are undoubtedly relevant in understanding the Fourteenth Amendment's guarantee of liberty.[50]

This oversight impoverishes our constitutional understanding, for freedpeople offer perhaps our greatest source of knowledge as to the meaning of slavery and its opposite. To recognize freedpeople as constitutional authors requires taking seriously the constitutional questions they raised in the early years of Reconstruction as key indicia of the popular meaning of the Reconstruction Amendments, a meaning with legal implications today.[51] Indeed, the constitutional claims of freedpeople analyzed in this Note reveal an alternative origin point for the familial rights guaranteed by the Reconstruction Amendments. As will be demonstrated in greater depth below, the actions and authorship of the Maryland mothers reveal that familial freedom—the right to a relational life unviolated by private or government actors—was a motivating, indeed *definitional* element of many freedpeople's conceptions of liberty. This history, following Peggy Cooper Davis, suggests an alternate doctrinal origin for parental rights, one rooted not in the propertied schoolhouse debates of the Progressive Era, but rather in the explicitly antiracist tradition of emancipation.[52]

This approach follows the path-making work of several legal scholars of Black feminism and racial equity whose scholarship widens our collective constitutional memory. Reminding that constitutional doctrine is "made of stories,"

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original meaning of the Thirteenth Amendment. *See, e.g.*, Slaughterhouse Cases, 83 U.S. 36 (1872); Civil Rights Cases, 109 U.S. 3 (1883); Robertson v. Baldwin, 165 U.S. 275 (1897); Bailey v. Alabama, 219 U.S. 219 (1911); United States v. Kozminski, 487 U.S. 931 (1988).

49. *See* Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOLEDO L. REV. 855, 860 (2007) (noting that "[o]ver the last 150 years, the Thirteenth Amendment's meaning has shrunk to the dimensions of an antebellum grave marker").

50. *See* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 197-98 (arguing that "the Court's incomplete address of history renders slavery and Jim Crow invisible, making Black women unseen in the nation's archive on abortion and involuntary reproductive servitude, despite the central political battles of the nineteenth century relating to the corrosive and coercive sex trafficking and sexual exploitation of Black women and girls").

51. Of course, Reconstruction Era constitutionalism produced divergent interpretations. This Note does not seek to suggest that freedpeople spoke univocally, but rather to document the coordinated efforts of one grassroots constitutional movement which was itself disparate and multivocal.

52. *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 142-48 (1997); *see also* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1000-01 (1992) (warning that *Meyer* announced "a dangerous form of liberty, the right to control another human being").

Davis's careful archival research vindicates familial freedom and reproductive autonomy as principles deeply rooted in the abolitionist human rights traditions.[53] Addressing "those who deny that the history and traditions of this country support constitutional recognition of rights of family," Davis uses memoirs of freedpeople, abolitionist speeches, and congressional hearings to argue that the Reconstruction Amendments grant all people the rights of family today.[54] In recent years, Michele Goodwin has called for the Thirteenth Amendment to be recognized as a source of reproductive rights through historical work documenting slavery's excessive sexual and reproductive violence.[55] Dorothy Roberts also documents slavery's familial violence as she locates Black familial autonomy as an urgent and enduring civil rights concern stretching back to slavery.[56]

Each of these scholars cites the anti-apprenticeship movement as an early example of Black maternal activism against state violence.[57] But an in-depth archival history of the popular constitutional movement in Maryland, the movement that led the country and ultimately secured the key court ruling, has yet to be written.[58] This Note offers such an account, using original archival research to surface the familial rights claims of freedwomen in the years after emancipation. As will be explored in Part V, this original account offers valuable historical fortification for present-day movements to recognize a child's right to familial integrity unviolated by state intrusion, equitable child welfare systems as a racial justice issue, and women's and children's constitutional rights to be free from domestic violence. All three of these claims were indexed by freedwomen as key elements of constitutional liberty. Their convictions remain urgent today.

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53. *See generally* DAVIS, *supra* note 52 (discussing this history through the lenses of "Doctrinal Stories" and "Motivating Stories" related to how the Fourteenth Amendment has been and might be interpreted).

54. Davis, *supra* note 15, at 308, 312-75.

55. *See* Michele Goodwin, *Distorting the Reconstruction: A Reflection on* Dobbs, 34 YALE J.L. & FEMINISM 30, 35-36 (2023) (noting that "the neglected history of abolition and the Reconstruction Amendments leaves a troubling void in American legal analysis" that "serves to obscure women and girls, and their unique concerns and quests for freedom").

56. *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 95 (2022) (noting that "the rights of family" were "central to the antislavery movement" and "a burning issue for the Reconstruction Congress").

57. *Id.* at 96-99; DAVIS, *supra* note 52, at 147-48; Goodwin, *supra* note 15.

58. *See, e.g.*, FIELDS, *supra* note 32, at 148-56; GUTMAN, *supra* note 6, at 402-12; Fuke, *supra* note 7, at 627; Tani, *supra* note 35, 1619-21; and Savarese, *supra* note 36, 27. All note the efforts of freedpeople, particularly freed parents, to attack the apprenticeship contracts which indentured their children, but these efforts as a collective act of popular constitutionalism are not explored.

C. Methodologies for an Incomplete Archive

A final note on method illustrates the opportunity and challenge of this work. One difficulty of piecing together a populist account of this era is the reality that the voices of freedmen and freedwomen often arrive to us heavily mediated.[59] Social and political pressures dictated the scope and content of the testimony freedwomen gave and the claims they made.[60] As such, state records often obscure historical conditions of violence as much as they illuminate them. This silence presents a problem for constitutional history from the bottom: in order to appreciate the full meaning of a legal movement in its day, one must consider the social context in which claims were made and decisions delivered. Yet, when it comes to the claims of Black women, surviving records often obfuscate the full force of their positions.

Black feminist theory provides a set of reading practices particularly valuable for this inquiry. Saidiya Hartman's seminal work over the last decade grapples with the task of documenting the experiences of Black women in American history whose lives have been deliberately obscured, disfigured, and erased from official archives.[61] Such work, Hartman teaches, requires a careful and never-finished practice of "listening for the unsaid, translating misconstrued words, and refashioning disfigured lives" within and between the surviving records.[62] Subsequent scholarship by Black feminist historians including Marisa Fuentes,

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59. Several decades of Black feminist theorists have advanced alternative reading practices to buttress against the frequent violence and silence of state archives. This field provides tools from which constitutional historians and scholars might now draw. *See, e.g.*, NELL IRVIN PAINTER, SOUTHERN HISTORY ACROSS THE COLOR LINE 76-127 (2002) (relying on the contents of a personal diary to analyze Reconstruction Era history); Saidiya Hartman, *Venus in Two Acts*, 12 SMALL AXE 1, 12 (2008) [hereinafter Hartman, *Venus*] (describing a mode of writing "[t]he intent of [whose] practice is not to *give voice* to the slave, but rather to imagine what cannot be verified, a realm of experience which is situated between two zones of death—social and corporeal death—and to reckon with the precarious lives which are visible only in the moment of their disappearance"); SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF SOCIAL UPHEAVAL, at xiii (2019) [hereinafter HARTMAN, WAYWARD LIVES] ("Every historian of the multitude, the dispossessed, the subaltern, and the enslaved is forced to grapple with the power and authority of the archive and the limits it sets on what can be known, whose perspective matters, and who is endowed with the gravity and authority of historical actor.").

60. FIELDS, *supra* note 32, at 149 (noting the ways in which freedpeople shaped their claims to appeal to the audience they spoke before, one illustration being that "freedmen often buttressed their complaints of injustice with charges of disloyalty"; thus, when Lucy Lee complained to the federal official, she took care to emphasize that the man who held her daughter "was no friend to the Union").

61. Hartman, *Venus*, *supra* note 59, at 2-5.

62. *Id.* at 2-3.

Emily A. Owens, Sarah Haley, and Tiya Miles further contribute archival reading practices for reading "alongside archival fissures."[63]

Guided by this methodological imperative to *listen for the unsaid*, this Note reveals an understudied element of the postbellum apprenticeship laws: the quiet legacy of slavery's sexual violence. Original archival research conducted for this Note discovers that the mixed-race child at the center of the federal case, *In re Turner*, was likely the biological daughter of the ex-slaveholder respondent who fought to retain her,[64] a possibility which goes unmentioned in nearly all scholarship considering the case.[65] Additional archival readings of obscure census records, media accounts, and popular writings from the day reveal that *Turner* was not an aberration: white paternity was a looming feature underlying the racialized apprenticeship practice, one legal historians have largely missed.[66]

This discovery has substantive consequence. It restores an additional element of the *Turner* case, one which may have been apparent to all in the courtroom, yet has been excised from memory. If Elizabeth Minoky, the mother at the center of *In re Turner*, had been free to speak aloud the truth of the sexual violence she endured on the record, her legal victory might have provided an additional historical anchor for feminist constitutional scholars and lawyers to build upon today. Indeed, had the thousands of formerly enslaved survivors of sexual violence had a forum to vindicate their grievances and claims, the salience of sexual, familial, and gender-based violence to the meaning of constitutional liberty might be canonized by now.[67] Instead, forced silence begat more silence.

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63. Marisa J. Fuentes, Dispossessed Lives: Enslaved Women, Violence, and the Archive 1, 78 (2016) (noting "[t]o trace the distortions of enslaved women's lives inherent in the archive, this book raises questions about the nature of history and the difficulties in narrating ephemeral archival presences by dwelling on the fragmentary, disfigured bodies of enslaved women [and reading] along the bias grain."); Owens, *supra* note 16, at 6 ("Seeking the remains of Black women in archives must be understood not as a preordained failure, a task too difficult to approach, but instead as 'an exercise of endurance.'"); Sarah Haley, No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity 105 (2016) (noting the function of the archive in "maintaining erasures and silences, functioning to compound the historical violence of sexual assault" against Black women); Tiya Miles, All That She Carried: The Journey of Ashley's Sack, a Black Family Keepsake 47 (2021) (advancing archival reading practices of "stretching historical documents, bending time, and imagining alternative realities into and alongside archival fissures" to recover experiences of enslaved women not reflected or distorted in official records).

64. *See infra* notes 151-153.

65. Harold Hyman's biography of Chief Justice Chase is the only scholarship to raise the possibility of white paternalism in *Turner*. Hyman, *supra* note 37, at 125.

66. *See discussion infra* note 159.

67. *See* Siegel, *supra* note 15, at 19 ("Those who sought votes for women made claims for liberty and equality in the family on which constitutional law might now draw—but there is no trace

While compelled labor in the cotton fields has entered legal memory as *de jure* slavery, sexual domination generally does not trigger the same recognition.[68] And despite the efforts of generations of feminist activists, the promise of a life free from sexual servitude has never been fully vindicated as a core right.[69]

Sexual violence was a constitutive element of American slavery and its aftermath, but the reality of rape was rarely mentioned explicitly in official legal records from the era.[70] This censure has emaciated the development of our constitutional doctrine, erroneously removing the gendered elements of slavery from Thirteenth and Fourteenth Amendment jurisprudence. Here, too, is an opportunity to repair our collective constitutional memory. This Note provides one means by which constitutional history may remedy deliberate censures from the past. By returning to overlooked fragments in the record, we might excavate the

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of their voices or claims in constitutional law."); Forbath, Hartog &, Minow, *supra* note 19, at 765 ("The very variety in the voices we identify in the historical struggles over law's meanings attests to the hegemonic power of legal order itself, in limiting and disarming social grievances that could have taken other avenues.").

68. For the absence of consideration regarding the Thirteenth Amendment's relevance in areas of gender violence or familial rights for women, see generally *United States v. Rhodes*, 27 F. Cas. 785 (1866); The *Civil Rights Cases,* 109 U.S. 3 (1883); *Bailey v. Alabama*, 219 U.S. 219 (1911); *Butler v. Perry*, 240 U.S. 328 (1916); *Jones v. Mayer*, 392 U.S. 409 (1968); and *United States v. Kozminski*, 487 U.S. 931 (1988). *See also* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 211 (1992) (criticizing judicial interpretation of the Thirteenth Amendment for "inaccurately characteriz[ing] the Amendment as narrow in scope" particularly for courts' failure to apply the Thirteenth Amendment to gendered forms of violence); STANLEY, *supra* note 27, at 735 ("Until abolition, the bondswoman's subjection carried much of the antislavery argument, by negation vindicating the ideal of inalienable human rights violated by chattel slavery. Yet under the abolition amendment, slavery has come to represent a matter only of labor, property, and race – not sex."). Of course, Black men were also harmed by familial separation and sexual violence, and fathers lodged complaints protesting the illegal apprenticeships as well. *See* GUTMAN, *supra* note 6, at 407-08 (detailing efforts of Black fathers to free their children from apprenticeships).

69. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 35 (1992) (noting that, despite three decades of scrutiny, "the law of rape still fails adequately to protect the sexual freedom of women"); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 451 (2020) (explaining that "[w]e have forgotten the family-related equal-citizenship claims that began in the decades before the Nineteenth Amendment's ratification, and continued for decades after").

70. WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 170-71 (2013) (declaring slave plantations a "landscape of sexual violence" in which sexual torture was a routine feature); SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 79 (1997) (noting that "the actual or attempted rape of an enslaved woman was an offense neither recognized nor punished by law").

nuanced claims of freedwomen unable to be fully aired in their day.[71] What emerges is a forgotten moment in which a complex but powerful vision of familial and sexual safety for Black women and their families flickered at the center of what constitutional freedom meant and might become.[72] It is not too late to vindicate their vision.

D. Democratizing Constitutional Memory

Taken together, the contributions of this Note outline one means by which new approaches to constitutional history may help develop our constitutional understanding. This Note uses Reva B. Siegel's concept of constitutional memory to consider how neglected historical claims enrich our present constitutional frameworks. Constitutional memory, Siegel helpfully reminds us, is both entrenched and contestable: "[I]t is a field of meaning in which we continuously negotiate who we are and what we are to do together."[73]

Legal historians are sometimes asked to account for the practical value of their descriptive projects.[74] Admittedly, this tale from history alone is unlikely to persuade our conservative Supreme Court to revivify Thirteenth Amendment jurisprudence nor adopt a generous reading of familial self-determination as a substantive due process right. Yet neither should the value of these "neglected stories," to use Peggy Cooper Davis's luminary phrase, be wholly discounted.[75]

For one, revitalizing forgotten stories from the past fortifies present legal movements.[76] One need not be an originalist to nevertheless recognize the value

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71. Mia Bay reminds that "silences are rarely complete." Mia E. Bay, *The Battle for Womanhood is the Battle for Race: Black Women and Nineteenth-Century Racial Thought in* TOWARD AN INTELLECTUAL HISTORY OF BLACK WOMEN 75, 77 (Mia Bay, Farah J. Griffin, Martha S. Jones & Barbara D. Savage, eds., 2015).

72. *See In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867).

73. Siegel, *supra* note 15, at 22.

74. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (considering "traditional standards" of legal scholarship as being in tension with legal narratives and storytelling); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 645-654 (2001).

75. *See* DAVIS, *supra* note 52.

76. Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012) https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [https://perma.cc/47T5-SRK4] (noting American history is "full of examples" by which constitutional claims move from "off the wall" to "on the wall"); Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2256 (2014) (noting that "any constitution worth its salt may spend a good bit of time in exile").

of historical antecedents to ground constitutional claims. As explored in Part V, current calls to recognize children's constitutional rights to familial integrity, to condemn racial disparity in home removals as an unconstitutional act of racial discrimination, and to defend domestic safety as a constitutional right, all benefit from the freedpeople's successful constitutional movement to strike down the Maryland apprenticeship laws.[77]

Further, by taking seriously the constitutional claims of freedpeople, alternative visions of judicial democracy appear more possible. It is beyond this Note's scope to assess the democratic responsiveness of our judicial system broadly. But this Note argues, as a preliminary matter, that our capacity to identify the opportunities and deficiencies of judicial democracy is at its apex when our nation's constitutional memory is as rich and complex as its history. Moreover, the opposite is surely true: if we ignore the participation of disenfranchised litigants from the past, their advocacy will fade further from our constitutional memory, tricking future students into believing that narrow channels of official power form the entirety of our intellectual heritage.[78] One need not close one's eyes to the shortcomings of our rights-based system to nevertheless draw inspiration from the enormous series of efforts by which subjugated individuals engaged, and changed, constitutional law in their day.[79] Their memory may illuminate new paths forward.

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77. *See* discussion *infra* Part V.

78. Such an approach may offer hope at a moment in which cynicism towards our federal court system appears to be on the rise. *See* Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx [https://perma.cc/M3BS-6K3X] (presenting poll results showing that only 41% of U.S. adults approve of how the Supreme Court is doing its job, close to record low of 40% from the previous year); James L. Gibson, *Losing Legitimacy: The Challenges of the Dobbs Ruling to Conventional Legitimacy Theory*, 68 AM. J. POL. SCI. (forthcoming 2024) (manuscript at 1) (warning that "the Court's legitimacy may be at greater risk today than at any time since Franklin D. Roosevelt's 1930s attack on the institution").

79. Critical race theorist Mari Matsuda coined the term "jurisprudence of reconstruction" to balance the postmodernist critique of the legal system as whole as well with the urgency of need, particularly of poor Black and brown people, for legal rights. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 744 & n.14 (1994). A jurisprudence of reconstruction, Angela Harris further explained, requires scholars to hold the tension of both urgent need and historical disappointment: to recognize the ways in which "[f]or people of color, as well as for other oppressed groups, modernist concepts of truth, justice and objectivity have always been both indispensable and inadequate." *Id.* With insight from Mari Matsuda, Angela Harris, and Patricia J. Williams, *see id.* at 750-51 & n.54, we might observe that women at the center of this Note engaged in their own "jurisprudence of Reconstruction" as they set out to vindicate a vital right even as they were doubtlessly aware of the limitations and biases of the system in which they engaged. *See also* Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263, 266 (1993)

The following Part begins to excavate this memory, starting with a powerful image of freed parents' legal advocacy efforts and then moving back in time to contextualize the legal origins of the racialized apprenticeship laws which ensnared the lives of freedpeople in the first years of emancipation.

II. THE LEGAL ARCHITECTURE OF APPRENTICESHIPS

On June 25, 1867, a steamer from Baltimore arrived in Cambridge, Maryland. The ship carried a celebrated guest, Judge Hugh Lennox Bond, arriving to speak at the Dorchester County Freedmen's Bureau meeting on the subject of child apprenticeships.[80] The steamer docked before a newsworthy crowd of twenty-five hundred, roughly equal to the town's entire population.[81] As Judge Bond exited the ship, the assembled men, women, and children thronged so closely to the carriage "that it was almost impossible to proceed."[82] Young women carrying infants pressed against men with backs curved by age. Many had walked twenty, thirty, or forty miles to reach this destination.[83] Some would walk back most of the night to meet the dawn of the next workday.[84] They came by and large for a single purpose: to see the man who might help free their children.

Nearly three years after Maryland's formal abolition of slavery, thousands of Black parents had not yet been reunited with their children. For many, this unbearable condition was no freedom at all. "We were delighted," Baltimore freedwoman Lucy Lee recounted, "when we heard that the Constitution set us all free, but God help us, our condition [has] bettered but little; free ourselves but deprived of our children, almost the only thing that would make us feel free and happy."[85] In this telling, Lee poignantly distinguishes between freedom as a status and a feeling. Without the rights of family and companionship, the legal status *free* rang hollow.

Formerly enslaved Black women such as Lucy Lee were not the passive grammatical objects of constitutional emancipation. As war raged across the South, Lucy Lee and her peers began the task of vindicating the promises of freedom

(describing Black female engagement and a reconceptualization of outlaw culture as a means of "adopting and practicing communitarian values without abandoning rights as an organizing jurisprudential principle").

80. *Movements in Maryland*, ZION'S HERALD & WESLEYAN J., July 25, 1867, at 118.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Letter from Mary Dare to Dinah Reid, *reprinted in* WALLACE, *supra* note 1, at 68.

denied to them. A foundational conviction of these women, as Lucy Lee articulated so powerfully, was that emancipation gave freedpeople the right to form and maintain their families apart from state intervention. This conviction sparked a popular constitutionalist movement, though it has rarely been remembered as such.

This Part moves backwards to trace the origins of the laws relied upon by Orphans' Court judges to separate women like Lucy Lee from their children in the early years of emancipation. Original source material collected for this Note illustrates how state apprenticeship laws such as those in Maryland exploited state constitutions, English common-law apprenticeship provisions, and the contorted laws of family under slavery to extend effective conditions of slavery after constitutional emancipation.

A. Maryland's New Constitution

Three years before Judge Bond arrived in Cambridge, in a convention room across the bay, the delegates of Maryland gathered together to debate an unsettled question: *What does emancipation mean?* In the spring of 1864, newly elected state lawmakers convened in Annapolis to rewrite Maryland's state constitution as one intolerant of slavery.[86] As a border state, Maryland abolished slavery before the confederacy fell and thus was free to institute its antislavery constitution without congressional oversight.[87] Maryland's new constitution was, as Eric Foner writes, a "rehearsal" for the national emancipation to come.[88]

As Congress would a few months hence, the Maryland delegates based the language of their emancipating article on the Northwest Ordinance, which prohibited slavery and involuntary servitude except as punishment for a crime.[89]

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86. The abolition of slavery, Foner writes, "headed the agenda," but abolition was one essential piece of a new class vision. The delegates had been voted in by working-class white Marylanders, small farmers of Northwest Maryland, and the manufacturers and laborers of Baltimore, who saw in this transition the possibility for economic reform. FONER, *supra* note 20, at 40.

87. FIELDS, *supra* note 32, at 137 ("Maryland permitted itself the luxury of more equivocal answers to questions of political democracy, as concerned both white and black, than congress permitted the former Confederate states while it retained jurisdiction over their internal affairs.").

88. FONER, *supra* note 20, at 35, 40. ("Bolstered by loyalty oaths administered to voters by army provost marshals, Unionists committed to immediate and uncompensated emancipation swept the Maryland elections of 1863 and called a constitutional convention to reconstruct the state.").

89. *Compare Ordinance of 1787, July 13, 1787: An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, reprinted in* GOV'T PRINTING OFF., DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc.

When it came to the civil rights of freedmen and freedwomen, however, the delegates' vision of Black freedom ran rather thin. The new state constitution did not grant Black men the right to vote, nor did it guarantee Black children access to education.[90] Many antislavery delegates in Maryland, Foner explains, "felt compelled to deny that voting for abolition implied any sympathy with *'negro* equality.'"[91]

Greed and racism foreshortened the delegates' vision. They warned of the economic consequences of freeing the state's labor source "in the midst," one delegate stated baldly, "of the harvest field."[92] Other delegates presented caricatured images of the deep South where, they alleged, free people of color were refusing to work and becoming "an intolerable nuisance."[93]

At the convention, proslavery delegates seized upon child apprenticeship as an alternative means of racial domination.[94] They instructed the Committee on the Judicial Department to inquire into the expediency of incorporating a constitutional provision to require Black children to be apprenticed to "some white person" until the age of majority "so as to better provide for their welfare and preparation for freedom."[95] Numerous senators registered objections to this law, stating the obvious: that it sounded an awful lot like slavery. Opposing lawmakers responded by warning, with simmering racial panic, of the chaos that might ensue should Black children be turned "loose on the community."[96]

No. 398, at 54 (1st Sess. 1927) ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."), *with* MD. CONST. OF 1864 art. 24 ("That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted; and all persons held to service or labor as slaves, are hereby declared free"), *and* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

90. DU BOIS, *supra* note 20, at 565 *(*explaining that Black Marylanders did not get the vote until after the Fourteenth and Fifteenth Amendments).

91. FONER, *supra* note 20, at 40.

92. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, ASSEMBLED AT THE CITY OF ANNAPOLIS, WEDNESDAY, APRIL 27, 1864, at 236 (Annapolis, Richard P. Bayly, ed.,1864) [hereinafter DEBATES].

93. *Id.* at 238.

94. FIELDS, *supra* note 32, at 140-42 (explaining that "[a]pprenticeship served a complex social purpose for former slaveholders. One of its tasks—arguably the most important—was to provide a temporary landmark for people as yet unable to orient themselves in the new landscape of emancipation," with other purposes being revenge and efforts to extract labor from both children and perhaps parents).

95. DEBATES, *supra* note 92, at 391.

96. *Id.* at 61.

Ultimately, the delegates adopted no position. They did not pass a constitutional provision explicitly providing for any "system of negro apprenticeship" which they feared would "carry with it the idea of a continuance of slavery in this state" too clearly.[97] Still, they left existing state laws regulating apprenticeships for free children of color unrepealed.[98] This loophole would be exploited by white Marylanders to devastating effect in the weeks to come.

B. Antebellum Apprentice Law

The laws that the Maryland delegates left conspicuously unrepealed were the contorted relics of English common law. To understand the landscape of apprenticeship law at the moment of Maryland's emancipation, some historical context is helpful. In English common law, the position of apprentice occupied a fuzzy place in the laws of domestic relations, a status somewhere between child and servant.[99] When William Blackstone considered the doctrine of apprentices in his *Commentaries*, he taxonomized apprentices as a "species of servants" who were, unlike other servants, "instructed" by their masters.[100] By Blackstone's telling, there were two routes by which a minor was apprenticed at English common law. Middle-class fathers apprenticed their children, sometimes alongside "very large sums," to skilled masters who would teach them profitable trades.[101] Children of the poor, on the other hand, could be apprenticed by local overseers, with the consent of judges, to persons selected by the state, typically until the age of twenty-one.[102] Masters received no sums for these minors, and one may speculate that their treatment differed accordingly.

That a single word was used to describe these fundamentally different conditions illustrates the slipperiness of apprenticeship as a legal doctrine. In truth, these two forms of apprenticeship — one vocational, the other state-mandated — shared little resemblance. The former was a voluntary exchange of labor, and sometimes money, in consideration for training in a professional trade. The latter was a nonconsensual, often lengthy indenture of indigent children ordered

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97. *Id.* at 393.

98. There was no reason, Maryland state Senator Valliant hinted horribly, that slave masters could not "have said slaves bound to them under the existing law of apprenticeship; and . . . [that] the preference of binding these negro children be given to them." *Id.* at 548.

99. Burnham, *supra* note 32, at 435 (explaining that apprenticeship and slavery shared several premises including the extent to which "commercial concepts were linked to domestic law to justify treating children as property").

100. 1 William Blackstone, Commentaries on the Laws of England: In Four Books 425 (George Sharswood ed., 1866) (1765).

101. *Id.*

102. *Id.* at 426.

by a state official. Vocational apprenticeships were justified through the praxis of contract; the arrangement was rooted in mutual consent and consideration with the child's legal father, a critical bargaining party.[103] In the case of indigency, however, the state dispensed with consent and contract altogether, instead justifying its own intervention through the language of children's welfare.[104]

The English tradition of forcing poor children into apprenticeships provided a helpful precedent for the emerging American concept of *parens patraie*.[105] In an 1816 decision, Judge Story justified the police power of the state to direct matters concerning children, reasoning that "[the state] has already, in the case of paupers, taken the custody from the parents, and enabled the overseers of the poor to bind out the children as apprentices . . . without consulting the wishes of their parents."[106] Common-law apprenticeships were accordingly used to justify a range of state interventions into the "private realm" of the family.

As the nineteenth century progressed, new ideas about childhood and the family began to take root. Allegations of mistreatment by apprentice masters accumulated. The influential American jurist James Kent, writing at the end of the 1820s, observed that "[t]he temptations to imposition and abuse [of apprentices] have rendered legislative regulations particularly necessary."[107] These reforms included the requirement that masters teach apprentices to read and

103. In the first model, fathers of apprentices would be liable for civil damages if their child did not perform the terms of their contract. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 458 (1989) ("Apprenticeship was an extension of the family relation more than it was of the labor relation. Unlike the slave relation, or other labor relations for that matter, the underage apprentice's true father was central to the relationship.").

104. Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1129 (1997) ("Unlike slavery, indentured servitude and apprenticeship had been understood as based in contractual freedom and therefore as legitimate forms of work.").

105. Douglas R. Rendleman, Parens Patriae*: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 223 (1971) ("[T]he chancery phrase *parens patriae* came to be used to justify the state in sundering children from parents. [It was] a lineal descendent of poor law mechanisms for parting pauper children and their parents and placing the children out as apprentices and . . . *parens patriae* was no more than a phrase added, after the fact, as a reason for the regulation.").

106. United States v. Bainbridge, 24 F. Cas 946, 950 (No. 14,497) (D. Mass. 1816); *see* Rendleman, *supra* note 105, at 221.

107. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 111 (Lonang Inst. 2006) (1827).

write[108] and provide apprentices with access to the civil courts to lodge complaints of ill usage by their masters.[109] In many states, the minor's own consent, not only that of his father, was a required provision for a valid indenture.[110] Janet Dolgin explains that by the second half of the century, "[t]he idea of middle- and upper-class children as inestimable treasures" had taken hold, and thus, "apprenticing them had become morally repugnant."[111] Poor children were largely deprived of this shine, and they continued to be subject to indenture "either 'voluntarily' by their impoverished parents, or involuntarily under state poor laws."[112] Thus, it was only the latter of Blackstone's two apprenticeships that survived the sentimentalizing era, but forced apprenticeships continued to benefit from their traditional association with the middle-class sons of England. The reality of state and economic compulsion camouflaged itself through the language of paternalism, education, and betterment.

C. Racializing Apprentice Law

It was in these decades that several Southern state legislatures enacted laws providing for the apprenticeship of free children of color.[113] These were the laws

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108. Apprentice masters were increasingly encouraged to provide moral and academic training in addition to vocational skills to the children under their care. An article published in the *Baltimore Sun* in 1840 reminded apprentice masters that they stood "*in loco parentis*" to the child apprentices, and like parents, they had a moral duty to provide for the cultivation of the child's mind into a moral citizen. Eventually, this requirement was written into law. *Apprentices*, BALT. SUN, Feb. 20, 1840, at 3. *In loco parentis* and *parens patriae* each reflected somewhat flexible and overlapping ideologies in nineteenth-century courts. In his history of *parens patriae*, Rendleman distinguishes between the two, explaining that *in loco parentis* expressed the power of the state to control the child once it had obtained custody of the child, while *parens patriae* referred to the state's interest which is over and above the interest of a legal parent. *See* Rendleman, *supra* note 105, at 224-29. The doctrine of *parens patriae* was used with accelerating force as the reform movement gained speed and Houses of Refuge became increasingly common. *Id.* at 223.

109. KENT, *supra* note 107, at 111.

110. *Id.*

111. Dolgin, *supra* note 104, at 1118.

112. *Id.*

113. Border states such as Maryland and Missouri appear to have been among the first to pass racialized apprenticeship laws specifically for Black children, perhaps due to the large populations of free people of color by mid-century. *See* Act Authorizing a Free Person of Color to Remain in This State Until He Arrived at the Age of Twenty One Years, 1855 Mo. Laws 617-18.

which would eventually become the subject of *In re Turner*.[114] In 1840, the Maryland legislature passed "An Act to provide for the better regulation of the Free Negro and Mulatto Children within this State."[115] The Act provided that:

> [T]he orphans' court of any county in this State, upon information being given to either of said courts, shall summon before them the child or children of any free negro or negroes or mulattoes in said county; and if it shall appear, upon examination before such court, that it would be better for the habits and comfort of such child or children, that it should be bound as an apprentice to some white person to learn to labor, then such court shall bind, as apprentices, such child or children to some white person, males till they are twenty-one years of age, and females till they are sixteen years of age.[116]

For a state in which roughly half of antebellum Black residents were free, this law threatened the family life of many persons in the state.[117] Maryland's law for Black child apprentices differed in several consequential ways from the law which existed for white apprentices. The labor standards for indigent white children were not by any means robust, but even the meager protections afforded to white apprentices were not extended to their Black counterparts. While masters were required to provide white children a basic education in reading, writing, and arithmetic, the law did not require apprentice masters to educate Black children at all. Moreover, the law for apprentices of color differed in that it gave the master the right to transfer the child to another apprentice master, mimicking the slave-leasing system of the era.[118] The aging-out provisions shared features of gradual emancipation deployed in Northern states[119] and *statu libre* laws of

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114. *In re* Turner, 24 F. Cas. 337, 337 (C.C.D. Md. 1867).

115. Act of Mar. 20, 1840, ch. 35 § 1, 1839 Md. Laws. 33.

116. *Id.*

117. Maryland was the only state in which the enslaved population and the population of free people of color were roughly equal. *See* Richard B. Morris, *Labor Controls in Maryland in the Nineteenth Century*, 14 J. S. HIST. 385, 385-86 (1948).

118. Act of Mar. 20, 1840, ch. 35 § 2, 1839 Md. Laws (providing that the master may, with permission of the Orphans' Court, "transfer to any other person residing in said county, any apprentice bound under this act.").

119. *See, e.g.*, An Act for the Gradual Abolition of Slavery (1780), *in* 10 THE STATUTES AT LARGE OF PENNSYLVANIA 1682 to 1801, at 67, 68-69 (1904) (specifying that "every Negro and Mulatto child born within this State after the passing of the Act" would be free upon reaching age twenty-eight); An Act Concerning Indian, Mulatto, and Negro Servants and Slaves, *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 396, 396-99 (Hartford, Hudson & Goodwin 1805); An Act Authorizing the Manumission of Negroes, Mulattoes, and Others, and for the Gradual Abolition of Slavery (1784), *in* 10 RECORDS OF THE STATE OF RHODE

Louisiana.[120] In echo of the fugitive-slave laws, the apprenticeship law also imposed a steep penalty—eighteen-months' imprisonment—for any adult found attempting to entice a Black child apprentice away from service; the equivalent crime for white apprentices triggered only a twenty-dollar fine.[121]

Perhaps most distressing was the latitude given to the judges of the Orphans' Court to remove children without the consent of parent or child.[122] The Orphans' Court was required to summon white parents into court prior to binding out children and give white parents or relatives the chance to bond for one hundred pounds to prevent the indenture, but no such procedural safeguards existed for Black parents.[123] The Maryland act gave Orphans' Court judges the discre-

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Island and Providence Plantations in New England 1784-1792, at 7 (Providence, Providence Press Co. 1865) (abolishing lifetime enslavement in Rhode Island, providing that children born to enslaved women may be apprentices "at any Time after they arrive at the Age of One Year" and before they reach age twenty-one for males and eighteen for females); An Act for the Gradual Abolition of Slavery (1804), *in* Laws of the State of New Jersey, 103, 103-04 (Trenton, James J. Wilson 1811) (providing "[t]hat every child born of a slave within this state, after the fourth day of July next, shall be free; but shall remain the servant of the owner of his or her mother . . . and shall continue in such service, if a male, until the age of twenty-five years, and if a female until the age of twenty-one years"). For further discussion of gradual emancipation laws in northern states, see David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery* 1784-1848, 111 Yale L.J. 183, 184-85 & nn.3-5 (2001).

120. See Owens, *supra* note 16, at 97-101 (documenting the 1808 introduction of the *statu liber* status in Louisiana code, a seven year indenture after which enslaved persons would be granted their freedom, largely derogated by midcentury).

121. *Compare* Act of Mar. 20, 1840, ch. 35 § 3, 1839 Md. Laws 33 (providing a punishment of one to four years in penitentiary for those convicted of enticing a Black apprentice to run away), *with* Chapter 8, § 24, 1890 Md. Laws 9 (providing a twenty-dollar fine for those accused of enticing apprentices to run away).

122. Orphans' Courts were probate courts in Maryland with limited jurisdiction to oversee the administration of estates. Orphans' Court judges were made constitutional judges in 1851. *See The History of the Orphans' Court in Maryland*, Md. Cts., https://www.mdcourts.gov/orphanscourt/history [https://perma.cc/RSN8-PQTH].

123. *Compare* Act of Dec. 28, 1793, ch. 45, 1793 Md. Laws ("[W]hen any child is about to be bound out, the parent or parents of said child, if living in the county, shall be summoned to appear before the said justices, and the inclination of the said parent or parents, so far as is reasonable, shall be consulted in the choice of the person to whom the said child shall be bound out; and provided always, that when any child shall be before the court for the purpose of being bound out as an apprentice, if any relation or other person will, with food and sufficient security, enter into bond in the penalty of one hundred pounds, for the due and comfortable maintenance, and for providing sufficient and proper clothing for such child till of age as aforesaid, and also for the reasonable schooling and education of such child, then the court shall not proceed to bind out such child as aforesaid."), *with* Act of Mar. 20, 1840, § 1, ch. 35, 1839 Md. Laws (providing that, if it appear to the court "better for the habits and comforts" of the Black

tion to bind Black children out if it appeared "better for their habits and comfort," though they were instructed not to apprentice Black children if they had parents with means and ability to keep their own children "employed."[124]

As Dorothy Roberts has argued, the Maryland apprenticeship law reflected and foreshadowed several facets of the racialized child welfare systems that would emerge in the decades to come.[125] Scholar Margaret Burnham adds to this analysis, astutely identifying three assumptions visible within the 1840 law which would continue to shape the state's approach to Black children for the next century and a half: firstly, "the overarching assumption . . . that the state knew how to raise black children better than did their parents;" secondly, "that poverty automatically rendered a parent unfit;" and thirdly, "that work—more particularly, agricultural labor—not education, and certainly not creative idleness, was the proper lot of black youth."[126]

In antebellum Baltimore, families of color fought back against these apprenticeships with the legal tools available to them.[127] While excluded from many facets of the civil legal system, free people of color were permitted to file habeas petitions on behalf of their children when masters breached the terms of their contracts by removing children from city lines or mistreating child apprentices.[128] Black parents were permitted to enter *ex parte* testimony asking the courts to summon the white apprenticeship masters, a narrow legal channel they utilized to great effect.[129] In the post-emancipation movement, habeas corpus would prove to be a critical legal strategy for Black parents, and it is possible that this legal knowledge grew from the experiences of free families of color in the antebellum era.

In her careful archival study of antebellum Orphans' Court records, Martha S. Jones observes that the court provided a forum in which free people of color

children, they would be bound to white persons "to learn to labor"), *and id.* § 6 (stating that "no child be bound under this act, if that parent or parents have the means and are willing to support such child and keep the same employed, so as to teach habits of industry" but providing none of the procedural safeguards provided to white parents).

124. Act of Mar. 20, 1840, § 6.

125. ROBERTS, *supra* note 56, at 96-99 (2022).

126. Burnham, *supra* note 32, at 439.

127. MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 119-121 (2018) (noting that the Baltimore County Orphans' Court "served as a forum for aggrieved black families" in the antebellum era).

128. *Id.* at 120.

129. *Id.* ("The writ of habeas corpus proved to be a tool by which black apprentices, and their families and friends, could bring those said to be wrongdoers into the courthouse. Their testimony alone, through what began as an ex parte, or onesided, claim, gave their words the force of law.").

could sue and testify in a manner that "approached the rights of citizens."[130] Yet Jones also finds that the unsatisfactory endings common to so many of these cases ultimately illustrate "the limits of rights," as relatively robust proceedings nevertheless failed to deliver just outcomes.[131] Jones' historical account carries us to the precise moment where this Note begins: at the precipice of Maryland's constitutional revolution. The presence of an anti-slavery constitution altered the terrain on which Black parents in Maryland exercised their parental rights in diffuse but measurable ways. As with their antebellum counterparts, freedpeople's efforts in and out of court illustrate both the opportunities of constitutional citizenship and the limits of America's commitment to Black freedom.

D. Domestic Relations Under Slavery

Before turning to the anti-apprenticeship movement, it is worth noting the shadow of a second set of laws on the development of the racialized apprenticeship system: the laws of slavery.[132] To appreciate the force of Black parents' convictions of familial freedom, it is critical to examine the near-past slaveholding system to which they were reacting against. A cornerstone cruelty of American slaveholding was the legal disregard for what was otherwise sacrosanct: the relation between parent and child.[133] Though the influence of slavery's familial and sexual violence was rarely spoken aloud in the postbellum apprenticeship cases,

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130. *Id.*

131. *Id.*

132. *See* Giuliana Perrone, *"Back into the Days of Slavery": Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom*, 37 L. & HIST. REV. 125, 129, 144 (2019) (explaining that the civil disabilities of slavery pervaded past abolition, creating "lasting consequences for newly free individuals, which could make exercising those rights difficult or even undesirable" and citing apprenticeships as one such area in which the familial disabilities of slavery shaped postbellum claims).

133. Indeed, Blackstone taxonomized laws governing apprentices on the foundation of the laws of slavery. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, 413-15 (George Sharswood ed., 1866) (1765). *See* Lea VanderVelde, *Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment's Labor Vision Immediately After Its Enactmen*t, 27 WM. & MARY BILL RTS. J. 1079, 1082 (2019) ("As slavery was the platform of Blackstone's taxonomy, all other service relations were described as status modifications built upon this base of absolute subjugation.") This analogy was made explicit in congressional debates regarding the enactment of the Thirteenth Amendment in which congressmen analogized the laws of slavery to those governing apprenticeships. CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (remarks by Rep. White) ("A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves.").

close archival reading elucidates the heavy if often silent influence of slavery's familial violence on the freedpeoples' postbellum claims for kinship rights.

No law protected the kinship claims of enslaved people in the antebellum era.[134] While the free people of color in the Baltimore courtroom described by Martha S. Jones were often prevented from exercising their parental rights, enslaved parents in Maryland were excluded from such recognition explicitly. Marriages between enslaved people were denied legal recognition.[135] Enslaved parents had no legal right to the custody, care, or control of their children.[136] The denial of family recognition was not only an extraneous cruelty applied by a few sadistic masters; it was a constitutive element of enslaved status. In fact, as Nancy Cott observes, "[s]lavery and marriage were so incompatible that a master's permission for a slave to be (legally) married was interpretable as manumission."[137] In the sociolegal matrix of American slavery, Hortense J. Spillers writes in her canonical essay, "'kinship' loses its meaning, *since it can be invaded at any given and arbitrary moment by the property relations*."[138] Thus, Spillers notices, the legally recognized family became synonymous with freedom, as it existed only as a "mythically revered privilege of a free and freed community."[139]

In addition to family separation, slaveholders' assault on the familial lives of enslaved persons also took the form of pervasive sexual violence. Reports from the era describe a culture of sexual violence both intimate and extraneous; freedman William Thompson recalled a culture of sexual depravity in which slaveholders impregnated multiple generations of enslaved women before selling

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134. Du Bois, *supra* note 20, at 44 ("Sexual chaos arose from economic motives. . . . [T]here was not only no bar to illegitimacy, but an actual premium put upon it. Indeed, the word was impossible of meaning under the slave system.").

135. *See generally* Tera W. Hunter, Bound in Wedlock: Slave and Free Black Marriage in the Nineteenth Century (2017) (describing pervasive denial of legal protections to marriages between enslaved persons).

136. William Goodell, The American Slave Code in Theory and Practice: Its Distinctive Features Shown by Its Statutes, Judicial Decisions, and Illustrative Facts 114 (1853) ("In the slaveholding States, except in Louisiana, no law exists to prevent the violent separation of parents from their children, or even from each other." (quoting George M. Stroud, A Sketch of the Laws Relating to Slavery in the Several States of the United States of America (1827))).

137. Nancy F. Cott, Public Vows: A History of Marriage and the Nation 33 (2000).

138. Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 Diacritics 65, 74 (1987).

139. *Id.* Spillers is clear that the state denials of recognition of Black family formations did not banish "the powerful ties of sympathy that bind blood-relations in a network of feeling, of continuity." *Id.* Indeed, "the inviolable 'Black Family,'" formed, nurtured, and cultivated by enslaved people in spite of unceasing state violence, "remains one of the supreme social achievements of African-Americans under conditions of enslavement." *Id.*

them away down river.[140] Other freedmen described atmospheres of violation and cruelty in which incest and bigamy were routine occurrences,[141] in which slaveholders ordered enslaved people to copulate while they watched,[142] and in which girls as young as twelve or thirteen were forcibly assaulted and impregnated,[143] as well as other pervasive practices of violation and sexual torture.[144]

The reality of sexual violence under slavery is not captured in legal records because the rape of enslaved women was not recognized as a crime.[145] Rather, on the American slave plantation, the rape of enslaved Black women, as Saidiya Hartman explains, "existed as an unspoken but normative condition fully within the purview of everyday sexual practices."[146] Little legal or social consequence accrued to the perpetuators of this sexual violence. Indeed, the laws were positioned to shine in another direction entirely: state slave codes stipulated *partus sequitur ventrem*, according to which the enslaved status followed the mother.[147] Not only would a white slaveholder face neither criminal nor civil repercussions for his act, but he stood to profit from it.

These two forms of violence, familial separation and sexual violation, fed one another in a sickening cycle. The refusal to recognize familial ties amongst enslaved persons was one means of preserving Black women as sexually violable in

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140. Benjamin Drew, The Refugee: Or the Narratives of Fugitive Slaves in Canada 137 (1856) ("I knew a man at the South who had six children by a colored slave. Then there was a fuss between him and his wife, and he sold all the children but the oldest slave daughter. Afterward, he had a child by this daughter, and sold mother and child before the birth.").

141. William J. Anderson, Life and Narrative of William J. Anderson, Twenty-four Years a Slave 19 (1857) (calling the southern slave plantation "the worst place of incest and bigamy in the world").

142. Sam Everett, Louisa Everett, Pearl Randolph & Federal Writer's Project of the Work Projects Administration for the State of Florida, *Sam and Louisa Everett: Slave Interview, October 8, 1936*, *in* Narratives of Formerly Enslaved Floridians (1936).

143. The Federal Writers' Project, Slave Narratives: A Folk History of Slavery in the United States from Interviews with Former Slaves 434 (1941) (relaying the account of Hilliard Yellerday, who had been enslaved in North Carolina, and who reported that some enslaved girls "had children at the age of twelve and thirteen years old").

144. Johnson, *supra* note 70, at 170 (2013) (noting that "the choreography of service, surveillance, and space defined a landscape of sexual violence" in which physical punishment, sexual taunts, lewd language were all means of violence deployed to extract and extend the psychic torture of slavery amidst the landscape of labor).

145. On the slaveholding culture of sexual violence, see generally Owens, *supra* note 16. *See also* Harriet Ann Jacobs, Incidents in the Life of a Slave Girl 45 (1861) (noting that "there is no shadow of law to protect [enslaved girls] from insult, from violence, or even from death").

146. Hartman, *supra* note 70, at 85.

147. Jennifer L. Morgan & Partus Sequitur Ventrem: *Law, Race, and Reproduction in Colonial Slavery*, 22 Small Axe: Caribbean J. Criticism 1, 4 (2018).

slaveholding culture. Pervasive rape and forced copulation, in turn, scrambled the familial lines of enslaved people, rendering familial recognition more difficult. In this way, as Saidiya Hartman explains, the "various mechanisms of sexual domination—the repression of rape, the negation of kinship, and the legal invalidation of slave marriage—act[ed] in concert."[148]

The child whose case would change federal law was brought into being beneath such overlapping circles of violence. Elizabeth Turner was born to her mother, also named Elizabeth Turner, on October 18, 1856, likely in the bayside town of St. Michaels, Maryland.[149] She lived on the plantation of a white man named Philemon T. Hambleton, a wealthy resident of St. Michaels.[150] The first time an official record of Elizabeth Turner's existence surfaces is in an 1860 slave census schedule which lists a female child, listed as age five, recorded amongst the census taker's bureaucratic tally.[151] An *m* appears next to the child's age, indexing her as a mixed-race child.[152] Elizabeth Turner was thus born to a man who counted her among his chattel and to a mother who blessed her with her own first name.[153] Under slavery, only the former had any legal claim to the child.

Throughout the antebellum era, abolitionists protested slavery's persistent disregard of familial rights.[154] Antislavery publications from the era warned of families routinely separated and sold on the auction block, emphasizing slavery as a definitional destruction upon "the sacred right of marriage, and the parental relation."[155] Harriet Beecher Stowe declared the slavers' "outrage upon the family" to be "the worst abuse of the system of slavery" and "one which is more notorious and undeniable than any other."[156] In the halls of Congress, antislavery

148. HARTMAN, *supra* note 70, at 84.

149. *In re* Turner, 24 F. Cas. 337, 337-38 (C.C.D. Md. 1867).

150. Hambleton's death in St. Michaels was reported in 1878. STAR-DEMOCRAT, Dec. 3, 1878, at 3.

151. 1860 U.S. Federal Census—Slave Schedule, St. Michaels, Talbot County, Maryland 45 (on file with Nat'l Archives, Records of the Bureau of the Census; Series M653, Record Group 29).

152. The notion that Elizabeth Turner was the biological child of Philemon T. Hambleton was suggested by Harold Hyman. HYMAN, *supra* note 37, at 125 (1997).

153. When the elder Elizabeth Turner got her freedom, she moved to Baltimore and married and adopted her husband's surname Minoky. *In re* Turner, 24 F. Cas. 337, 337 (1867). When Elizabeth was freed and lived with her mother and stepfather in Baltimore, she too adopted the surname Minoky. The 1870 Census shows Charles, Elizabeth, and Elizabeth Manokey [sic] residing together in Baltimore. 1870 United States Federal Census, ANCESTRY.COM, https://www.ancestry.com/search/collections/7163 [https://perma.cc/K4EZ-CUUC].

154. Davis, *supra* note 15, at 318-20 (noting that the "devastating effect of slavery" upon Black families was among the "paramount concerns of the anti-slavery movement").

155. ANON. (STEPHEN SYMONDS FOSTER), REVOLUTION THE ONLY REMEDY FOR SLAVERY, *reprinted in* 1 Anti-Slavery Tracts, at No. 7 (Westport, Negro Univs. Press 1970) (1855-56).

156. HARRIET BEECHER STOWE, A KEY TO UNCLE TOM'S CABIN 323 (1853).

orators reported of children being torn from mothers, of wives separated from husbands, and of slaveholders impregnating the women they held as slaves.[157]

By the time emancipation finally arrived, antislavery advocates had succeeded in spreading the conviction that the abolition of slavery required an end to the familial and intimate violence which constituted it. An 1864 article in the *Anti-Slavery Reporter* covered the speech given by then-Governor Andrew Johnson to announce emancipation in Tennessee.[158] Addressing the Black residents in the crowd, Andrew Johnson promised an end to the sexual and economic forms of domestic servitude, promising the freedmen that "your wives and daughters shall no longer be dragged into a concubinage . . . to satisfy the brutal lusts of slaveholders and overseers!"[159] These promises were widely made and clearly spoken, yet as a constitutional matter, they were never fully vindicated. Amy Dru Stanley refers to this as the "paradox of the Thirteenth Amendment": that the gendered plight of enslaved women was widely discussed as a motivating cause for emancipation, yet once the amendment was ratified, the Thirteenth Amendment as a source of rights against the gendered forms of violence never came to pass.[160]

The battle over apprenticeships has not generally been remembered as a movement engaging sexual safety or reproductive autonomy.[161] Yet archival newspaper coverage reveals that many commentators at the time understood the apprenticeship issue as one interwoven with white paternity and the legacy of sexual violence.[162] Census data uncovered for this Note suggests that sexual violence under slavery was likely an unspoken background detail of the landmark

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157. CONG. GLOBE, 38th Cong., 2d Sess. 221 (1865) (remarks of Rep. Broomall); *see also* ROBERTS, *supra* note 56, at 96 ("Slavery's deprivation of family rights was a burning issue for the Reconstruction Congress as it drafted the Thirteenth Amendment prohibiting slavery and involuntary servitude and the Fourteenth Amendment protecting liberty and citizenship.").

158. *Vice-President Johnson on Emancipation in Tennessee*, 12 ANTI-SLAVERY REP. 282, 282 (Dec. 1, 1864) (recounting a November 1864 speech by then-Governor Andrew Johnson promising "*freedom*, *full, broad, and unconditional*, to every man in Tennessee").

159. *Id.*

160. Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights*, 115 AM. HIST. REV. 732, 735 (2010).

161. Most prolonged examinations of the apprenticeship system in Maryland can be found in FIELDS, *supra* note 32, at 148-56; GUTMAN, *supra* note 6, at 402-412; Fuke, *supra* note 7 and accompanying text (labor); Tani, *supra* note 35 (administrative constitutionalism); and Savarese, *supra* note 36, at 39 (early example of legal aid). None of these accounts engage the issue of white paternity in the apprenticeship context.

162. The proliferation of enslaved children of white, slaveholding fathers was referenced widely at the time, though rarely directly. See, for example, the writings of humorist David Ross Locke, who wrote the popular Nasby column, parodically mimicked a fictional ex-slaveholding rebel,

Thirteenth Amendment case; this discovery offers a historical root through which to glimpse an early vision of the Thirteenth Amendment as a promise which included an end to the sexual and gendered forms of violence which characterized American slaveholding. This history adds to the important legal scholarship of Michele Goodwin and others who seek to revitalize the Thirteenth Amendment as a source of sexual and reproductive rights for women.[163] The efforts of the freedwomen in Maryland and the culminating legal victory *In re Turner* help restore the memory of a moment in which the Thirteenth Amendment was understood to speak directly to the gendered and sexual forms of coercion inextricably bound up in practices of forced labor.

III. THE FREEDPEOPLE'S ANTI-APPRENTICESHIP MOVEMENT

This Part adds previously unstudied or understudied archival letters, newspapers, and court records to existing secondary scholarship to narrate how freedpeople in Maryland began the grassroots movement to abolish racialized apprenticeship laws in their state. Constitutional emancipation is sometimes remembered as a single event, but emancipation was made real through a prolonged series of legal, social, intimate, political, and physical struggles.[164] These

Petroleum V. Nasby, bemoaning the loss of his status of double-paternalism: "Her children are free—they are mine, likewise, but I can't sell 'em on the block to the highest bidder. Therein Linkin sinned—he violated the holiest and highest instinks of our nacher; he interposed a proclamashen atween father and child." Petroleum V. Nasby, *A Sam uv Agony,* CIVILIAN & TELEGRAPH, Dec. 7, 1865, at 1. For more on Locke, see Amanda Zimmerman, *Lincoln, Locke, and the Disagreeable Rev. Nasby*, THE LIBRARY OF CONGRESS BLOGS (Aug. 16, 2023), https://blogs.loc.gov/bibliomania/2023/08/16/lincoln-locke-and-the-disagreeable-rev-nasby [https://perma.cc/EUV2-8DMQ]. *Compare In Maryland*, DAILY PITTSBURGH GAZETTE, July 3, 1865, at 2 (reporting of a grandmother seeking help in filing a habeas petition to free her grandchildren, explaining that the slaveholder was the biological father of the children from whom she was trying to free them), *with* Letter from Thomas B. Davis, quoted in GUTMAN, supra note 6, at 404 (reporting of the children being kidnapped from white people and taken across the Chesapeake Bay, acknowledging but seeking to rebut the widespread belief that many of these children were the mixed race children of the putative apprentice masters, "[s]ome folks in Baltimore to see this letter would hint that it was [a] fathers interest manifested in young darkies. [But it] is not so, every one of them are Jet black.").

163. Goodwin, *supra* note 50, at 219 (2022) (noting that "at the heart of abolishing slavery and involuntary servitude in the Thirteenth Amendment was the forced sexual and reproductive servitude of Black girls and women . . . These issues were widely debated and part of common discourse").

164. *See, e.g.*, Rebecca Scott, *The Battle over the Child: Child Apprenticeship and the Freedmens's Bureau in North Carolina*, 10 PROLOGUE: J. NAT'L ARCHIVES 102, 102 (1978) ("It is by now a familiar observation that while slavery as a legal system ended abruptly with the ratification of the Thirteenth Amendment, social patterns were not as quickly changed."). Scott's distinction between the legal system and social pattern is typical of the historiography, but they may not be so clearly delineated. Both informed the other.

struggles occurred not in a single room in Washington, but in fields and storerooms and probate courtrooms and town halls across the South. The relevant legal actors were not only elected statesmen but everyday individuals who responded to the law with their own visions of justice. This case study contributes to popular constitutionalism and scholarship of demosprudence to document the means by which freedpeople, many of them illiterate and without access to official channels of economic or political power, succeeded in convincing a federal court to adopt their vision of the familial rights granted by constitutional emancipation.

On November 1, 1864, Maryland's new antislavery constitution took effect. To commemorate the earth-quaking event, Baltimore's mayor ordered three rounds of a five-hundred-gun salute.[165] But on the other side of the Chesapeake Bay, the morning of November 1 might have felt like any other for Elizabeth Turner and her mother. News of freedom traveled unevenly along Maryland's rural roads. If slaveholders knew of the contents of the new constitution, they were evidently often not inclined to inform the enslaved laborers of their new legal rights.[166] Even after learning of their free status, formerly enslaved men and women often had few avenues to alter their material conditions; many were forced to negotiate with their slaveholders to procure freedom for themselves and their children one by one. On the day she learned of her freedom, the formerly enslaved woman Jane Kamper confronted her former slave master William Townsend directly:

> [I] told Mr. Townsend of my having become free & desired my master to give my children & my bedclothes[.] he told me that I was free but that my Children Should be bound to [him]. he locked my children up so that I could not find them[.] I afterwards got my children by stealth & brought them to Baltimore. . . . My Master pursued me to the Boat to get possession of my children but I hid them on the boat.[167]

Striking is Townsend's seemingly instantaneous confidence that while emancipation might release Ms. Kamper, he could still retain her children with impunity. We cannot know how he arrived at this conviction. Was the unrepealed 1839 apprenticeship law already well known to planters? Or was Townsend acting on

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165. *Maryland a Free State*, Xenia Sentinel, Nov. 4, 1864, at 2, https://chroniclingamerica.loc.gov/lccn/sn85038244/1864-11-04/ed-1/seq-2 [https://perma.cc/2TDJ-6QMM].

166. Levi Jenkins Coppin, Unwritten History 91 (1919) (explaining that, for enslaved persons on the Eastern Shore of Maryland, "there was no one present with authority to say to the slave, you are free; so all were in suspense").

167. 2 The Wartime Genesis of Free Labor: The Upper South: A Documentary History of Emancipation, 1861-1867, at 519 (Ira Berlin, Steven F. Miller, Joseph P. Reidy & Leslie S. Rowland, eds., 2012).

a raw sense of entitlement? Whatever its source, white men and women across the state shared Townsend's impulse. As planters reluctantly and unevenly allowed Black adult laborers out of their bonds of imprisonment, they overtook Black children by force and law.[168]

The eight-year-old Elizabeth Turner slept two nights under this new sign, *freedom*, before she was once more indentured to the man who held her since birth. The court records describe the hazy circumstances under which Elizabeth and the other Black children of Talbot County were "collected together under some local authority, the nature of which does not clearly appear."[169] On November 3, 1864, Elizabeth was conveyed to the county Orphans' Court judge, where a prefabricated indenture form was briskly filled in and signed out, restoring the former slaveowner Philemon T. Hambleton's control until her eighteenth birthday.[170]

Letters to Union Army officials in the days after emancipation reported with alarm of children being carried in "several ox-cart loads to the Court House" where proslavery judges signed stacks of indentures to former slaveholders.[171] Thomas B. Davis, a lighthouse keeper, warned of "upwards of hundred young Negroes on the ferry with their old Masters draged [sic] away forseble [sic] from there [sic] parents for the purpose of Having them Bound."[172] In Talbot County, federal provost marshal Andrew Stafford described "a rush" by former owners to the Orphans' Court "to apprentice ex-slave children."[173]

It is difficult to know precisely how many children were bound out this way. Historians believe as many as ten thousand Black children in Maryland may have been re-enslaved via apprenticeship, reflecting roughly eleven percent of the state's total enslaved population.[174] Richard Paul Fuke estimates between three to four thousand children were apprenticed in the first few weeks of freedom

168. *See* Burnham, *supra* note 32, at 435 (noting that Black children were "the most vulnerable members of the community, and planters rushed to exploit their tentative economic and legal status by holding them as apprentices").

169. *In re* Turner, 24 F. Cas. 337, 339 (1867).

170. *Id.*

171. WALLACE, *supra* note 1, at 6.

172. GUTMAN, *supra* note 6, at 404.

173. *Id.* at 402.

174. ROBERTS, *supra* note 56, at 97 ("Of ninety thousand emancipated Black people in Maryland, some ten thousand were reenslaved under apprenticeship laws, typically to their former enslavers.").

alone.[175] In some counties, it was reported that former owners retained the children of two-thirds of the freed families.[176] Many more children would be indentured in the coming months and years, as the apprenticeship practice spread across the South.

The vast majority of children were apprenticed to their former slaveholders.[177] To justify the coercive indentures, planters deployed paternalist rhetoric, insisting on the inadequacy of Black parents' ability to care for their children, though they sometimes marked children as orphans without making any effort to search for living relatives.[178] The planters proffered concern for the children's wellbeing, but, as Fuke explains, the "planters' self-image of sacrificial concern was betrayed," both by the roughshod pace at which they bound out the children, and by their preference, not for children in need of care, but rather for the healthiest and strongest-looking teenage children who would immediately be put to work in the fields.[179]

Maryland's apprenticeship farce would soon be replicated across the South. As a border state, Maryland developed its brutal Black codes early. When the former Confederate states enacted their own, they followed Maryland's horrific lead. In 1865 and 1866, nearly every Southern state passed legislation to provide

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175. Fuke, *supra* note 7, at 63 (1988) (noting that "[w]ithin weeks of emancipation, nearly one thousand children were indentured in Anne Arundel and Calver Counties alone, and on the Eastern Shore, whites in Somerset, Worcester, Talbot and Dorchester Counties claimed the labor of 1,600 children"). Fuke notes that it is difficult to determine the precise number of Black children apprenticed in the weeks immediately following emancipation. Reports from the era vary wildly, but Fuke concludes that a "conservative estimate might range between 3,000 and 4,000 children." *Id.* at 63 n.29.

176. *Id.* (citing Testimony in Investigation of the Government of Maryland (1867), Records of the House of Representatives, Committee on the Judiciary, Record Group 233, National Archives, Washington, D.C.).

177. *Provost Marshal at Annapolis, Maryland, to the Commander of the Post of Annapolis; Enclosing a Letter from the Judges of the Orphans Court of Anne Arundel County to the Provost Marshal*, FREEDMEN AND SOUTHERN SOCIETY PROJECT (Nov. 30, 2023), https://freedmen.umd.edu//Curry.html [https://perma.cc/AB9L-EBV3] (noting that "Judges of the Orphans Court in and for the county of Anne Arundel. Md. have been binding out colored children to whoever might apply for them (but giving their former owners the prefference [sic])").

178. *See id.* (enclosing a letter to Captain Geo. W. Curry from three judges of the Orphans Court who assert that "we think it very probable our course has been misrepresented by some mothers. who think they can support themselves & family, their previous antecedents being enquired into by the court it is made too apparent their utter inability to properly provide & teach habits of industry & in such cases the court regards it as an act of humanity when proper employers can be selected for them").

179. Fuke, *supra* note 7, at 64.

for the "apprenticeships" of formerly enslaved children.[180] These postbellum laws typically gave preference to the former slaveowners and often explicitly specified that the masters must be white people.[181] Statutes passed in Alabama, Kentucky, Mississippi, and North Carolina utilized nearly identical language, each providing "preference to the former owner of said minor" so long as they were "suitable."[182]

Many state statutes also carried express provisions permitting the mother to bind out her children without permission from their father. Statutes in Georgia and Mississippi took care to clarify that Black children could be bound out by either their father or their mother, and that the assent of both was not required.[183] The statute in South Carolina specified that "illegitimate children" could be bound by the mother alone.[184] These statutes, somewhat anomalous at the time for the legal agency they conferred to mothers, were seemingly calibrated to lower the procedural hurdles in the case of absent fathers, whether due

180. See *infra* note 181, 183 (citing apprenticeship laws passed in Alabama, Kentucky, Mississippi, Georgia, Florida, North Carolina and South Carolina passed in the years after the post-emancipation apprenticeship practice arose in Maryland).

181. *See* Act of Feb. 23, 1866, ch. 120, § 1, 1865-66 Ala. Laws 128, 128 ("Provided, If the said minor be the child of a freedman, the former owner of said minor shall have the preference, when proof shall be made that he or she shall be a suitable person for that purpose . . . ."); Act of Feb. 16, 1866, ch. 621, § 4, 1866 Ky. Acts 49, 50 ("When the minor is a negro or mulatto, it shall be the duty of the court, in apprenticing such minor, to give the preference to the former owner of said minor, if the owner shall request it, provided he shall be a suitable person."); Act of Nov. 22, 1865, ch. 5, § 1, 1865 Miss. Laws 86, 87 ("Provided, that the former owner of said minors shall have the preference, when in the opinion of the court, he or she shall be a suitable person for that purpose."); Act of Mar. 10, 1866, ch. 40, § 4, 1866 N.C. Sess. Laws 99, 100 ("*Provided, always,* That in the binding out of apprentices of color, the former master of such apprentices, when they shall be regarded as suitable persons by the court, shall be entitled to have such apprentices bound to them in preference to other persons.").

182. *See* sources cited *supra* note 180.

183. Act of Mar. 17, 1866, § 1, 1866 Ga. Laws 6 (providing that "minors may, by whichever parent has the legal control of them, be bound out as apprentices to any respectable person, until they attain the age of twenty-one, or for a shorter period"); Act of Nov. 22, 1865, ch. 5, § 9, 1865 Miss. Laws 89 (providing that a father *or* mother may bind out an apprentice child).

184. Act of Dec. 21, 1865, §§ 15-16, 1865 S.C. Acts 292-93 (providing that a "child, over the age of two years, born of a colored parent, may be bound by the father, if he be living in the District, or in case of his death, or absence from the District, by the mother, as an apprentice, to any respectable white or colored person, who is competent to make a contract" and further stipulating that "[i]llegitimate children, within the ages above specified, may be bound by the mother").

to slavery's rupture of families, army enlistment of Black fathers, or white paternity.[185] In practice, however, meaningful consent from neither parent was required, as Union Army reports reveal that former slaveholders often bullied, coerced, or simply fabricated the indenture contracts and the judges of the Orphans' Court looked the other way.[186]

The cruelty of these laws was plain to any observer. Children as young as three or four could be removed from their parents and forced to labor in the home of a white ex-slaveholder for minimal compensation and no education until they reached the age of majority.[187] No prolonged legal analysis was required to conclude that these apprenticeships were, as one newspaper argued, "simply slavery under another name."[188] Yet the widespread enactment of these apprenticeship laws reflects Southern lawmakers' bald confidence, at the dawn of emancipation, that this practice, as a matter of state law, could flourish beyond constitutional reach.

The successful movement to strike down the apprenticeship system in Maryland can be sorted into three levels of scale. The most immediate response came from parents, friends, and local officials who registered complaints about the forced apprenticeships they witnessed. The second level occurred in the state courts, where judges publicly battled one another and eventually the state legislature over the legality of the child-apprenticeship contracts. At the highest

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185. *See also id.*; Act of Jan. 12, 1866, ch. 1,471, § 5, 1865 Fla. Laws 34 (providing that children under sixteen abandoned by their fathers "may be bound out by the Judge of Probate . . . but no such child shall be bound out unless with the assent of the mother, or unless she be unable or neglects to provide for its support and maintenance").

186. *See, e.g.*, Letter from Joseph Hall to Maj. Gen. Wallace (Nov. 26, 1864), *reprinted in* WALLACE, *supra* note 1, at 59, 60 (reporting that the Orphans' Court "intends[s] to bind out all children, whether their parents are willing or not"); Letter from Capt. George W. Curry to the Hon. J. of the Orphans Ct. for Anne Arundel Co. Md. (Nov. 18, 1864) (reporting of a large number of complaints by freed parents "that their children were being taken from them and apprenticed without their sanction and in direct opposition to their wishes"); Letter by J.M. McCarter, Dep't Provost Marshal, Caroline Cnty., Md., to Major William B. Este (Nov. 24, 1864), *reprinted in* WALLACE, *supra* note 1, at 35, 36 (reporting of "threats . . . used to induce [a mother] to give her consent" to the indenture of her children); Letter by Louis H. Wheeler to Maj. Gen. Lew Wallace (Nov. 30, 1864), *reprinted in* WALLACE, *supra* note 1, at 49, 49 (reporting of three children, ages 5, 7, and 9, illegally bound out by the Orphans' Court without the presence of the mother, who showed up an hour after the court had adjourned).

187. *See* Act of Nov. 17, 1855, ch. 6, § 10, 1855 Mo. Laws 190 ("When an apprentice is a negro or mulatto, it shall not be the duty of the master to cause such colored apprentice to be taught to read or write, or a knowledge of arithmetic, but he shall be allowed, at the expiration of his term of service, a sum of money, in lieu of education, to be assessed by the county court."); Act of Feb. 16, 1866, ch. 621, § 2, 1866 Ky. Acts 49 (providing that "if the apprentice be not a negro, the master shall have him taught to read and write, and common arithmetic, including the rule of three").

188. DAILY STANDARD, (Raleigh, North Carolina) Oct. 24, 1867 at 2.

level—the national platform—Congress and the Chief Justice of the Supreme Court ultimately intervened to settle the legal issue. The following Sections explore these three layers in turn, though their chronologies overlap, and each affected the others.

A. Grassroots Response

The first impulse of many mothers appears to have been to confront their former slaveholders directly and without state involvement. They did so at great personal risk. Lavina Brooks paid a livery stable keeper ten dollars to drive her to the farm on which her ten-year-old daughter was being held.[189] When she arrived on the property, the slaveholder marched her back to the road and told her that if she ever came back, she would be shot.[190] Hester Anthony was similarly warned by her former master that she would never have access to her children, and he would "blow their brains out" before returning them to her.[191] Henrietta Clayton traveled back to the Eastern Shore to gather her young son from the home of her former slaveholder, who said that he would not give up the boy unless the law forced him to.[192] When Francis Smallwood went to the home of a Mr. Alridge to inquire about her children, she was threatened with a beating.[193] Francis next wrote to her brother asking him to try again on her behalf, but warned him to bring "some officer or some white person" along.[194]

When direct efforts proved futile or too dangerous, freedwomen turned to the Union Army. They hired wagons or walked miles to register their affidavits with the nearest county provost marshals. The stories they told provoked horror from the Union Army officials who heard them. J.M. McCarter, Department Provost Marshal of Caroline County, reported three weeks after the new state constitution of "[n]ot one, two, but numberless cases of hardship and grievance" brought to his office by Black parents deprived of their children.[195] He feared for the children above all, who "are as much slaves as before[,] . . . doomed to grow

189. Letter from Lavina Brooks to Major William B. Este (Nov. 14, 1864), *reprinted in* WALLACE, *supra* note 1, at 10, 10.

190. *Id.*

191. Letter from Hester Anthony, *reprinted in* WALLACE, *supra* note 1, at 9, 9.

192. Letter from Henrietta Clayton (Dec. 6, 1864), *reprinted in* WALLACE, *supra* note 1, at 15, 15.

193. Letter from Francis Smallwood to her brother (Nov. 28, 1864), *reprinted in* WALLACE, *supra* note 1, at 34, 34-35.

194. *Id.* at 34.

195. Letter from J.M. McCarter, Dep't Provost Marshal, Caroline Cnty., Md., to Major William B. Este (Nov. 24, 1864), *reprinted in* WALLACE, *supra* note 1, at 35, 36.

up without education, and are as perfectly orphaned in the free State of Maryland as if no parents existed."[196]

When mothers could not travel, they enlisted literate friends or employers to write to army officials on their behalf. Emily Cuff, a formerly enslaved woman who escaped to Philadelphia, wrote to her employer to assist her in petitioning the Baltimore Provost Marshal to release her son, who she heard was sick and being treated cruelly by a white woman on the Eastern Shore.[197] Mary A. Barnes recruited her employer J.A. Peck to write to General Wallace on her behalf regarding her young daughter who was placed in jail by her former owners, Confederate rebels who "will not hesitate to hold her child in jail to gratify their hellish purposes towards the colored people."[198] A Black mother named Derinda Smothers enlisted white unionist Joseph Hall to write to the Freedmen's Bureau in Washington D.C. detailing her predicament: after attempting to free her son from an abusive ex-slaveholder, Ms. Smothers was imprisoned and charged with attempting to entice a child to abscond his apprenticeship, a crime under the Maryland statute.[199] Her story profoundly disturbed Hall, and he urged the D.C. officials to come investigate the scene for themselves, insisting that the situation was worse than he could possibly describe: "[A]ll I ask is an examination and you will find what I have stated is not as bad as it is."[200] Andrew Stafford, the federal provost marshal in Easton, wrote to his boss reporting on the stories he had heard from freedmen and freedwomen.[201] Children were gathered up and transported to the Orphans' Court judges, who labeled their parents "vagrants" and indentured the children "before they have enjoy[ed] liberty a single week—in many instances before they have even been permitted to leave their masters."[202] "Justice," Stafford wrote, "has become a mockery."[203]

A few records capture the strategic ways in which freedmen and freedwomen translated expansive kinship claims into the narrow confines of the law's sympathy. Freedwomen successfully asserted their parental rights irrespective of the presence of a male partner, a necessary claim in a world in which slavery and war

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196. *Id.*

197. Letter from Anne de B. Mears to Leopold Blumneburg, Provost Marshal, Baltimore (Nov. 14, 1864), *reprinted in* WALLACE, *supra* note 1, at 28, 28-29.

198. Letter from J.A. Peck to Gen. Wallace, *reprinted in* WALLACE, *supra* note 1, at 26, 26.

199. Letter from Joseph Hall, *supra* note 5; *see* MD. CODE art. 6, § 39 (1860), *reprinted in* 1 THE MARYLAND CODE: PUBLIC GENERAL LAWS (Henry C. Mackall ed., 2d ed. 1860) (making it a crime to "entice or persuade any negro apprentice to run away or abscond").

200. *Letter from Joseph Hall*, *supra* note 5.

201. *See* GUTMAN, *supra* note 6, at 402 (quoting Stafford's letter).

202. *Id.* at 403 (alteration in original).

203. *Id.*

had separated or reconstituted many family formations.[204] In other instances, where the parent did not possess a biological connection to the child, freedmen made claims for recognition of familial rights.[205] Another Bureau record tells of a veteran of the Union Army, Isaiah H. Bayne, who wrote to the Freedmen's Bureau requesting assistance in freeing his deceased wife's seven-year-old son from the white man who held him. Though the child, he acknowledged, was not his biological offspring, he nevertheless had always planned to "claim the child when I came home."[206] An especially wrenching letter in the Union Army file comes from Samuel Elbert, who wrote to Colonel Lyance out of concern for a twelve-year-old orphan girl held by former slaver Franklin Newman, a man Elbert knew "to be a very brutal man[.]"[207] Elbert got to know the girl when he worked on the property on which she was enslaved. The child's mother was separated from her and sold South when the girl was two years old. Several adults had gone to Newman to attempt to free the girl from his control, but Newman refused them. When Elbert arrived, Newman threatened him with a shotgun and said that Elbert "could not take her unless I could prove that she is my child and that I was married to her mother. That I could not do as it was not so[.]"[208] Biological parentage was doubtlessly the strongest legal claim Black adults had to intercede on behalf of children, but the constitutional kinship claims of the freedpeople exceeded the nuclear family.

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204. An official exchange between the Governor of Mississippi and his Attorney General illustrates this reorientation. On March 6, 1866, Governor Benjamin G. Humphreys wrote to Attorney General Charles E. Hooker to warn that complaints were "constantly reaching [the Governor's] office" regarding the administration of Mississippi's apprenticeship laws. One question weighing on the state was whether "the mother of a fatherless child under twenty-one years of age [is] entitled to its custody and service[.]" Hooker concluded that while the term "orphan" had "been adjudicated by the High Court of Errors and Appeals to mean a 'fatherless child,'" the "intent of the Legislature [was] to give to *either* parent the right to control the minor child when they have the 'ability,' coupled with the 'willingness,' to support the minor." *Important—Official Correspondence upon the "Freedmen's Apprentice Bill,"* MEMPHIS DAILY POST (Mar. 28, 1866) (emphasis added); *see also In Maryland*, PITTSBURGH POST-GAZETTE 2 (July 3, 1865) (reporting that a lawyer informed the grandmother that the children's father would have to sign the petition, to which the grandmother explained that the slaveholder was the biological father of the children from whom she was trying to free them).

205. This accords with Elsa Barkley Brown's description of freedpeople's "sense of shared responsibility" which "extended past blood ties to include in-laws and even fictive kin." *To Catch the Vision of Freedom*, *supra* note 22, at 67.

206. Notes on Letter from I.H. Bayne (May 4, 1868) (on file with the National Archives and Records Administration, M1906: Records of the Offices for the States of Maryland and Delaware, Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1872, Roll 37).

207. Letter from Samuel Elbert to Colonel Lyance (Nov. 29, 1864), *reprinted in* WALLACE, *supra* note 1, at 52 [hereinafter Elbert Letter]; *see also* GUTMAN, *supra* note 6, at 406 (extracting the same letter).

208. Elbert Letter, *supra* note 207, at 52.

These letters reflect only a few out of the bevy that were written. When Major General Lew Wallace submitted his file to Congress in January 1865, it contained the mountain of correspondence received by his office in regard to the apprenticeship system. This file would later be transcribed onto dozens of pages of letters from mothers, fathers, grandparents, and unrelated but disturbed witnesses describing the cruelty, threats, fraud, and deception of the slaveholders and the conditions of hunger, nakedness, and illness in which Black children were held as so-called apprentices.[209]

This outpouring provoked the Union general to action. On November 9, 1864, eight days after the new constitution took effect, General Wallace issued Order No. 112, placing freedpeople "under special military protection."[210] To execute this order, he appointed Major Este to oversee the needs of freedmen in the state. He directed the provost marshals of the county to hear and transcribe all complaints and to forward proof of wrongdoing to Major Este.[211] In the preamble to the order, General Wallace underscored the circumstances that made such extraordinary action necessary. First, local law officers were "so unfriendly to the newly made freedmen . . . as to render appeals to the courts worse than folly."[212] And second, he invoked the urgency of illuminating for formerly enslaved men, women, and children "the way to the freedom of which they have yet but vague and undefined ideas . . . ."[213] This order, General Wallace predicted, would only be necessary temporarily, until the state legislature met in January and remedied the deficiency in current law.[214]

But General Wallace was wrong twice over. The Maryland legislature did not pass legislation to protect Black children in the January session nor the sessions after those. And General Wallace was mistaken when he wrote that freedmen and freedwomen had only "vague and undefined ideas" about freedom. In the coming months and years, freedmen's and freedwomen's deep and abiding convictions as to freedom's true meaning would reshape the law.

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209. *See* WALLACE, *supra* note 1, *passim*.

210. General Order No. 112, Head Quarters Middle Dep't, Eighth Army Corps (Nov. 9, 1864), *reprinted in* WALLACE, *supra* note 1, at 4 [hereinafter General Order No. 112]. There is a misprint in the source, claiming that it was printed in 1865, but the accompanying documents and other corroborating references make it clear that Order 112 was issued on November 9, 1864.

211. *Id.*

212. General Order No. 112, *supra* note 210, at 4.

213. *Id.*

214. *Id.*

B. Contesting Apprenticeship in Maryland State Courts

On March 23, 1865, six months after emancipation, Maryland's new Republican-controlled legislature repealed the so-called 'free negro laws.'[215] This repeal removed many of the civil disabilities that had been put in place to constrain free people of color during the years of slavery.[216] The General Assembly did not, however, repeal the apprenticeship provisions. This omission was immediately noted and criticized by Black residents and those sympathetic to their cause. The *Baltimore Daily Commercial* reported sardonically that while the state legislature had "magnanimously *repealed* the '*free negro laws*,'" which many believed the state constitution already annulled, it seemed to have "overlooked" the negro apprentice laws.[217] In truth, no one believed the omission accidental. The legislature's silence sent a powerful signal to white residents: they could continue to hold Black children despite the General's protective order. Meanwhile, Black parents and advocates on the ground redirected their efforts toward a different branch of government.

It was not clear at first which courts might have jurisdiction to assess the validity of the indentures. In the days after emancipation, amidst the flood of complaints, Major General Wallace wrote to William Price, the United States District Attorney for Maryland, to request his assistance.[218] Wallace attached a letter from the lawyer of Mary Anne Barnes, a formerly enslaved Black woman whose daughter Julia was being kept in jail by hostile former slaveowners. "Is it not possible for law officers of the Government, to give assistance in cases like this matter?"[219] Wallace continued, "[I]s not the judicial interposition proper?"[220] Wallace received a curt reply from Federal District Attorney Price, instructing him that "[t]he case of Mary Barnes and her child, belongs to the State tribunal, exclusively."[221] D.A. Price directed the major general to seek redress in Howard County.[222] The problem, of course, was that it was precisely the judges in the rural county courthouses who were issuing these indenture contracts, rendering the possibility of judicial intervention unlikely.

A judicial advocate emerged from an unlikely place: the criminal court of Baltimore County. Hugh Lennox Bond was a noted abolitionist, one of the chief

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215. Act of Mar. 23, 1865, ch. 166, § 1, 1865 Md. Laws 306, 306.

216. *Id.*

217. *Negro Apprenticeship*, BALT. DAILY COM., Nov. 7, 1865, at 1.

218. *See* WALLACE, *supra* note 1, at 25-26.

219. *Id.* at 26.

220. *Id.*

221. *Id.* at 27.

222. *Id.*

framers of Maryland's antislavery constitution, and the President of the American Freedmen's Aid Union.[223] He rapidly gained a reputation for sympathy to the plight of Black apprentices. Soon Black parents were traveling from distant counties to file their habeas petitions in his court.[224] In the coming months, Judge Bond would order the immediate release of dozens of children bound in illegal apprenticeships. His judicial activism would earn him a national reputation as a defender of freedpeople's constitutional rights to family. His rulings would also spark the ire of Maryland's proslavery establishment. Two widely publicized cases from this era illustrate both the force and the limitations of state-court adjudication regarding the constitutionality of the apprenticeship system. These cases are briefly summarized below.

1. Habeas in Judge Bond's Courtroom

On May 18, 1865, Judge Bond heard the consolidated habeas petition that would generate his first major ruling on the apprenticeship question.[225] The *Baltimore Sun* noted the potentially large consequences of the case; it was "intended to determine for the entire class of negroes in Maryland, as well as their former owners, and all others interested, the important questions involved."[226]

Three sets of parents appeared before Judge Bond to challenge the indentures of their children, who ranged in age from three to fifteen years old.[227] The parents were represented by Archibald Stirling and Henry Winter Davis, two prominent Radical Republican lawyers in Baltimore.[228] Stirling and Davis advanced a claim identical to the one Mary Dare wrote seven months earlier in her

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223. *See The System of "Negro Apprenticeship" in Maryland.—Judge Bond's Decision*, 1 FREEDMEN'S REC. 105, 105 (1865).

224. The jurisdiction of the court was the subject of controversy; Judge Bond located his authority in the Maryland Constitution which "declare[d] it the duty of all judges to discharge from slavery, whether called by that name or another, all persons in Maryland upon *habeas corpus*, when that writ is applied for." *Id.* at 107. For the distance Black parents traveled to be heard by Judge Bond, see, for example, *Negro Apprenticeship in Maryland*, N.Y. HERALD, June 11, 1865, at 2, which hears habeas for John Perry, Jesse Dashiell, Samuel Dashiell and others of Somerset county; *Local Matters*, BALT. SUN, July 24, 1865, at 1, which reports the discharge of Jas Deale, aged nine years, indentured to W. James M. Dale, of Worcester County; and *The Colored Apprenticeship System*, BALT. SUN, July 17, 1865, at 1,, which reports on habeas petitions filed in Judge Bond's court from Somerset, Talbot, Dorchester, and Anne Arundel counties.

225. *Local Matters*, BALT. SUN, May 19, 1865, at 1.

226. *Id.*

227. *Id.*

228. *Id.*; *see* Fuke, *supra* note 7, at 72 ("In May 1865, Radical lawyers Henry Winter Davis, Henry Stockbridge, and Archibald Stirling Jr., brought the cases of several black children before the Baltimore Criminal Court.").

letter to her mother: the apprenticeships violated the twenty-fourth article of the new Maryland constitution that proscribed involuntary servitude.[229] They asserted that laws governing negro apprenticeships had none of the required elements of contract: the indentures were involuntary and allowed persons to be bought, reassigned, and sold.[230] They further argued that the provisions violated the constitution's proscription against race-specific legislation by presenting two sets of laws, one for white apprentices and a second for apprentices of color. Lastly, they asserted that the laws violated the thirty-sixth section of the third article of the state constitution, which banned the compensation of slaveholders, finding that many of the indenture contracts awarded the free labor of children to their former slaveholders "in consideration of having raised them."[231]

Counsel for the respondents insisted that Maryland's constitution was not as revolutionary as the petitioners claimed.[232] The new state constitution did not repeal all racial distinctions based on law; it merely moved enslaved persons into the legal status of free people of color. The antebellum apprenticeship laws which applied to free people of color before the war, thus, were unaffected by the new constitution. In support of this contention, the lawyers cited the debates of the recent congressional convention which showed, they argued, the delegates' intention to "ignore this system of apprenticeship."[233] The court reporter for the *Baltimore Sun* congratulated the parties on presenting oral argument "very able and elaborate on both sides."[234] At five o'clock, Judge Bond adjourned the court and reserved his judgment.[235]

Several days later, Judge Bond issued his ruling. His opinion reflected an expansive theory of the impact of constitutional emancipation on preexisting corridors of state common law. The constitution's declaration of equality, Bond pronounced, voided all state laws in conflict with it.[236] For while the laws of contract were once contorted to accommodate the state's tolerance for slavery, the new constitution required that judicial principles and common-law norms "must now tend to protect and defend the liberty of the person, as it formerly tended

229. *Local Matters*, *supra* note 225, at 1. *See also* Letter from Mary Dare to Dinah Reid, *reprinted in* WALLACE, *supra* note 1, at 74-75.

230. *Local Matters*, *supra* note 225.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *See Local Matters*, BALT. SUN, May 29, 1865, at 1.

to favor the masters of slaves."[237] For Bond, any laws with the purpose of "destroy[ing] the family relations among a portion of the freemen of the State," or depriving the parents of the labor and company of their children, were nullified vestiges of the state's now defunct laws of slavery.[238]

As to public policy concerns regarding orphans, indigent, and vagrant children, Judge Bond declared himself comforted by the existence of a general system of apprenticeship laws, that is, the provisions traditionally for white children. These laws, Bond commented, were "just and equitable" in requiring that the child apprentices be provided protection, education, and instruction in return for their service and labor, and could encompass children of all races.[239]

Lastly, Judge Bond addressed the respondents' objection as to his jurisdictional authority. While it was true that the indentures had been issued in a different county, Bond wrote, habeas corpus was a writ of right, and "any man in the State has a right to appeal to the first court or judge he comes to."[240] Besides, Bond continued, the new constitution imposed an affirmative duty on all judges to discharge slavery wherever they encountered it, "whether called by that name or another."[241] This choice of venue feature would become a critical tool for Black families in the coming months, as parents would strategically travel across the state to file their habeas petitions before sympathetic judges.[242]

With this, Judge Bond concluded his opinion. He ordered the ten children to be immediately discharged from the respondents' custody and conveyed to the homes of their parents. Bond's opinion reverberated across the country, and, as the *Sun* reported, it "excited considerable attention."[243] News of the decision was reported in newspapers in Maine, Boston, New York, and Washington.[244] The *Freedmen's Record* celebrated the enormous implications of the decision, predicting that it would alter the conditions of thousands of children: "It is as if the

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. See *supra* note 224.

243. *Id.*

244. *The System of "Negro Apprenticeship" in Maryland—Judge Bond's Decision*, *supra* note 223, at 105 (1865); *Negro Apprenticeship in Maryland: New Constitution Sustain Decision of Judge Bond*, N.Y. TIMES, June 4, 1865, at 3; *Colored Apprentices—the Law to be Finally Adjudicated*, NAT'L REPUBLICAN, July 11, 1865, at 1; *Negro Apprenticeship in Maryland*, BANGOR DAILY WHIG & COURIER July 15, 1865, at 1.

trade-winds should stop, and begin to blow in the opposite direction," the commentator optimistically announced, "every thing is reversed, and bends the other way."[245]

Habeas petitions became the primary legal tool by which people of color attacked unjust apprenticeships. Several features made habeas particularly appealing for disenfranchised litigants. Habeas was relatively inexpensive to file, it allowed filers choice of venue, and it permitted Black parents to file ex parte testimony even when the Maryland code barred people of color from testifying against white defendants.[246] Another feature of habeas made it particularly amenable as a tool of popular constitutionalism: it carried no right of appeal. In a state such as Maryland, where Confederate sympathizers still monopolized appellate courts, this provision was a critical democratizing element. Indeed, when the ex-slaveholder Samuel Coston attempted to appeal Judge Bond's consolidated habeas decision, he was summarily refused.[247]

2. Brown v. State

The extremity of the Maryland planters' desire to retain control of Black children exceeded their legal opponents' expectations, however. When the appellate court customarily declined to review Judge Bond's habeas ruling, the planters devised an alternate route to appellate review. They found their opportunity in an April 1865 criminal case *Brown v. State*. The case concerned a Black woman named Adeline Brown who was charged with unlawfully enticing and persuading a Black child, presumably her son, to run away from the white man who held him as a so-called apprentice.[248]

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245. *The System of "Negro Apprenticeship" in Maryland—Judge Bond's Decision*, *supra* note 223, at 105.

246. Act of Mar. 2, 1864, ch. 109, § 5(2), 1864 Md. Laws 136, 138 ("No negro or mulatto, whether slave or free, shall be admitted as evidence in any matter depending in any court of before any justice of the Peace, where any white person is concerned."). *See also* JONES, *supra* note 127, at 120 (noting that, in antebellum Baltimore, "[t]he writ of habeas corpus proved to be a tool by which black apprentices, and their families and friends, could bring those said to be wrongdoers into the courthouse. Their testimony alone, through what began as an ex parte, or one sided, claim, gave their words the force of law").

247. On July 17, 1865, Maryland Chief Justice Bowie dismissed Coston's appeal, refusing to review the habeas petition. The decision first noted "the reasoning of the adjudged cases in England for a century past" creating the "settled law" that a habeas order could not be a subject of appeal. The discretionary nature of the ruling, the fact-based nature of the question, and difficulty of presenting evidence, all confirmed the appellate court's refusal to review Judge Bond's decision. Coston v. Coston, 25 Md. 500, 500 (1866).

248. Like the fugitive slave laws which once terrorized enslaved persons and their allies, these statutes carried the threat of imprisonment for talking, in this case, to one's children. Brown v.

Adeline Brown was found guilty by a jury and sentenced to prison. Here the case ordinarily would have ended but for a conspiracy within the Maryland bar. It was reported at the time that proslavery advocates recruited Brown's defense lawyers to agree to appeal the decision.[249] The appeal appeared to have been a thinly disguised ruse, however; the only certified question asked the court to assess the legality of the Maryland negro apprentice laws broadly.[250] This was a clear "contrivance," commentators remarked at the time, to give the proslavery appellate court jurisdiction to create a binding precedent in favor of the apprenticeships.[251]

On November 1, 1865, the Maryland Court of Appeals delivered its decision in *Brown v. State*, affirming the legality of the negro apprentice laws in a clear repudiation of Judge Bond's prior decision. While a parent certainly has a right to the custody of her child, the court began, "it frequently happens that such child is an orphan, without the means of education or support," or is indigent, and such circumstances "render necessary or proper the hand and care of another to train him to habits of industry, furnish him suitable maintenance and education, and thus prepare him for the duties of life and the citizen."[252] A law manifesting such "beneficent ends" for the good of the child, the court further reasoned, "cannot be regarded as imposing involuntary servitude upon those who are carefully bound out in compliance with its terms and provisions."[253] The appellate court's opinion reflects how courts contorted rhetoric of paternalism and beneficence to further brutal systems of racial subordination after emancipation. This history instructs taking a cautious approach, as Margaret Burnham and Dorothy Roberts have argued, towards the child welfare justification when deployed to defend state practices that disproportionately sever families of color, as will be explored further in Part V.[254]

State, 23 Md. 503, 503 (1865) (providing the appellant's statement that "[e]nticing and persuading a negro apprentice to abscond, is made criminal, and punished as a misdemeanor or felony.").

249. *See Negro Apprenticeship*, *supra* note 217, at 1 (reporting that Judge Chambers searched for an indictment for harboring or enticing an apprentice and while the case "ought to have ended" there, he "got an agreement that the question of the apprentice laws should be considered alone on appeal, and the record went up").

250. *Id.* It was not lost upon the commentators that the court never should have had jurisdiction in the first place. The writer decried the court's usurpation of authority, but nevertheless predicted optimistically that the writ of habeas corpus will still be good law "in spite of this unjudicial dictum."

251. *Id.*

252. *Brown*, 23 Md. at 509.

253. *Id.* at 509, 511.

254. Burnham, *supra* note 32, at 439; ROBERTS, *supra* note 56, at 96-99.

Despite the unfavorable *Brown* ruling, Black parents in Maryland continued to leverage habeas to great effect. Freedpeople around the state persisted in traveling to file petitions in Judge Bond's courtroom, despite the expense and risk of such a trip.[255] Bond complied, issuing a steady stream of writs ordering the release of the kidnapped children.[256] These writs enraged George Vickers, Chairman of the Maryland Senate, who wrote to Bond demanding that he justify why he did not "feel bound to conform to the decision of the Court of Appeals upon this subject."[257]

Judge Bond was not cowed by Senator Vickers's ire. He replied with thin courtesy, acknowledging the "honor" of having received the letter, before contending that he could not "admit the right of a committee of the Senate to inquire of the judges of the courts the reasons for their judgements in cases which are or have been depending before them."[258] Thus he declined to comment on particulars, though he did remind the Chairman that "[t]he writ of *habeas corpus* is a writ of right. It is a cheap and swift process of the law, which guarantees the liberty of the citizen."[259] Bond stated defiantly, "The Criminal Court of Baltimore has issued, and will continue to issue, writs of *habeas corpus*, in every case where a party alleges illegal confinement, and states the facts required by the code in his petition."[260]

Back at the state capitol, the text of Judge Bond's letter was read aloud on the Senate floor, and a motion was put forth to declare the letter "disrespectful to the committee, and as a consequence equally disrespectful to the Senate."[261] Of this expressive motion, Bond appeared to have had no comment.

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255. The appellate court decision immediately had a devastating effect on at least one family. Mary Mathews had successfully freed her five children from the custody of Edward J. Boteler, of Anne Arundel County, on the strength of a judgment by Judge Bond. However, when Boteler learned of the *Brown* opinion, he rekidnapped the children and compelled them to work. After losing her children for a second time, Mary Matthews traveled back to Bond's courtroom to file her second writ against her same tormentor. Bond defied the appellate court and held Boteler in contempt, issuing an immediate order to discharge the children to the care of their mother and charge all costs to Boteler. *Habeas Corpus Cases Before Judge Bond—Negro Apprentices*, BALT. SUN, Dec. 7, 1865, at 1. Margaret Gray of Anne Arundel County also appeared in court that same season to request the release of her four children held by Joseph Jones. On her petition, Judge Bond reserved judgment. *Id.*

256. Parents in Kent and Cecil Counties obtained writs from Judge Bond against William McCauley, John Gale, and John F. Beels for illegal indentures of their children. *Correspondence with Judge Bond*, 2 FREEDMEN'S REC. 39, 39-40 (1866) [hereinafter *Correspondence*].

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

3. The Making of Judge Bond

In the legal arc of Maryland apprenticeship cases, it is tempting to cast Judge Bond as a singular hero. His wit, clarity, and determination to end the horrors of child apprenticeship certainly invites admiration.[262] Yet his singularity may also be a false constitutional memory: the apocryphal triumph of the lone judicial visionary who transformed the law through moral might alone. We miss a great deal if we flatten the complex and multipronged apprenticeship movement into the actions of a single individual.

Firstly, while Judge Bond's opinions materially improved the lives of freedpeople in Maryland, he carried regressive racial views. In speeches and letters, he parroted paternalistic talking points, insisting that freedpeople needed civilizing and warning that any form of financial reparations would lead to idleness.[263] And while he argued forcibly for Black Americans' full rights as citizens, he privately declared his own aversion to social integration. "Bond's speeches and writings," Richard Paul Fuke concludes, "make it clear that he had surprisingly little faith in or liking for the people he sought so hard to help."[264]

Professional progressivism and private racism is, of course, a familiar narrative, and one that has been told of more than one liberal judge.[265] The more interesting narrative, and perhaps the more useful one, is *how* a man partially blinded by prejudice nevertheless became an effective agent of progressive reform. In Fuke's careful biography of Judge Bond, Fuke observes Bond as a young man, talented but somewhat aimless, and above all eager for a purpose.[266] If Hugh Lennox Bond craved direction, he found it in the determination of the freedpeople he encountered. When Bond traveled to rural areas of Maryland, he met Black parents who walked ten or eleven miles after work to speak the names

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262. Richard Paul Fuke, *Hugh Lennox Bond and Radical Republican Ideology*, 45 J. S. HIST. 569, 573-74 (1979) (quoting a December 1864 *Liberator* article celebrating Bond as "one of the truest friends of freedom in the country" and an 1867 eulogy declaring Bond "one of the best men the world ever saw").

263. *Id.* at 577.

264. *Id.*

265. *See, e.g.*, Victor N. Baltera, Book Review, 102 MASS. L. REV. 99, 101 (2021) (providing an intellectual biography of Justice Harlan, the sole dissenter in *Plessy*, who "opposed federal emancipation as well as the post-war constitutional amendments and the 1866 Civil Rights Act"); Jerome McCristal Culp Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or, How Not to Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21, 24 (1994) (describing Justice Bradley's evolution from "an outspoken advocate of racial justice" to ultimately "develop[ing] a model of racial oppression and justice that left Black Americans outside the protection of the law").

266. Fuke, *supra* note 262, at 583-84.

of their children aloud to him in the hopes that he would help get them free.[267] He saw freedwomen standing in line in the rain for hours with infants in their arms[268] and elderly fathers who walked overnight to catch the judge at his hotel before his morning departure.[269] These are the unnamed men and women who molded Hugh Lennox Bond into the heroic figure he became. Indeed, "[i]t was as a soldier in this ideological battle," Fuke recounts, "that Bond found his calling."[270]

Over time, Judge Bond's courtroom swelled with plaintiffs driven by word of mouth. No records reveal how parents learned of Judge Bond, but we might imagine that the Black community in Maryland, tattered by war and domestic terrorism but nevertheless persistent and resourceful, passed Bond's name forward to one another in fields and side yards and dirt roads and ferry boats traversing the Chesapeake Bay.[271] Without the perseverance of freedmen and freedwomen to insist on filing their writs of right despite enormous obstacles, who provided the testimony and documentation and moral conviction that these cases required, Bond's star would not have shone so brightly.

The writs of Judge Bond, however, were not enough to defeat the Maryland apprenticeship laws alone. Individual habeas petitions were inadequate to free the thousands of children still held. Other efforts met middling success: state-court judges remained divided on apprenticeships.[272] A bill to reform the apprenticeship system was introduced and then left to languish.[273] Meanwhile, the months churned onward. Children separated from their parents at age five

267. *Movements in Maryland*, ZION'S HERALD & WESLEYAN J., July 25, 1867, at 118.

268. *Id.*

269. *Id.*

270. Fuke, *supra* note 262, , at 584.

271. FIELDS, *supra* note 32, at 144, 149 (noting the "[f]reelance violence" of white nightriders, the routine burning of Black churches, and other forms of extralegal racial violence targeting Black people in Maryland); *see id.* at 149 (in complaints regarding Maryland apprenticeships, "[f]reedmen showed a fine sophistication in their manner of seeking assistance").

272. On December 5, 1866, Judge Spence—a circuit judge in the heavily confederate Dorchester County—issued a ruling invalidating indentures of a large number of apprentices in the county. His decision was publicized in the local news. *See, e.g.*, *Telegrams*, EVENING STAR, Dec. 5, 1866, at 1 (reporting that "the decision was a most important one as it invalidates nearly all the indentures so hastily entered into when the act of emancipation took effect in Maryland"); *Negro Apprenticeship*, HERALD & TORCH LIGHT, Dec. 5, 1866, at 2; *News of the Day*, ALEXANDRIA GAZETTE & VA. ADVERTISER, Dec. 5, 1866, at 2; *Maryland Affairs*, NAT'L REPUBLICAN, Dec. 5, 1866, at 2; *Negro Apprenticeship in Maryland*, N.Y. DAILY HERALD, Dec. 11, 1866, at 10 (reporting that the "grounds" for Judge Spence's decision "were much the same as those taken by Judge Bond"); *Trouble in Maryland*, DAILY POST, Dec. 11, 1866, at 2.

273. *News of the Day*, BALT. DAILY COM., Jan. 17, 1866, at 1 [hereinafter *News*, BALT. DAILY COM.] (reporting that "[t]he bill to repeal certain sections of the code relating to negro apprentices, led to a considerable debate").

would soon be turning eight. Vocabularies would have budded in the intervening years; milk teeth lost and inches grown, precious years of bonding stolen from these families. But all indication in early 1867 suggested that the Maryland state government was doubling down on, not backing off from, its cruel apprenticeship system. In March of that year, the legislature passed an act singling out Bond's courtroom to restrict him and him alone from exercising "any jurisdiction whatever in any case involving the validity or legal effect of any contract or indenture of apprenticeship."[274] As avenues for justice appeared to narrow in the state government, Black parents increasingly set their sights on federal lawmakers.

C. Apprenticeship on the National Stage

The freedpeople who protested Maryland's apprenticeship laws succeeded in gaining the attention of Congress. When the Thirteenth Amendment was ratified in 1865, few on the national stage discussed its implications for apprenticeship laws. But by the time the Habeas Corpus Act was passed in 1867, it was widely understood to respond directly to the apprenticeship system.[275] The movement's success in transforming the issue from obscurity to one of national concern helps illustrate the discursive relationship between the grassroots efforts of freedpeople, state courts, and federal legislation.

As Black parents in Maryland were working to free their children by the emancipation clause of the state constitution, the Thirteenth Amendment was making its way through federal ratification. On December 6, 1865, the Thirteenth Amendment was officially ratified. It was not immediately clear the effect the amendment would have on the restrictive Black codes passing through Southern state houses. Proslavery legislators persisted in their conviction that the federal amendment had little power to void state laws governing labor, family, and contract.[276] When the Civil Rights Act of 1866 came up for a vote a few months later, the bill's central purpose was to settle this question: to give the federal government the authority to dissolve the network of state laws that kept

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274. Act of Mar. 20, 1867, ch. 144, 1867 Md. Laws 250 (providing that "the Criminal Court of Baltimore city and the Judge thereof . . . shall not have or exercise any jurisdiction whatever in any case involving the validity or legal effect of any contract or indenture of apprenticeship").

275. *A Bill Changing the Proceedings in Writs of Habeas Corpus*, CHI. TRIB., Feb. 4, 1867, at 1 (contemporaneous news coverage explaining that the Act will have the direct effect of making negro apprenticeship laws reviewable via habeas corpus).

276. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 51-52 (2004) (noting that "the pattern around the South was to reinstate de faco slavery, even after the Thirteenth Amendment ended de jure slavery," with the passage of "facially nondiscriminatory [black codes] . . . which riddled freed people's lives with onerous disabilities and burdens").

many freedpeople restrained in de facto statuses of bondage.[277] As the Act's authors praised the law, they emphasized not only the freedmen's right to free labor contracts, but also their constitutional rights to home and family. The law, proponents promised, would protect the freedmen's right "to be protected in their homes and family" as well as "the right to become a husband or father."[278] The rights of freed*women* to become mothers and spouses went undiscussed.

Advocates in Maryland closely followed the Civil Rights Act's slow progression through Congress. The law, a precursor to the Fourteenth Amendment, granted citizenship to all persons born in the United States and explicitly proscribed states from enforcing racially differentiated laws.[279] Black parents realized at the time that this law would be an essential tool to strike down the state apprenticeship laws. "In terms of southern apprenticeship practices especially," Farmer-Kaiser writes, the 1866 Act "offered black parents a great deal of hope."[280]

This hope was not of the passive sort. In 1866, three hundred of Baltimore's "most respectable colored people" wrote to President Johnson directly to ask him to sign the Civil Rights Act into law.[281] They detailed the horrors of the apprenticeship program and expressed their belief that this law would end the present status in which "[o]ur homes are invaded and our little ones seized at the family fireside, and forcibly bound to masters who are by law expressly released from any obligation to educate them in secular or religious knowledge."[282] Efforts to elicit Johnson's support failed, but the bill nevertheless passed over his veto a few months later.

These two pieces of legislation provided the legal framework necessary to permit a federal right of action to attack both the private actions of the indenture holders, under the Thirteenth Amendment, and the racialized apprenticeship laws, via the Civil Rights Act. But it was not clear by what means a federal judge might obtain jurisdiction to rule on a child in Elizabeth Turner's position, indentured as she was under the state's apprenticeship laws — for under existing habeas

277. STANLEY, *supra* note 27, at 55.

278. CONG. GLOBE, 39th Cong., 1st Sess. 42, 502 (1866); *see* STANLEY, *supra* note 27, at 56.

279. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (granting that all persons born in the United States are citizens and "shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens").

280. MARY J. FARMER-KAISER, FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION 123 (2010).

281. GUTMAN, *supra* note 6, at 411 (quoting the joint letter).

282. *Id.*

law, federal courts only had habeas jurisdiction over individuals held under federal law.[283]

This issue motivated a third and final act of Congress. In 1867, Congress expanded federal habeas authority to permit federal courts to issue habeas relief for any person held "in violation of the Constitution, or of any treaty or law of the United States."[284] The bill was viewed, William M. Wiecek explains, as a "means of enforcing the recently ratified Thirteenth Amendment" by giving federal courts enforcement abilities to attack all instances of freedpeople being held in slavery-like conditions.[285] As Senator Lyman Trumbull, one of the bill's sponsors, explained a year after its passage, the Habeas Corpus Act was intended to be "applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage."[286]

It was the stories and testimony of Black Americans that seemed to move Congress to act. That same year, the joint congressional committee on Reconstruction produced a report on the state of Reconstruction. In addition to the horrors of nightriders and the prevalence of random attacks, the witnesses testified that the "apprentice system has been greatly abused."[287] Captain J.H. Matthews of the 66th colored infantry told the committee of the spurious procedure through which white men dragged Black children before proslavery judges who were willing to "secure to him almost any freedman's child he may select."[288] The system they described reeked so potently with the stench of slavery that eventually Congress could no longer ignore it.

Meanwhile, the Black citizens of Maryland persisted in their local efforts. In January of 1867, Sarah Smith filed a successful habeas petition for the release of her child, Shadrach Iler, who had been held since emancipation by a slaveholder,

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283. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81-82, (granting habeas power to federal judges as "necessary for the exercise of their respective jurisdictions"). Ex parte Dorr, 3 Howard 103 (1845) (denying federal habeas relief to persons held under state law). See discussion in William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 533 (1970), which explains that the Judiciary Act of 1789 granted a "limited" habeas power to the federal government, one which "prohibited federal courts from issuing the writ to persons held in custody under state authority".

284. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385; *see also* Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1193 ("Before 1867, when Congress expanded federal habeas authority, federal courts issued 124 reported decisions in habeas cases, and all of these cases were understood to pose the same question raised by *Burford*—'what authority has the jailor to detain him?'").

285. Wiecek, *supra* note 283, at 583.

286. CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868).

287. H.R. REP. NO. 39-30, at 271 (1866).

288. *Id.* at 271, 144.

Abraham Cole.[289] The court granted her petition, ordering that Shadrach be released to his mother's care because the Orphans' Court had not followed the proper procedure when binding out the child.[290] Indeed, the court found that the child should not have been indentured because Ms. Smith had the means and desire to support her son and had never consented to the apprenticeship.

At the same time, children themselves protested the illegal indentures through perhaps the oldest method of labor protest: fleeing. In January of 1867, two Black boys made national news when they ran away from their Maryland apprenticeships to Washington, D.C., where they sought amnesty from their indentures.[291] In April, another boy, Carter Holmes, age twelve, escaped his apprenticeship and made his way to the Washington Freedmen's Bureau, where he testified to the cruelty of his captors.[292] He told of being struck by the mistress with a shovel when he could not fix a pot and of his own sense of injustice at being a child forced to work without receiving any education in return.[293] He declared himself "so tired of not receiving any compensation for [his] services — no clothing, no chance for school — nothing but *whippings*."[294] He begged the Bureau not to take him back but rather give him a chance to locate his parents, "for [he] ha[d] a mother and father . . . who would care for [him] if they knew where [he] was."[295]

The passage of the federal Habeas Corpus Act illustrates the rapid success of the Maryland parents' grassroots campaign. A year prior, the apprenticeship issue had gone virtually unmentioned in congressional debates. But in 1867, the plight of Black children and their parental advocates sparked sympathy and congressional action. As Clarke D. Forsythe explains, "Congress was specifically concerned with freedmen, or their children, held under apprenticeship laws."[296] An article in the *Chicago Tribune* a few days after the Act's passage reported that the President was on the precipice of signing a bill that would "materially" change the scope of federal habeas power.[297] The purpose of the Act was clear to

289. *Circuit Court for Baltimore County*, BALT. SUN, Feb. 2, 1867, at 1.

290. *Id.*

291. *See Our Washington Dispatches*, CHARLESTON DAILY COURIER, Jan. 17, 1867, at 1; *Washington*, MONROE J., Jan. 19, 1867, at 1; *General News*, GA. WKLY. TEL., Jan. 21, 1867, at 3.

292. Letter from Carter Holmes to Lieutenant Colonel William M. Beebe (Apr. 22, 1867), https://freedmen.umd.edu/Holmes.html [https://perma.cc/2RSL-JTHA].

293. *Id.*

294. *Id.*

295. *Id.*

296. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1113 (1995).

297. *A Bill Changing the Proceedings in Writs of Habeas Corpus*, CHI. TRIB., Feb. 4, 1867, at 1.

all: "The whole negro apprenticeship system," the Chicago commentator predicted, "may be reviewed under this bill."[298] All that was left to do now was to bring a test case. The following Part tells the story of the legal culmination of this movement: how Black parents' claims for familial rights were vindicated in the federal landmark decision *In re Turner.*

IV. *IN RE TURNER* (1867)

Nearly three years after the Maryland constitution abolished slavery in the state, the crisis of child apprenticeships reached the nation's highest judge. Chief Justice Salmon P. Chase granted a habeas petition to hear *In re Turner* while riding the Maryland Circuit.[299] The case represented the culmination of years of efforts by freedpeople in Maryland. Chief Justice Chase's final opinion adopted the constitutional arguments that had been made for years: that the provisions of the "negro apprenticeships laws" were incompatible with the constitutional guarantees of freedom.[300] The decision resounded across the South.

The habeas petition was brought by Elizabeth Turner's mother, Elizabeth Minoky (née Turner), via her husband and next friend, Charles Henry Minoky.[301] Elizabeth Minoky was freed with her daughter from a plantation on the Delmarva Peninsula. After her young daughter was reindentured against her will to their former slaveholder, Mrs. Minoky fled to Baltimore, where she wed Charles Henry Minoky and together they fought to free young Elizabeth.[302] In 1867, Mr. and Mrs. Minoky found their way into the office of Henry Stockbridge, a Baltimore lawyer recently hired by the Freedmen's Bureau to attack Maryland's apprenticeship laws.[303] The Minoky family was selected to bring a test case to the federal circuit to challenge the Maryland laws.[304] They filed the habeas petition in early October and Chief Justice Chase, the famous abolitionist and politician recently appointed Chief Justice of the U.S. Supreme Court, extended his circuit to hear it.

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298. *Id.*

299. *In re* Turner, 24 F. Cas. 337, 337 (C.C.D. Md. 1867).

300. *Id.* at 340.

301. *Id.* at 337.

302. *See id.* at 337-38.

303. Savarese, *supra* note 36, at 39. Henry Stockbridge was appointed by the Bureau to assist on apprenticeship litigation. Chief Justice Chase extended his circuit explicitly to hear this case.

304. *Id.* It is unknown how Elizabeth Turner's petition was selected.

On October 15, 1867, all parties appeared before the Chief Justice.[305] Henry Stockbridge presented the indenture document of Elizabeth Turner, issued by an Orphans' Court judge in the days after emancipation. The mass-printed form left blanks for the Orphans' Court clerk to fill in the names, dates, and details of indenture. Through roman type and faded cursive, the document provided that Elizabeth Turner would "learn the art, trade, or mystery *of a house servant*" and "dwell with and serve the said *Philemon T. Hambleton* from the day of the date hereof, until the *eighth* day of *October* in the year eighteen hundred and *seventy four.*"[306] In exchange for ten years of service, the contract stipulated that Philemon T. Hambleton would pay Elizabeth's mother "ten dollars at the end of her sixteenth year, twelve dollars and fifty cents at the end of her seventeenth year, and fifteen dollars to the girl at the end of her term of service."[307]

Before Chief Justice Chase, the petitioners asserted three grounds for habeas relief: firstly, the conditions of indenture violated the Thirteenth Amendment's proscription against involuntary servitude; secondly, the race-based provision of the Maryland apprenticeship law violated the 1866 Civil Rights Act; and thirdly, the apprenticeship could not be defended under the Maryland laws for white apprentices because Elizabeth's conditions did not adhere to the existing requirements for white apprentices, which prohibited binding out children without their parents' consent and required masters to provide education in reading, writing, and arithmetic.[308] Thus, the petitioners concluded, the apprenticeship itself and the state law which governed it violated both the Thirteenth Amendment and the Civil Rights Act.[309]

Turner was among the first Thirteenth Amendment cases heard by a federal judge.[310] It was also understood at the time to be an important test of the constitutionality of the 1866 Civil Rights Act, which many criticized as an impermissible extension of federal power.[311] Given the import of the case, what happened next surprised everyone. When Chief Justice Chase asked for reply by the

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305. *Before Chief Justice Chase—Important Opinion—Discharge of a Colored Apprentice Under the "Civil Rights Law,"* BALT. SUN, Oct. 17, 1867, at 1 [hereinaster *Before Justice Case*].

306. Indenture of Apprenticeship at 1, *In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (Nov. 3, 1864) (on file with Md. State Archives, Rsch. & Educ. Projects, MSA SC 5463-1-8c).

307. *Id.*

308. *In re* Turner, 24 F. Cas. 337, 339-40 (C.C.D. Md. 1867).

309. *Id.* at 339.

310. Another major Thirteenth Amendment ruling was issued several months prior by Chief Justice Chase's colleague sitting for the Kentucky Circuit Court. *See* United States v. Rhodes, 27 F. Cas 785, 785 (C.C.D. Ky. 1866).

311. *See* Savarese, *supra* note 36, at 42 (noting that, at a moment in which "opponents of Radical Reconstruction vehemently challenged both the scope of the Thirteenth Amendment and the

respondent, Philemon T. Hambleton rose to say he was unrepresented by counsel. Chase asked Hambleton if he wished to keep Elizabeth Turner as an apprentice, and if he did, whether procuring a lawyer would be well advised.[312] Hambleton replied that he wished to keep the child, but that he "did not feel sufficient interest in the case to spend any money on it" and was "satisfied to leave the case with the court."[313] Chase responded that the questions raised were grave, and that he "should prefer to be advised by the argument of counsel" representing the respondent. He determined to adjourn until the following morning at nine o'clock to provide the respondent, or any other person so interested, the opportunity to appear.[314] The ten-year-old child whose fate hung in the balance was ordered to sleep in the custody of the court that night.[315]

One can only imagine how long the distance from evening to morning may have felt within the mind of a child waiting to hear her fate. When the court reopened the next morning, all were present except the respondent, Philemon T. Hambleton. Unsure how to proceed, Chief Justice Chase asked the petitioner's lead counsel, Henry Stockbridge, whether "any argument would be presented" by the respondent.[316] Mr. Stockbridge replied that he had been informed that Mr. Hambleton had left the city, and he was unaware of any lawyer appearing in his stead.[317]

Hambleton was a well-off planter from a respected family.[318] It is difficult to believe that frugality alone kept him from hiring counsel, particularly given the financial ramifications of a loss.[319] The existence of a biological tie between

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constitutionality of the Civil Rights Act, which still awaited the backing of the Fourteenth Amendment, the apprenticeship case would test the strength of an incipient constitutional revolution").

312. *Turner*, 24 F. Cas. at 338.

313. *Id.* at 338-39.

314. *Id.* at 339.

315. *Id.* The *Baltimore Sun* reported that the child Elizabeth Turner was kept in the custody of General Gregory overnight. *Before Chief Justice Chase*, *supra* note 305, at 1.

316. *Before Chief Justice Chase*, *supra* note 305, at 1.

317. *Id.*

318. *Baltimore Markets*, STAR-DEMOCRAT, Dec. 3, 1878, at 3 (obituary for Hambleton describing him as "an old and respected citizen of St. Michaels"); *see also 1860 U.S. Federal Census - Slave Schedules Talbot County*, at 45 (revealing large property holdings).

319. The original opinion mistakenly ordered the petitioner to pay fees. *Turner*, 24 F. Cas. at 340. Chief Justice Chase corrected the error in a subsequent ruling, instead ordering all legal fees to be paid by Hambleton. Letter from Salmon P. Chase to James W. Chew, Clerk for the Dist. of Md. (Nov. 1, 1867) (on file with Md. State Archives, Rsch. & Educ. Projects, MSA SC 5463-1-80).

Hambleton and the child may offer one explanation of his otherwise strange behavior at court.[320] Perhaps Hambleton realized that testifying himself, or hiring a lawyer to argue on his behalf, would risk the revelation of details he preferred to keep concealed. Perhaps he resolved that night to surrender the child but preserve the secret, and thus retreated back across the Chesapeake Bay.[321]

Any speculation as to Hambleton's sudden departure was not discussed on the record. Instead, Chief Justice Chase proceeded with the hearing. He declared himself regretful that he had "been obliged to consider [the case] without the benefit of any argument in support of the claim of the respondent to the writ."[322] Nevertheless, Chase continued that he had "considered the case with care" and an "earnest desire" to reach the right conclusions and was now prepared to hand down his opinion.[323] His decision rested on five propositions which, Chase posited, together decided the case. The first two concerned the meaning of the Thirteenth Amendment which had not yet been interpreted against apprenticeships. Chase ruled that the apprenticeships were properly characterized as involuntary servitude, thereby in violation of the Amendment's first clause.[324]

Next, Chief Justice Chase assessed the Maryland laws against the Civil Rights Act. The Act, enacted a year and a half prior, promised all citizens the "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[325] Maryland's separate provisions for white children and Black children clearly violated the Act, which plainly proscribed such racial distinctions in law. Lastly, Chase assessed the constitutionality of the Civil Rights Act. The second clause of the Thirteenth Amendment, Chase reasoned, comfortably provided Congress with the necessary authority to pass the Act which in turn nullified contracts before or after its enactment. Chase

320. *See infra* notes 132-134 (discussing paternity); *see also* NELL IRVIN PAINTER, SOUTHERN HISTORY ACROSS THE COLOR LINE 34 (2d ed. 2021) (noting that "[i]n the interests of preserving patriarchy, victims of incest, like victims of wife abuse, were abandoned by law and sacrificed to the ideal of submission").

321. Nell Irvin Painter has discussed southern white aristocrats' skills at "keeping secrets and preserving appearances." PAINTER, *supra* note 320, at 34. We might understand Hambleton's overnight exodus here as one more example of such archival concealment. On the Southern memory wars, see generally DAVID BLIGHT, RACE AND REUNION (2002), for a discussion of how the role that slavery had played in the Civil War was reimagined in the war's aftermath to allow for reconciliation between the North and South.

322. *Turner*, 24 F. Cas. at 339.

323. *Id.*

324. *See id.*

325. *Id.*

summarized with resounding clarity: "Colored persons equally with white persons are citizens of the United States."[326] With this conclusion, the Chief Justice ordered the immediate discharge of Elizabeth Turner from the custody of Philemon T. Hambleton.[327]

The consequence of the case was immediately felt. Portions of the opinion were reprinted in newspapers across the nation. The *Philadelphia Inquirer* declared the opinion "of great importance," predicting that it would, "if enforced, liberate every apprenticed negro similarly held in Maryland, of whom there are at present several thousand."[328] The *Alexandria Gazette and Virginia Advertiser* celebrated that "the practical result of this decision is that all those indentures are invalid, and all the colored apprentices held under them, several thousands in number, are freed from their bonds and remitted to the care and control of their parents."[329] The *Daily Standard* predicted that the decision "will virtually put an end to the infamous apprenticeship system of Maryland, which in fact is simply slavery under another name."[330]

It is difficult to assess how closely Justice Chase's holding reflected the evolving general opinion against the apprenticeship practice. There is some evidence that, even before the Circuit Court ruling, Black parents and their allies had already begun to "change the wind" regarding attitudes towards the apprenticeship practice.[331] The *Baltimore Sun* reprinted the returns of the Freedmen's Bureau records from May 1866 tallying 3,281 apprentices of color.[332] By the time the *Turner* decision was handed down, the Bureau estimated that about 2,300 of these children had already been discharged, some by habeas petitions to Judge Bond, but most "were discharged by their masters, under the influence of the Bureau, or upon being notified by parties that the court would be appealed to if they refused."[333] General Edgar M. Gregory, Freedmen's Bureau Commissioner for Maryland, reported in April of 1867, six months before the decision, that "the system has begun to yield to the continual pressure" brought by the Bureau and

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326. *Id.* at 340.

327. *Id.*

328. *From Baltimore: Important Decision by Chief Justice Chase*, PHILA. INQUIRER, Oct. 17, 1867, at 1.

329. *News of the Day*, ALEXANDRIA GAZETTE & VA. ADVERTISER, Oct. 17, 1867, at 2.

330. DAILY STANDARD, (Raleigh, North Carolina) Oct. 24, 1867, at 2.

331. "Changing the Wind" comes from Lani Guinier and Gerald Torres's influential essay, quoting Reverend Jim Wallis. Guinier & Torres, *supra* note 18, at 2740.

332. *Before Chief Justice Chase*, *supra* note 305, at 1.

333. *Id.*

independent litigants.[334] A *Baltimore Sun* article a few weeks before the *Turner* decision bemoaned the negative attention on the Maryland apprenticeship system, reporting that "[t]here is little disposition . . . in the State now to receive such apprentices on any terms."[335] Papers with Confederate sympathies downplayed the impact of the decision, reporting that white slaveholders had already voluntarily ceased the practice. Several months after the decision, the *Aegis* reported that white masters had already "been annoyed with writs and processes" to such an extent that "scarcely any persons will take these children under any circumstances."[336] When covering the *Turner* decision, the *New York Times* acknowledged that "[w]e all rejoice to hear that this Maryland girl is released by Judge Chase's mandamus from doing involuntary duty as a housemaid," yet the commentator warned that extreme cases erased the educational and social value of apprentices, declaring that "it is one of the worse features of our social system that there is such a repugnance to apprenticeship among the growing community."[337]

Nevertheless, the federal court opinion had an immediate and forceful effect. As word of Chief Justice Chase's opinion spread, parents streamed into the Freedmen's Bureau offices to register official complaints for the release of their own children. The record books of the Bureau for the following year are crowded with the agent's neat script recording the complaints and outcomes in quick succession:

> Zacharia Bowers of Port Tobacco, Charles Co. Md. complains that George Shields of same place holds his two daughters against their consent. Letters sent as above. Case settled and children released.[338]
>
> Ellen Brown of Dorchester Co. Md. complains that Benjamin Taylor of same place holds her three children against their consent. Letters sent as above. Case settled and children released.[339]

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334. W.A. Low, *The Freedmen's Bureau in the Border States*, *in* RADICALISM, RACISM, AND PARTY REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION 245, 247 (Richard O. Curry ed. 1969) (quoting Record Group 105, Maryland, report by Edward Ketchem, Apr. 11, 1867).

335. *The New York Times on Maryland Affairs*, BALT. SUN, Sept. 4, 1867, at 2.

336. *Negro Apprentices*, AEGIS, Dec. 27, 1867, at 2.

337. *Remnants of the Slave System—The Laws of Apprenticeship*, N.Y. TIMES, Oct. 18, 1867, at 4.

338. Freedmen's Bureau Illegal Apprenticeship Complaints Record #5 (n.d.) (on file with Edward H. Nabb Rsch. Ctr. For Delmarva Hist. & Culture, Salisbury Univ., Enduring Connections: Exploring Delmarva's Black History).

339. *Id.*

> James Harris of Locust Grove, Kent Co. Md. complains that James Williamson of same place holds his two children against his consent. Letters sent as above. Case settled and children released.[340]

If test cases such as *In re Turner* concentrate diffuse political and social conflicts into a limited frame of literary-like drama, the record books of the Freedmen's Bureau reflect what happens in the dissipating *after*. Row after row of tight script reflect the repetitive bureaucratic mechanics through which freedmen and freedwomen insisted that the court declaration be translated into material action.

Justice was not immediate for all families. As historian Barbara J. Fields narrates, "The moribund system of apprenticeship lingered on" in Maryland even after the favorable ruling in *Turner*.[341] Complaints of illegal indentures in the freedmen's bureau records appeared through 1870, and as of 1876, the state legislature had still neglected to officially remove the voided apprenticeship statutes from its lawbooks.[342]

Nevertheless, historical evidence suggests the vast majority of Maryland apprentices were freed within a year of Justice Chase's opinion. In his analysis of the Maryland freedmen's bureau records, historian Richard Paul Fuke finds that most apprentices of color were released by the summer of 1868. Fuke approximates that about two hundred apprentices remained indentured, suggesting, by conservative estimate, that over 90% of apprentices had been released from their indenture contracts by that date.[343] Though other means of racial violence and labor exploitation remained, the unique cruelties of the apprentice system were largely dismantled in Maryland by the end of the decade.

To the reported disappointment of Chief Justice Chase, Hambleton did not appeal the ruling up to the Supreme Court.[344] As a result, *Turner*'s immediate holding was confined to the circuit in which it was issued.[345] Yet, the Chief Justice's full-throated rejection of the apprenticeship system resonated beyond the state. A celebratory article in the *Philadelphia Inquirer* predicted that the decision would spread across the country, as it "will teach the ex-slaveholders that by no artifice can they evade the obligations of the Constitution, that slavery is utterly dead, and that by no trick or subterfuge can the plain intentions of the people of

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340. *Id.*

341. FIELDS, *supra* note 32, at 154.

342. *Id.*

343. Fuke, *supra* note 7, at 73.

344. HYMAN, *supra* note 37, at 130 (noting in his biography of Justice Chase that the Justice "expected and wanted appeals from the loser in *Turner* and in other related lawsuits to go to the Supreme Court").

345. *Id.* at 163 ("[B]ecause *Turner* was not appealed to the Supreme Court, his opinion affected only his circuit.").

the United States be violated."[346] A mournful confederate-sympathizing paper in Mississippi carried the same message, declaring *Turner* "a blow to all apprenticeships of that character," predicting that it "would abolish all apprenticeships" across the country.[347]

Indeed, *Turner* did appear to hasten the demise of apprenticeship systems across the South. Four months after *Turner*, a father in Delaware brought a habeas petition under the Civil Rights bill to free his daughter from her indenture. The case, the *Delaware Tribune* reported, was "similar to applications recently heard in Baltimore before Chief Justice Chase."[348] The *Turner* decision made it "very evident that the [Delaware] Legislature must revise our apprenticeship laws and make the stipulations in all indentures the same for blacks as for whites."[349] Some states, such as North Carolina, preceded *Turner* in removing racial distinctions from its apprenticeship laws. The North Carolina legislature amended its statutes following a skeptical ruling by the state supreme court in January of 1867.[350] In the years after *Turner*, the trend appeared to accelerate: Arkansas removed racial distinctions from its apprenticeship laws in 1868,[351] Mississippi did so in 1870,[352] and Texas repealed its racialized apprenticeship laws in 1871.[353]

A. Understanding Turner*'s Impact on the Law*

It is often difficult to identify precisely and credit the influence of a popular social movement on a federal court's ultimate ruling. Lani Guinier and Gerald

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346. *Civil Rights*, PHILA. INQUIRER, Oct. 18, 1867, at 4.

347. *Apprenticeship*, CLARION-LEDGER, Oct. 22, 1867, at 2.

348. *The Civil Rights Bill: What is Involuntary Servitude? A Case Before Judge Hall*, DEL. TRIB., Feb. 13, 1868, at 3.

349. *Id.*

350. *See* ZIPF, LABOR OF INNOCENTS, *supra* note 33, at 102-105 (citing *In re Ambrose*, 61 N.C. 91, 91 (1867)).

351. ARK. CONST. of 1868 art. XV, § 13 (removing racial language from the apprenticeship statute); *cf.* ARK. CONST. of 1864 art. V, § 1 ("Nor shall any indenture of any negro or mulatto hereafter made and executed out of this State, or if made in this State, where the term of service exceeds one year, be of the least validity, except those given in case of apprenticeship.").

352. An Act to Repeal Certain Laws Relating to Slaves, Free Negroes and Mulattoes and Freedmen, and for Other Purposes, ch. 10, 1870 Miss. Laws 73; *see also* An Act for the Protection of Apprentices and Minor Children, ch. 120, § 3, 1870 Miss. Laws 375 (requiring masters to provide all apprentices with medical care and some degree of education, and voiding all indentures wherein children were apprenticed without consent of parents).

353. Act of May 13, 1871, ch. 92, § 1, 1871 Tex. Gen. Laws 90, 90, *repealing* Act of Oct. 27, 1866, 1866 Tex. Gen. Laws 61.

Torres have introduced the concept of demosprudence to articulate the dialectical ways in which social movements and courts influence each other to interpret the law.[354] The Maryland anti-apprenticeship movement provides a powerful illustration of the "recursive relationship" between the activism of ordinary people and legal holdings.[355] When Mary Dare wrote to her mother in the first days of Maryland's emancipation, she advanced an interpretation of the state constitution's proscription against "involuntary servitude" beyond what any court had yet held.[356] Three years later, her conviction had permeated popular opinion and, eventually, a circuit court opinion, which interpreted identical language from the Thirteenth Amendment in the same way Mary Dare had years before.[357]

It is easier, from our position in the present, to trace change through the official channels of power—the legislative revisions and doctrinal developments. Yet we miss a great deal if we ignore the atmospheric ways by which ordinary people contribute to the "change in wind;" how their persistent contestation, through formal and informal means, assist in reframing the terms of the debate, advancing new constitutional understandings, and ultimately, converting written holdings into durable change.

V. RESTORING THE MEMORY OF *TURNER* TO OUR PRESENT LEGAL ORDER

By the end of the nineteenth century, *In re Turner* would become calcified in our nation's memory as an archetypal case of de facto slavery. Harold Hyman notes, "Nearly every other federal and state judge who in the latter 1860s considered issues arising from the Thirteenth Amendment and Civil Rights Act agreed substantially with [Justice Chase's] *Turner* stand on civil contract matters."[358] Even as subsequent rulings have shrunk Thirteenth Amendment doctrine, *Turner* remains good law. Justice Miller's emaciated reading of the Reconstruction Amendments in *Slaughterhouse* still gave a nod to "the case of the apprentice slave, held under law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus" as an example of a clear, near-definitional Thirteenth

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354. Guinier & Torres, *supra* note 18, at 2749.

355. *Id.* at 2756.

356. Historian Barbara J. Fields explains that the apprenticeship system "outlived its usefulness to the former owners who had at first seized eagerly upon it." FIELDS, *supra* note 32, at 153.

357. Mary Dare was interpreting the state constitution, though because the language in the emancipating article was identical to the language of the Thirteenth Amendment, we might observe the similarity of the reasonings. See discussion *supra* note 89.

358. HYMAN, *supra* note 37, at 130.

Amendment violation.[359] Ten years later, in the *Civil Rights Cases*, the Supreme Court yet again reached back to Maryland and held up the apprenticeship cases, in dicta, as an example of the sort of law the Equal Protection Clause was clearly and properly designed to attack.[360]

Yet as *Turner*'s citation lingered, its legal meaning dwindled. The anti-apprenticeship movement had an enormous and immediate impact on the children and families victimized by the brutal laws. But over time, the boldness of the Maryland mothers' constitutional vision of familial freedom has largely been lost in the sea of the United States Reports. Supreme Court interpretations of the Thirteenth and Fourteenth Amendments reflect frail husks of the robust constitutional visions articulated during Reconstruction. Constitutional cases regarding familial rights rarely if ever reference the experience of freedpeople after the Civil War.[361] Yet, as Peggy Cooper Davis has argued, the antislavery human rights tradition of Reconstruction sits available for use; we might now restore the neglected voices from the past to inform future claims.[362]

This final Part outlines three arenas in which the anti-apprenticeship movement's history may inform present social and legal movements: current efforts to articulate a child's constitutional right to familial integrity; the grassroots movement to end racial discrimination within the child welfare system; and longstanding attempts to vindicate women's and children's right to be free from domestic violence as a constitutional right. Across these various movements, *Turner* provides ongoing relevance. Of course, history need not be the sole or even primary modality through which to argue for the justness of these claims in the present. But the anti-apprenticeship movement provides one point of orientation as our nation continues to struggle to live up to the promises of emancipation.

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359. Slaughter-House Cases, 83 U.S. 36, 69 (1872) (referencing "the case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus" to illustrate the Thirteenth Amendment's applicability to such instances of servitude). *But see* Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1637-38 (2001) (characterizing *Turner* and *Rhodes* examples of the early expansive reading of the Thirteenth Amendment which was soon abandoned by the courts); Tani, *supra* note 35, at 1621 ("In the short term, the *Turner* decision was of modest value to freed people. It was an important statement of law, but enforcement required resources, institutional capacity, and political will, all of which were in short supply in the late 1860s.").

360. 109 U.S. 3, 43 (1883) (explaining that the Fourteenth Amendment was intended to expand Congress's power to intervene in state laws regarding "Apprentice, Vagrant, and Contract regulations").

361. See *infra* Section V.A and notes 294-300 (citing major parental rights cases, none of which mention the Reconstruction Era nor the Thirteenth Amendment).

362. DAVIS, *supra* note 52, at 142-48.

A. A Child's Right to Familial Integrity

Turner provides a valuable historical anchor for ongoing efforts to articulate children's constitutional rights to familial integrity. Familial due-process doctrine largely assesses rights from the perspectives of the parents.[363] Two landmark cases, *Pierce v. Society of Sisters* and *Meyer v. Nebraska*, located within the liberty rights granted by the Fourteenth Amendment the right of the individual to "direct the upbringing and education of children under their control."[364] In the last century, parental rights have enjoyed a hallowed place in substantive due process, declared "perhaps the oldest of the fundamental liberty interests recognized by this court,"[365] and hailed to be "established beyond debate as an enduring American tradition."[366] This doctrine has furthered the parental rights of religious minorities,[367] the parental rights of unmarried fathers,[368] and the parental right to exclude third parties from visitation.[369]

Yet the question of a child's reciprocal right to familial integrity has been less clearly defined. While several circuits have found that the right exists,[370] and scraps of Supreme Court dicta seem to agree,[371] the Supreme Court has never

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363. John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 51 (2014) ("[T]he Supreme Court has almost always granted the rights of the family to the parents.").

364. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("Without doubt, [the liberty interest guaranteed under the Fourteenth Amendment] denotes . . . the right of the individual to . . . establish a home and bring up children.").

365. Troxel v. Granville, 530 U.S. 57, 65 (2000).

366. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

367. *Id.* at 234-35.

368. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

369. *Troxel*, 530 U.S. at 72-73.

370. *See* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 282-84 (2021) (explaining that the Second, Fourth, Fifth, Seventh, Ninth and Tenth Circuits have all found that a child possesses an independent right to family integrity and citing, among others, Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) (recognizing "the child's interests in his family's integrity and in the nurture and companionship of his parents"); J.B. v. Washington Cnty., 127 F.3d 919, 925 (10th Cir. 1997)).

371. Santosky v. Kramer, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without

explicitly recognized such a right, nor decided what level of scrutiny it might trigger.[372]

Turner reflects a moment when the constitutional rights of children were briefly articulated. Legal historians largely remember the Thirteenth Amendment and the 1866 Civil Rights Act as granting parental rights to freedpeople. But it is notable that in *Turner*, it is the *child*'s, not the parent's, constitutional right that was at issue. In other words, it was Elizabeth Turner's right to be free from conditions approximating involuntary servitude that placed her back at home with her mother.

Developing a child's right to familial integrity would provide a useful tool for advocates seeking to end some of the worst abuses of our present system: the disparate separation of poor families and families of color. In a recent article in the *Harvard Civil Rights-Civil Liberties Law Review*, Shanta Trivedi argues that a "key strategy for reforming [child welfare] systems is to explicitly recognize and encourage the assertion of a child's independent constitutional right to family integrity."[373] A child's interest is particularly vital in civil proceedings in which a parent has been found unfit and thus unable to assert their own liberty interest in parental control; in such instances, the family members' interest in familial integrity may never be considered without a party to assert it.[374]

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some showing of unfitness . . . .'") (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

372. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (noting that the Court "ha[s] never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship"); *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.") (citation omitted). *See generally* Trivedi, *supra* note 370, at 281 (tracing how the Court has either hinted at or not foreclosed the possibility of a child's constitutional interest in familial relationship with her parents with no mention of the scrutiny it might entail); Shereen A. White, Ira Lustbader, Nicole Taykhman, Elissa Glucksman Hyne, Makena Mugambi, Jill Hayman, Asha Menon & Marisa Skillings, *Fighting Institutional Racism at the Front End of Child Welfare Systems*, CHILD.'S RTS. 23 (May 15, 2021), https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf [https://perma.cc/9GGL-S4FV] ("While this fundamental liberty interest has long been recognized by the courts, the level of scrutiny triggered by a violation of the right to family integrity is not settled.").

373. Trivedi, *supra* note 370, at 271.

374. *See id.* at 270.

Elizabeth Turner and the movement that surrounded her provides one possible historical anchor for present-day efforts to vindicate this right.[375] As Peggy Cooper Davis has argued, the antislavery abolitionist tradition considered familial autonomy to be a core constitutional right.[376] *Turner* adds to this argument, demonstrating that the child's right to the care and company of her mother lives already in our constitutional history and tradition.

B. Challenging Racial Discrimination in Child Welfare Through Grassroots Methods

The freedpeople's movement to end apprenticeships provides a valuable blueprint for current efforts to eliminate racial violence from the child welfare system. The Maryland case study illustrates the potency of a movement led by impacted individuals to reveal and abolish racial discrimination within American family regulation.

The data reveals harrowing racial disparities in our current child welfare system. The vast majority of children removed from homes are removed on charges of neglect, not physical or sexual violence, which many policy experts observe as the effective criminalization of poverty.[377] Numerous studies have revealed that impoverished families of color are subject to additional oversight,[378] severed at disproportionate rates,[379] and face more punitive consequences.[380] More than

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375. It is worth noting that in some cases this right may resonate with recent trends in giving constitutional recognition to functional parenthood, not rooted in biology per se but in the mutual bonds and affection of a child and her caretakers. *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 322, 330 (2023).

376. DAVIS, *supra* note 52, at 10, 112 (arguing that abolitionists "regarded denial of family liberty as a vice of slavery" and that "[t]he Reconstruction Congress directly addressed the abolitionists' insistence that former slaves, and all other citizens, be secure in the parental relation").

377. *Id.* (noting that removals for unfitness frequently serve to punish poverty).

378. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017) (analyzing 2003-2014 data from national repository for child maltreatment reports to CPS in all 50 states, District of Columbia, and territories and finding that Black children had the highest lifetime prevalence of maltreatment investigations at 53.0%, followed by 32.0% for Hispanic children and 28.2% for white children).

379. Kathryn Maguire-Jack, Sarah A. Font & Rebecca Dillard, *Child Protective Services Decision-Making: The Role of Children's Race and County Factors*, 90 AM. J. ORTHOPSYCHIATRY 48, 59 (2020) (evaluating 3,619,387 child-investigations and finding that the odds of out-of-home placement were 15% higher for Black children, 23% higher for American Indian/Alaskan Native children, and 43% higher for multi-racial children).

380. Kimberly M. Bernstein, Cynthia J. Najdowski & Katherine S. Wahrer, *Racial Stereotyping and Misdiagnosis of Child Abuse*, 51 AM. PSYCH. ASS'N, JUD. NOTEBOOK MONITOR ON PSYCH., 35 (2020) (finding disproportionate abuse diagnoses based on race of child).

one in ten Black children will be forcibly removed from their parent's home before reaching the age of eighteen.[381] Black and Native children are almost twice as likely as white children to have both parents' rights terminated by the state.[382] Such disparities have persisted for decades despite numerous reform efforts.

Today's efforts to reform the family regulation system face both political and legal hurdles. In her recent book, Dorothy Roberts draws a clear throughline between the system of family separation under slavery and postbellum apprenticeship laws and our present child welfare system, arguing that "[r]egulating and destroying Black families—in addition to Latinx, Indigenous, and other impoverished families—in the name of child protection has been essential to the 'ongoing white supremacist nation building project.'"[383] But racial discrimination in the child welfare system has largely gone unrecognized by courts.[384] Our present withered civil-rights jurisprudence requires a clear showing of racially discriminatory purpose—a difficult standard to meet, particularly in the child welfare context in which the state's performance of concern for the needs and safety of children exists as a virtual trump card.[385] Policy efforts offer perhaps a more likely avenue for reform, but there, too, meaningful change has proven illusory.[386]

In 1864, Black parents also confronted a law written through the obfuscating language of alleged benevolence. Apprentice masters and Orphans' Court judges pretended to act on behalf of the children, claiming they were rescuing children

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381. ROBERTS, *supra* note 56, at 29.

382. Hina Naveed, *"If I Wasn't Poor, I Wouldn't Be Unfit,"* HUM. RTS. WATCH (Nov. 17, 2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare [https://perma.cc/MT8H-VEBQ] ("Black children are almost twice as likely to experience investigations as white children and are more likely to be separated from their families.").

383. ROBERTS, *supra* note 56, at 33 (quoting Mariame Kaba).

384. White et al., *supra* note 372, at 25 (noting that Equal Protection challenges to racial discrimination in the child welfare system are "few[] and far[] between"). *But see* People United for Child., Inc. v. City of New York, 108 F. Supp. 2d 275, 280, 296 (S.D.N.Y. 2000) (alleging that New York City violated the Equal Protection Clause through racial discrimination in the child welfare system).

385. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (holding that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

386. Mical Raz, *Family Separation Doesn't Just Happen at the Border*, WASH. POST (Jan. 30, 2019), https://www.washingtonpost.com/outlook/2019/01/30/family-separation-doesnt-just-happen-border [https://perma.cc/L8D2-QR3S] (characterizing the American child welfare system since the 1970s as one which "pits children's rights against parental rights, leading to swift removal and a push for termination of parental rights").

of color from absent parents and unfit homes.[387] It was the testimony and relentless advocacy of Black parents that made the lie of this rhetoric impossible to ignore. The walking women persuaded the Union Army officials of the injustice occurring in Orphans' Court courtrooms across the state; their stories convinced the Army provost marshals that "the spirit of the apprentice law has been very generally disregarded,"[388] and their testimony forced the recognition that the Orphans' Courts were operating as though "the new [constitution] was only . . . a bogus affair."[389] In these confrontations, the parents' firsthand accounts forced government agents to acknowledge what they might have otherwise ignored: the vast gap between the law's alleged purpose and the reality of its implementation. A gap of constitutional proportions.

As lawyers search for solutions to the problem of racial discrimination within the child welfare system, the Maryland movement reminds that compelling legal arguments often grow from the stories of those directly impacted. Through "incorporating new voices," Siegel observes, it becomes "possible to tell new law stories."[390] Indeed, an enormously potent element of the present movement to abolish family policing is the advocacy and leadership of system-impacted individuals. Groups such as The Coalition for Families Against Child Separation, JMAC for Families, Parent Legislative Action Plan, and Parents Advocating Collectively for Kin utilize grassroots methods led by parents impacted by familial separation. These coalitions of parents engage in multiprong advocacy, collaborating with lawyers, social workers, academics, and community organizers to advocate for policy changes. These organizations recognize the power of storytelling to reduce stigma and raise awareness. For example, JMAC for Families, a nonprofit coalition of impacted people and advocates, identifies storytelling as a key pillar of the organization's advocacy work, explaining that "[w]e are working to change the narrative around the so-called 'child welfare system' by amplifying

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387. Steven F. Miller, *Provost Marshal at Annapolis, Maryland, to the Commander of the Post of Annapolis; Enclosing a Letter from the Judges of the Orphans Court of Anne Arundel County to the Provost Marshal*, FREEDMEN & S. SOC'Y PROJECT (Nov. 30, 2023), https://freedmen.umd.edu/Curry.html [https://perma.cc/JB2B-WFTJ]. (featuring a letter from apprentice-holders complaining that their "course has been misrepresented by some mothers, who think they can support themselves & family" but that, to the contrary, "the court regards it as an act of humanity when proper employers can be selected for [their children]").

388. Steven F. Miller, *Commander of the 3rd Separate Brigade, 8th Army Corps, to the Headquarters of the Middle Department and 8th Army Corps, Enclosing a Circular by the Brigade Commander*, *in Freedmen and Southern Society Project*, FREEDMEN & S. SOC'Y PROJECT (Nov. 30, 2023), https://freedmen.umd.edu/Lockwood.html [https://perma.cc/XPU4-DBRF].

389. Letter from Dep't Provost Marshal J.M. McCarter to Fredman's Office, *in* WALLACE, *supra* note 1, at 36-37.

390. Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1200 (2023).

the experiences of people who have been directly harmed by family policing."[391] JMAC for Families supports mothers in speaking out via media outlets about their own experiences facing investigation, discrimination, and retaliation in the child welfare system.[392] Their stories make the reality of racial injustice in the child welfare system painfully clear.

C. Towards a Thirteenth Amendment Right to be Free from Domestic Violence

The biographical facts underlying *In re Turner* also invite us to reconsider the Thirteenth Amendment's reach within the hierarchy of the family. Thirteenth Amendment jurisprudence was limited by an 1893 case *Robertson v. Baldwin*. The case upheld stringent punishments for violating labor contracts for seamen, reasoning that certain "exceptional" contexts of military and maritime service lived beyond the Amendment's purview.[393] Oft-quoted dicta in *Robertson* stray beyond the maritime context to reason additionally that "the [Thirteenth] amendment was not intended to . . . disturb the right of parents and guardians to the custody of their minor children or wards."[394] Post-*Robertson*, Thirteenth Amendment jurisprudence holds that the Amendment protects against involuntary servitude in factories and fields, but it does not reach into the private home. The invariable result of *Robertson*, as James Gray Pope explains, is that the domestic sphere is preserved "as a zone where services can be coerced free from Thirteenth Amendment scrutiny."[395]

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391. *What We Do*, JMAC for Families, https://jmacforfamilies.org [https://perma.cc/C6XT-7YL5].

392. *See* Rachel Holliday Smith, *What to Do When Children's Services Comes to the Door*, The City - NYC News (Oct. 5, 2023), http://www.thecity.nyc/2023/10/05/childrens-services-acs-rights-parents-children [https://perma.cc/6SGE-3YBY]; Roxanna Asgarian, *The Case for Child Welfare Abolition*, In These Times (Oct. 3, 2023), https://inthesetimes.com/article/child-welfare-abolition-cps-reform-family-separation [https://perma.cc/Y6Z9-TTRJ]; Michael Fitzgerald, *Prominent New York Court Official Fired on Eve of Testimony About Child Welfare Issues*, Imprint (Aug. 4, 2023), https://imprintnews.org/top-stories/prominent-new-york-court-official-fired-on-eve-of-testimony-about-child-welfare-issues/243426 [https://perma.cc/U5FV-6VBH].

393. Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

394. *Id.* at 282. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 944 (1988) (citing *Robertson* in support of the proposition that the Thirteenth Amendment was not intended to apply to children, wards, or sailors).

395. James Gray Pope, *The Thirteenth Amendment at the Intersection of Class and Gender*: Robertson v. Baldwin*'s Exclusion of Infants, Lunatics, Women, and Seamen*, 39 Seattle U. L. Rev. 901, 903 (2016).

But *Turner* suggests that this too is a false constitutional memory. The facts underlying *Turner* reveal the plain reality that the Thirteenth Amendment necessarily reached past the doorways of the private home, for it was often within the home and the bedroom and the knots of the slaveholding family in which many Black Americans were kept enslaved.

This inconvenient fact was loudly denied in the halls of Congress. Much has been made of the lawmakers' feverish, and somewhat paradoxical, insistence that the Thirteenth Amendment would not alter the status of parent over his child or husband over his wife.[396] But contemporaneous commentary surrounding the apprenticeship system uncovered for this Note illustrates a quietly-observed contradiction at the time: the Thirteenth Amendment certainly did change the status of some parents, namely it had significant implications for the white father over the mixed race children he attempted to keep enslaved.[397]

This plain reality may offer an alternative foothold from which to think through what our Constitution promises domestic dependents. Twentieth-century efforts to vindicate the rights of women and children in the home have been largely unsuccessful. Cases such as *DeShaney v. Winnebago*, which denied that the Fourteenth Amendment provides a right to protection from the violence of private actors even where state officials were aware of such risk,[398] and *United States v. Morrison*, which struck down the civil-rights remedies granted by the

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396. Senator Sumner's initial proposed version of the Thirteenth Amendment, based on the French Revolution, declared that "all persons are equal before the law, so that no person can hold another as a slave." He withdrew this language after criticism by his adversaries that such language would render her "equal to her husband and as free as her husband before the law." CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864). For discussion on this exchange see Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights*, 115 AM. HIST. REV. 732, 743-44 (2010) ("Sumner withdrew his phrasing, bowing to the will of the Judiciary Committee. Yet in that closing colloquy, abolitionists had come to link marriage with bondage in dissenting from principles of constitutional abolition inspired by revolutionary human rights doctrine, inadvertently revealing that the amendment's bearing on the badges of woman's slavery was anything but clear."); *see also* Vandervelde, *supra* note 103, at 457 ("Cowan appears to protest too much, though. The fact that some members worried that the term was applicable to family settings suggests its meaning lay somewhere between restricting it to Black slaves and extending it to include family relations.").

397. *See, e.g.*, *A Sam uv Agony*, CIVILIAN AND TEL., Dec. 7, 1865, at 1; *The Apprentices*, PITTSBURGH POST-GAZETTE, July 3, 1865, at 2.

398. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191, 195-96 (1989).

Violence Against Women Act as passed by Congress,[399] appear to evaporate constitutional claims just before the threshold of the family door, at least when a white father resides inside.

Several scholars have suggested that the Thirteenth Amendment may provide the affirmative right to safety that has been denied from substantive due process claims. Akhil Reed Amar and Daniel Widawsky have argued that the Thirteenth Amendment commands the state to act affirmatively to prevent the abuse of children.[400] The amendment, the scholars contend, was intended to apply to enslaved children "whether or not the 'master' is a blood relation of the 'slave' . . . and whether or not the enslavement is officially sanctioned by state law."[401] Other scholars have suggested that the Thirteenth Amendment provides a constitutional justification for women's claims against gender violence, such as the civil remedies struck out of the Violence Against Women Act,[402] or as a guarantor of bodily autonomy.[403]

Such arguments have been criticized by numerous scholars. Richard Posner scolds Amar and Widawsky for interpreting the phrase involuntary servitude by analogy, warning that "[t]o treat constitutional terms metaphorically is . . . to remove any textual check on constitutional interpretation."[404] Jamal Greene joins in, writing that while "there is no conceptual problem with using slavery as a metaphor," Amar and Widawsky "do not make a persuasive case that the Thirteenth Amendment's language was intended to be metaphorical."[405]

But familial-violence-as-slavery was not metaphorical for Elizabeth Turner, nor for the many children similarly situated. It was a literal description. If the Thirteenth Amendment freed these children, and it is indisputable that it did, then it necessarily freed them from the redundant logics of white paternalism, lest they simply be held in slavery by another name. As one lawyer explained in an 1865 newspaper article covering the Maryland apprenticeships: "[T]his old

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399. United States v. Morrison, 529 U.S. 598, 600-02 (2000) (striking down the civil-rights remedy of the Violence Against Women Act as an unconstitutional extension of Congress's powers under the Commerce Clause).

400. Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1365 (1992).

401. *Id.*

402. Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1146 (1998).

403. *See, e.g.*, Monica Vazquez, *The Thirteenth Amendment: A New Take on Abortion Rights*, COLUM. POL. REV. (Sept. 22, 2022), https://www.cpreview.org/blog/2022/9/the-thirteenth-amendment-a-new-take-on-abortion-rights [https://perma.cc/5DMR-2TTV]; Goodwin, *supra* note 163, at 191-98, 219.

404. RICHARD A. POSNER, OVERCOMING LAW 212 (1995).

405. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1743-44 (2012).

unnatural 'natural relation' of owner and father at the same time has been broken up by the new constitution."[406]

Yet, just what the antislavery Constitution owed daughters such as Elizabeth Turner was never satisfyingly articulated in a court of law. A network of legal, social, and political pressures swelled up to prevent such questions from reaching official records. *In re Turner* was arguably the closest the court got, yet the respondent Hambleton preferred to submit the question without argument, surrender the appeal, and slip back across the bay, rather than disclose the underlying facts.[407] The effort to exclude such details from official records was often even more explicit; the same year that *In re Turner* was decided, the Maryland assembly repealed the remaining provisions of its Black Code, yet it left in place a provision to prohibit Black women from testifying against the white fathers of their children.[408]

Such censures from the past artificially constrict our constitutional memory today. If the reality of slavery's sexual and familial violence had been consistently entered on the record, our nation's courts might be forced to conclude that the Thirteenth Amendment included the child's right to be free from domestic violence as well as forced labor. Or that a woman's right to be free from forcible pregnancy was a matter of constitutional relevance. The Maryland apprenticeship movement provides one glimpse into the means by which these historical potentialities have been excised from our constitutional memory. When the *Dobbs* Court asserted that a woman's right to bodily autonomy is "not deeply rooted in the Nation's history and traditions," the Court was not reporting a historical reality so much as advancing an epistemic commitment as to which voices, which traditions, form worthy wellsprings of our constitutional heritage. The Court's majority patently did not consider what the Reconstruction Amendments meant to the two million or more women whom the Amendments were designed to liberate, women for whom constitutional freedom was inextricable from familial and bodily autonomy, as Michele Goodwin, Peggy Cooper Davis, and Reva Siegel have argued.[409]

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406. *The Apprentices*, *supra* note 398, at 2.

407. HYMAN, *supra* note 152, at 163 (explaining that "[b]ecause *Turner* was not appealed to the Supreme Court, [Chase's] opinion affected only his circuit").

408. DU BOIS, *supra* note 20, at 564 ("The Assembly of 1867 repealed many parts of the Black Code, but among other things, did not allow a colored woman to be a competent witness against the white father of her child.").

409. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250 (2022); Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [https://perma.cc/FZ5E-BF7J] ("[T]he erasure of Black women from the

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These brief discussions sketch out three means by which the Maryland anti-apprenticeship movement may enhance our constitutional understandings today. These examples are neither exhaustive nor comprehensive. Rather, they are intended to invite more scholars, lawyers, and activists to engage with one of our nation's richest sources of constitutional knowledge: the writings, interpretations, and strategic advocacy of freedpeople themselves. As Margaret Burnham observes of freedpeoples' anti-apprenticeship claims: "Their voices are the hidden message in these cases. A message we have only begun to hear and understand."[410]

CONCLUSION

From the first day that Maryland instituted its new antislavery constitution, Elizabeth Minoky, Mary Dare, Lucy Lee, and countless others began interpreting its meaning for themselves and their families. They waged their constitutional battles shrewdly, utilizing direct action, labor protest, Union army circulars, state and federal courts, and congressional legislation to force Maryland's laws to meet their own understandings of freedom's promise.

The neglect of their constitutional visions is our collective detriment. With it, we have lost the clarion insistence that the racialized severance of familial bonds is incompatible with the freedom guaranteed by the reconstructed Constitution.

This Note reflects one effort to recover the constitutional voices that have been unjustly excised. Through the use of alternative source material and careful archival reading practices, this Note utilizes previously unstudied material to illustrate a constitutional movement led by freedpeople themselves with greater detail and depth than constitutional historians have previously appreciated. This new account allows us to glimpse the populist nature of constitutional interpretation in the Reconstruction Era and the centrality of familial rights to freedpeople's understanding of the new Constitution's promise. Restoring stories such as these to our collective memory may provide seeds from which a wider set of constitutional histories and traditions may grow.

Constitution."); Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV. BLOG (June 14, 2022), https://blog.harvardlawreview.org/a-response-to-justice-amy-coney-barrett [https://perma.cc/8DWL-S3NZ]. Siegel, *supra* note 390.

410. Margaret A. Burnham, *Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum*, 18 CARDOZO L. REV. 433, 449 (1996).