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Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy

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SYMPOSIUM ARTICLES

Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy

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"[Dred Scott's daughters] were virtually free before, having achieved their freedom by their heels, what the more conscientious Dred could not secure by ten years of litigation."[1]

LOOKING FOR CHILDREN'S STORIES IN HISTORIES WRITTEN BY AND FOR ADULTS

Minors, male and female, are virtually invisible to history. Their names are rarely known, their stories are rarely told, and their perspectives are rarely explored. Yet a closer examination of the experiences of children and youths caught up in the great struggles of our past, and a new exploration of history from a child-centered perspective, is essential to defining and addressing

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1. *Dred Scott Free at Last: Himself and His Family Emancipated*, ST. LOUIS DAILY EVENING NEWS, May 26, 1857, at 2 [hereinafter *Dred Scott Free at Last*].

contemporary injustices towards children. One step in this project is to uncover children's hidden legal histories. One can find such stories lurking between the lines in the biographies and autobiographies of famous adults. And one can find them hiding in case law and documentary collections. While the child's story is sometimes imperfectly recalled, dimly reflected, or altered to fit others' agendas, these sources are nevertheless a valuable starting point for exploring children's legal history. By concentrating on the children in these stories, we expose the ways in which minority (the unexamined category) intersects with race, gender, and class to define and confine their lives. This is especially the case with female children whose agency is even more hidden from view than that of their male counterparts.

Modern scholars, seeking to explore the interlocking roles of seemingly separate aspects of identity and status, are rapidly building a more complex and nuanced American history. Old studies are being re-examined to expose hidden stories that were omitted, misunderstood, or willfully distorted in earlier tellings and re-tellings. Prodded by a new field of study called "intersectionality," historians have begun to explore the ramifications of recognizing that history was created and experienced by all kinds of people, and that history can be and has been written from many perspectives. Having long taken for granted the practice of focusing on the stories of famous white men (an intersectionality heretofore invisible because it was treated as the unstated "norm"), historians are now delving into the histories of African males, Asian females, white women who worked in factories, and Black women who worked on plantations. Legal historians and legal scholars who study the meaning of the narratives in court cases, the basic building blocks of law, have been in the forefront of this movement, examining the process of law-making and its human impact from previously unexamined points of view.[2]

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2. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); Laura E. Gomez, *Constructing Latina/o Identities*, 19 CHICANO-LATINO L. REV. 187 (1998); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581 (1990); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L.

Intersectionality is simply the term used for the study of social phenomena from intersecting perspectives, accomplished by looking at the experiences of people who live at the intersections of culturally constructed categories like race, gender, and class. To some degree, childhood is a cultural construct. The realities of children's lives are shaped by, yet often defy, our descriptions of them. The same techniques used by those who study the intersections of race, gender, and class can shed light on the experiences of children and challenge the inevitability of their subordination by law.

As one scholar has observed,

> [f]or years, historians treated slaves as objects of white action rather than as subjects in their own right, and largely ignored the behavior and beliefs of the slaves themselves. Reacting against this emphasis, many scholars have more recently focused on the slaves as actors, stressing the world they made for themselves rather than the constraints imposed by their owners.[3]

Scholars of childhood understand and have shown that children are not passive objects, but rather operate as active agents in shaping their own environment and their own and others' destinies. Although my subject in these pages is "urban girls," I will begin by examining the story of an urban boy to illustrate how children's stories may be obscured from view by the lives of famous men and women. I found my protagonist, Fred Bailey, hiding in plain sight, between the lines of a famous man's autobiography.[4] Fred Bailey was born to a slave mother in Eastern Shore Maryland in 1818, and raised in the City of Baltimore. He grew up to become the famous abolitionist orator and

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REV. 309 (1996); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 LAW AND SEX. 83 (1994).

3. PETER KOLCHIN, AMERICAN SLAVERY: 1619-1877, at x (Eric Foner ed., 1993).

4. *See generally* Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave, reprinted in* THE CLASSIC SLAVE NARRATIVES 255 (Henry Louis Gates, Jr. ed., 1987).

author, Frederick Douglass. In the eyes of the law, young Fred suffered double disabilities as both a slave and a minor. Fred felt these double disabilities keenly. Yet we have been blinded to the implications of his minority by history's spotlight on his enslavement and escape from slavery. Frederick Douglass, the man, has claimed his place in history after generations in undeserved obscurity. I contend that it is time for Fred Bailey, the boy, to claim his place as well.

THE INTERSECTIONS OF MINORITY, RACE AND CLASS: CHILDREN IN SLAVERY AND SERVITUDE

Often, several identities overlap in a single human being. Race and age both played integral roles in shaping Fred Bailey's perceptions and in guiding his struggles against injustice. Though born on a rural plantation, Fred came of intellectual age as an urban child—the household slave of the Hugh Auld family in the Fells Point section of Baltimore. In many ways, despite his precocious intellect and his legal status as a slave, Fred Bailey's life was no different than that of the "ragtag band" of boys who were his Baltimore playmates in the alleys around Durgin & Bailey's Shipyard. All worked as well as played, and many of them were indentured servants or apprentices, living in the homes of their masters, and separated from their families of origin. Unlike these white children, however, Fred was forbidden to attend school—yet he learned to read and write, becoming a skilled orator and famous author.

He first learned his letters from his mistress Sophia Auld, who taught him from the family Bible. These lessons ended abruptly, with an angry lecture from Master Hugh on the importance of keeping slaves in ignorance in order to maintain their inferiority and keep them meek. The lecture made an indelible impression:

> "A nigger should know nothing but to obey his master—to do as he is told to do. Learning would *spoil* the best nigger in the world. Now," said he, "if you teach that nigger (speaking of myself) how to read, there would be no keeping him. It would forever unfit him to be a slave."[5]

5. *Id.* at 274.

This furious outburst "sank deep into [Fred's] heart . . . explain[ing] dark and mysterious things" which had puzzled this highly intelligent child.[6] Finally, "the white man's power to enslave the black man" had been revealed to him, and he suddenly "understood the pathway from slavery to freedom."[7] By starving the Black child—denying his natural hunger for learning—slavery sought ultimately to dominate and diminish the Black man.

As Fred Bailey realized long before he became Frederick Douglass, the lines between freedom and bondage, and between persons and property, were patrolled and reinforced by concepts of minority and dependency, as well as by concepts of race and color. Douglass' autobiography provides a vivid flash of insight. At one point, the young boy is gazing longingly at ships sailing north to freedom. He comforts himself by reflecting that it is not race alone that defines his bondage: "I am but a boy, and all boys are bound to some one."[8]

It was simply a fact of economic and social life that all children were indeed "bound" to somebody—legally under some adult's custody and control. The United States was settled in large part by working indentured children—many of whom were bound out for long terms of service and separated by an ocean from their parents. Historian Mary Ann Mason notes that over half the people who settled the Colonies south of New England came to America under contracts of indenture, binding them in many cases past the age of majority. Many were poor children taken from the streets of English cities, often without consent. The average age of an indentured servant was fourteen to sixteen, and the youngest was six.[9] The United States Constitution explicitly protected vested rights to the involuntary servitude of children and youths, and of adults who had been bound out or had bound themselves out as youths. Article IV, Section 2, Clause 3, which formed the basis for the Fugitive Slave Acts, covered all "[p]erson[s] held to [s]ervice or [l]abour" and obligated neighboring states to

6. Douglass, *supra* note 4, at 275.

7. *Id.*

8. *Id.* at 294.

9. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 2 (1994) (citing RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 391 (1946)).

return them if they escaped across state lines.[10]

Bondage during minority was the norm. But bondage *for life*? In his autobiography, the adult Douglass tells how the child Fred Bailey struck up conversation with an Irish seaman who was stunned and incredulous upon learning that this small Black boy who seemed so bright and capable was condemned to be a "slave for life." In Frederick's retelling of the story, it did not appear to surprise the Irish sailor that Fred was in bondage—it was the notion of slavery *for life* which so horrified the Irishman and continued to cause Fred such anguish.[11] In Douglass' day, adult control of children was virtually absolute, and it was ordinary to treat a child as an economic commodity. Free children belonged to their fathers, who had a right to their labor in exchange for education and sustenance. Except for those few children born into wealthy families, children typically spent much of their youth working for others, whether "rented out" by their fathers in exchange for wages, bound out to employers in long-term indentures, or apprenticed to a master to learn a trade.

Almost as draconian as racialized status were the consequences for children of illegitimacy. In combination, race, poverty, illegitimacy, and minority were used to deprive parents of their children, and to deprive children of many valuable rights. Again, Fred Bailey's story is illustrative. Frederick Douglass conjectured that the owner of Wye Plantation where he was born may have been his father. By right, that gentleman's child should have been among the lucky few children who lived a life of leisure and learning.[12] Under the one drop rule, however, a child with a drop of African blood was deemed Black. Deprived of his father's wealth, Fred grew up poor, and because his father did not (and legally could not) marry his mother, he was illegitimate—all of which were interlocking and mutually reinforcing disabilities.

Black children in antebellum America, in an exception designed to perpetuate and reinforce racialized slavery and to guarantee a renewable source of human capital, did not take the status, free or slave, of their fathers. Instead, the mother's status dictated that of her offspring. In every slave

10. U.S. CONST. art. IV, § 2, cl. 3.
11. *See* Douglass, *supra* note 4, at 280.
12. *See id.* at 255-57, 259-60.

state, white men who fathered children with their female slaves were able to "own" their children without having to share their wealth or their homes with them. Another large class of children, children born out of wedlock, were stigmatized as bastards. Considered "filius nullius," or children of no one, regardless of their color or class status, they had no right to claim their fathers' names or inheritance. Since legal marriage was denied to slaves, and interracial marriage was a crime, mixed race children like Fred were predestined to be either bastards or "chattels personal" of their mother's owners.

Frederick Douglass' childhood illustrates the uncertain existence of a "chattel." Deprived of his mother's care so she could work in the fields, he was raised by his grandmother, Betsy Bailey. When Fred was six, she was forced to take him to the "big house" and leave him there. When he awoke and found her gone, he was terrified and inconsolable. He learned to survive without his beloved grandmother, enduring beatings and hunger, but two years later he was abruptly shipped to Baltimore to work for Hugh and Sophia Auld.[13] Transported at the whim of his owners from place to place, and casually ripped from familiar surroundings and people, Fred was a form of moveable personal possession, with attributes both of thing and of human being, to be used to satisfy the needs of his owners.[14]

The less economically valuable the child, the more vulnerable the child was to abuse. The story of Fred's disabled female cousin Henny is an example. Henny was crippled as an infant and never was able to earn her keep, let alone turn a profit. For her, the consequences of being a chattel instead of a child were especially stark. Her master's frustration at being saddled with a slave who would forever be an economic liability seems to have escalated into a pattern of vicious physical abuse.[15]

Children of unmarried mothers, whatever their color or

13. *See id.* at 271.

14. *See* Kenneth M. Stampp, *Chattels Personal*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 203 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988); *see also* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 226 (1995) (stating that "[u]nder the American institution of slavery, then, [race] took on supreme importance. It determined the most critical feature of the human condition—whether a child would be deemed a free human being or chattel property").

15. *See* Douglass, *supra* note 4, at 288-89.

sex, were extremely vulnerable to being treated like chattel, transferred to the most economical use, and separated from their kin.[16] Even after unmarried mothers were given rights of custody to their bastard children, poor laws patterned on those of England continued to authorize local authorities to remove any child lacking support, and to offer the child for indenture as a servant or laborer until the age of majority.[17] Although single mothers were more likely to be destitute, the laws applied to all families unable to care for their young, and many children with two living, married parents found themselves involuntarily indentured. Mulatto children born to white mothers received still harsher treatment, which was intended to discourage miscegenation. They were indentured at birth until they reached age thirty-one. Indenture provided not only a process of redistributing labor, but also a method of both controlling unmarried and interracial sexual activity, and privatizing responsibility for the poor, who would otherwise be a drain on the community's resources.

Fred's work history in Fells Point illustrates that the boundaries among the labor of free, indentured, and slave children often blurred in practice. As both a young child and adolescent, Fred worked and played side-by-side with free Blacks and indentured whites. As a teenager, he was trained in one of the shipbuilding trades in the same shipyard as a gang of white apprentices who reacted angrily to the threat of competition.[18] During the first half of the nineteenth century, many Blacks migrated to urban centers, either in the custody of masters, as was the case for Fred Bailey, or after securing their freedom, as happened with Anna Murray, whom Douglass later married. In commercial economies like that of Baltimore, slave children were put to work by their masters in business, commerce, and craft settings, and worked side-by-side with free Black children and with whites who had been bound out by their parents or the poor law authorities. All such children were at risk, although Black children far more than their white counterparts, of being abruptly sent away from all things

16. For a discussion of the importance of marriage in establishing rights and protections for women and children, see Laura F. Edwards, *"The Marriage Covenant is at the Foundation of Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*, 14 L. & HIST. REV. 81 (1996).

17. *See* MASON, *supra* note 9, at 7-8, 31-36.

18. *See* Douglass, *supra* note 4, at 277, 311-13.

familiar. Children in slavery and indenture also were constantly at risk of being demoted from training in service or skilled crafts, which at least gave some promise of security even to those who were "slaves for life," and being assigned menial labor and field hand's work.

In the hierarchy of servitude, apprentices stood at the top. In theory, the child's consent was required, and he was entitled to training as part of the bargain. In some situations, the father of an apprentice, if he cared to assert his or the child's rights, might turn to the courts to enforce a master's broken promise to train and educate the child, or might petition to revoke an illegal assignment of the child to another master. The typical indenture gave more latitude for assignments and less assurances of useful education and training. Racism in both North and South created an overlay of legal and economic disabilities, placing additional burdens on free Black children in apprenticeships and indentures, withdrawing many of the protections afforded white apprentices, and further blurring the lines between free and bond labor. A slave child like Fred Bailey was at the very bottom of the ladder of power. His owner owed no duty of education or training to him, and was legally as well as practically free to use, sell, or abuse the child as he wished, limited primarily by public opinion, which (according to Douglass) might approve of whipping a child, but would censure starving her.

Urban children, then as now, posed a special challenge to adult control. When Fred Bailey tried to assert his will by learning to read and seeking to learn a trade, he was deported from Baltimore to his plantation of origin. The sullen teen lacked proper subservience, so he was rented to work in the fields under an overseer with a reputation as a "nigger-breaker."[19] As this episode illustrates, the ability to transfer a minor child's custody and control from one user to another provided not only economic benefits, but a means of maintaining social control of youth. Rebellious youths could be removed from bad company or temptation and sent to more restrictive surroundings, where their dangerous habits might be broken.

Non-slave children also could be sent away by their parents, and they could be seized by persons charged with maintaining public order and protecting the young. During

19. *Id.* at 289.

the nineteenth century, charities formed to rescue children from the deviance of youth among the "Dangerous Classes." Charitable and religious organizations founded houses of refuge, asylums, and reform schools, committed to controlling as well as teaching the young. The boundaries between education, protection, and incarceration were extremely vague. A child could be detained in these asylums until age twenty-one against his will, and without due process of law or any charge of criminal behavior. Courts rebuffed challenges to children's seizure and incarceration, by pointing to the educational mission of these institutions. Parents were warned that, if they failed to control their children, to feed and clothe them, or to inculcate them with appropriate morals, the state was empowered to take over the parental role. Those readers familiar with Oliver Twist's life in the Poor House would recognize the following description of a New York asylum:

> In summer, they are about fourteen hours under orders daily. On parade, at table, at their work, and in school, they are not allowed to converse.... For every trifling commission or omission which it is deemed wrong to do or to omit to do, they are "cut" with ratan.... The endurance of the whip, or the loss of a meal—deprivation of play or the solitary cell. On every hand their walk is bounded; [sic] while Restriction and Constraint are their most intimate companions.[20]

Oddly enough, perhaps because of the traditional dichotomy of private and public spheres, historians and scholars studying childhood often seem more concerned with *who* is carrying out the beating or incarceration than with *whether* children were routinely beaten, imprisoned, or forced into hard labor. Modern critics point to the abuses of slavery, or the incarceration of free children, as obvious deprivations of children's liberties. Less attention has been paid to the fact that parents and guardians had legal authority to use the same techniques—whippings, deprivation of food and education, solitary confinement, silencing, and forced labor—as legally sanctioned forms of control.

However, one key fact distinguished free children from

20. CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 691 (Robert H. Bremner et al. eds., 1970-74) (quoting ELIJAH DEVOE, THE REFUGE SYSTEM, OR PRISON DISCIPLINE APPLIED TO JUVENILE DELINQUENTS 27-28 (1848)).

slave children—the free child's legal coming of age, which arrived for boys at twenty-one, and for girls at eighteen or at marriage. Even here, race and class played a constraining role. Since children must be in some responsible adult's custody and control, and Blacks were by definition irresponsible, laws prohibited the manumission of slaves until they reached twenty-one, even with their master's consent. Indentured children were denied permission to marry, and indentured girls who bore an illegitimate child would find their terms of service extended by law. For mulatto children and for white children in long term indentures, even twenty-one was not a magic number signaling the end of servitude. Apprenticeships and indentures lasting past majority were commonplace. Thus limitations of slavery, involuntary servitude, and incarceration overlapped in powerfully symbolic ways with the limitations on the freedom of children as a class. Added to these, the disabilities and privileges of gender played a large role in defining and confining nineteenth century children's lives in slavery and in freedom.

THE DRED SCOTT CASE: UNCOVERING WOMEN'S UNTOLD STORIES

Recently, a pair of feminist historians named Lea VanderVelde and Sandhya Subramanian, exploring the intersections of race and gender, have opened a fascinating window into one neglected narrative of a woman behind a famous man—the story of Harriet Robinson Scott. Although this woman's name is virtually unknown, she is instantly recognizable when identified as "Mrs. Dred Scott." These historians skillfully uncovered, hidden between the lines of the famous case of *Dred Scott v. Sandford*,[21] the story of a woman's struggle to control her own life and the lives of her two daughters.[22]

In this article, I will open this window a bit further, and ask you to use your imagination and empathy to capture the female child's perspective, and to see the case anew through the eyes of Eliza and Lizzie Scott. Even more

21. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded*, U.S. CONST. amend. XIII.

22. Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

invisible to history than Mrs. Dred Scott, these two young girls peek out from between the lines of their famous father's case. Not only do they provide an insight into their mother's motivations, and her role in shaping history, they remind us that the case involved children as well as adults—two girls who were not only objects of a legal battle, but persons in their own right.

The *Dred Scott* case culminated in 1857, in a decision by the United States Supreme Court which dealt a severe blow to the abolitionist movement, making Civil War almost inevitable. The Supreme Court Justices' ruling concerned a manservant named Dred Scott, but it also decided the fates of his wife and children, whose cases were treated as if controlled by and subsumed within his. Dred Scott had been born in the slave state of Missouri, but had lived and worked for his owner, Dr. Emerson, and others in the free state of Illinois, and in Minnesota, a territory where slavery was prohibited. After he returned to Missouri, his master died, leaving his human chattels as part of his estate. Dred Scott brought a lawsuit in a federal court, claiming he could no longer be treated as a slave because he had lived in a free territory.[23] The threshold question for the Supreme Court was a technical matter: whether persons of African blood and descended from slaves could invoke the federal courts' "diversity jurisdiction," a provision of Article III of the Constitution which empowered the federal courts to hear lawsuits "between Citizens of different States."[24] The Supreme Court held that persons of color were not citizens under Article III, and therefore the federal courts had erred in hearing Dred Scott's case.[25]

Analyzing the prevailing attitude towards the African race at the time the Constitution was drafted, the Court observed: "They had for more than a century before been regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[26] The Framers who drafted Article III had also drafted Article I, Section 9, Clause 1 of the Constitution, which explicitly prohibited Congress from

23. *See Dred Scott*, 60 U.S. at 398-99.
24. U.S. CONST. art. III, § 2; *see Dred Scott*, 60 U.S. at 403.
25. *See Dred Scott*, 60 U.S. at 454.
26. *Id.* at 407.

outlawing the importation of slaves prior to 1808.[27] Finally, in Article IV, Section 2, they had protected slave holders' rights to recapture their runaway human property across state lines.[28] Reviewing this history of explicit discrimination, Chief Justice Taney concluded that it was not the intention of the Framers of the Constitution in 1789 to include descendants of slaves within the "political family," and no change of public sentiment in the intervening years could alter the meaning of the Constitution.[29]

Taney did not stop with simply dismissing the case. In a further discussion, Taney endorsed the concept that ownership of slaves was not merely an evil tolerated by the Constitution but a vested property interest protected under the Constitution.[30] Congress, he concluded, could not prohibit slavery or importation of slaves into newly acquired territories of the West because to do so would deprive slave holders of their property rights in their slaves.[31] This reasoning had grave ramifications for the containment of slavery as well as for the status of African Americans.

If one assumes, as many scholars and judges still do, that the Constitution's text should be interpreted according to the Framer's original intent, judged at the most specific level of historic fact, Chief Justice Taney and his brethren may well have been correct. But abolitionists had hoped for a broader reading of the document, based on its overarching purpose of advancing human liberty, reinterpreted in the light of growing sentiment that slavery was fundamentally incompatible with human liberty.

Among the most powerful advocates for this position was none other than Frederick Douglass, who had become an important voice in the abolition movement, and editor of an abolitionist publication, *The North Star.* In fact, Douglass had broken with influential abolitionists like William Lloyd Garrison over this issue, renaming his

27. U.S. CONST. art. I, § 9, cl. 1.

28. *See* U.S. CONST. art. IV, § 2, cl. 3; *supra* note 10 and accompanying text.

29. *See Dred Scott*, 60 U.S. at 417-18, 406-07.

30. *See id.* at 411.

31. *See id.* at 450-52. For an in-depth analysis of the various opinions in *Dred Scott v. Sandford*, see Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997).

publication *The Frederick Douglass Papers*. While Garrison believed the Constitution was morally bankrupt and ought to be discarded, Douglass argued that the document, as a whole, was intended as a "Glorious Liberty Document."[32] The very same provisions of the Constitution which recognized slavery also were proof, in Douglass' eyes, of the Founding Fathers' determination to limit its perpetuation. He saw these provisions as reflecting the Framers' belief that the continued toleration of slavery contravened basic principles of human rights on which the new Republic had been founded.

The *Dred Scott* decision, by its rigid and formalistic interpretation of the text, locked into place the essentialist racism of an earlier generation, even as this racism was being most sharply challenged. The decision seemed to close the door on any process of constitutional evolution short of a formal amendment. It placed property interests in slaves above principles of human liberty, and in one stroke disabled both the courts and Congress from altering the status quo of slavery. "Perhaps no legal case in American history is as famous—or as infamous—as Dred Scott v. Sandford."[33]

While much attention has been paid to the historic figure of Dred Scott, little was known of his wife, Harriet, or her role in the case. Historians VanderVelde and Subramanian fill that gap in a carefully researched and detailed account.[34] Their account moves Harriet from the wings to the center of the stage, and raises conjectures about the role Harriet must have played both in the genesis of the case and in determining its outcome. Harriet (they point out) was active in a church whose pastor was a leader of the free Blacks in St. Louis. Harriet, in her twenties when the case was filed, was much younger and stronger than Dred, a frail man in his fifties who later died of tuberculosis. She had more to gain from freedom, and her emancipation would present a far greater monetary loss to

32. Frederick Douglass, What to the Slave is the Fourth of July?, Speech at a meeting sponsored by the Rochester Ladies' Anti-Slavery Society, Rochester Hall, Rochester, N.Y. (July 5, 1852), *in* JAMES MONROE GREGORY, FREDERICK DOUGLASS THE ORATOR 103-06 (New York, 1907), http://douglass.speech.nwu.edu/doug_a10.htm

33. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 1 (1996).

34. *See generally* VanderVelde & Subramanian, *supra* note 22.

those claiming to own the Scott family members. In terms of market value, Harriet was clearly the most valuable asset.

In addition, Harriet's case, differing on both facts and law from Dred's case, provided stronger grounds for finding that at least some of the Scott family members had been emancipated by operation of law. Had Harriet remained in Pennsylvania, the state of her birth, she would have been manumitted by law at age twenty-seven. Her removal by her master to another jurisdiction arguably could not defeat this statutory right to manumission. The fact that Harriet and Dred were married at Fort Snelling (in free territory) by the military officer who was Harriet's master also supported her claim to freedom. Since slaves were prohibited from marrying, the officer's act in performing and making a written record of her civil marriage ceremony was tantamount to freeing her. Since children's status as free or slave depended on the status of their mothers at the time of their birth, Harriet's children were also free.

Despite these plausible arguments for hanging their case on Harriet's claims to freedom, the abolitionist lawyers representing the Scotts decided Harriet's claim could be treated as subsidiary to her husband's, and need not be argued separately. In historical context, their decision is not at all surprising. The prevailing doctrine applying to "free" married women—the law of couverture—placed married women's property and persons under the power of their husband. To cast the Scotts' claim in terms of Harriet's legal rights, rather than Dred's, would have required a re-visioning not only of race, but also of gender. Such a shift in consciousness would have been a major feat even for Harriet's abolitionist attorneys, not to mention the Supreme Court Justices of 1857, six of whom were slave holders and none of whom was female. Many abolitionist sympathizers who thought Scott entitled to be treated as a citizen would have balked at the notion that their own wives, let alone a "colored girl" like Harriet, should be entitled to vote, bring a legal action on her own, sit on a jury, or hold property in her own right. Even many ardent abolitionists defended hierarchy within the sphere of the family as not only natural and normal, but divinely ordained. Thus, Harriet's subordinate status as a person of African descent was compounded and complicated by her status as a woman.

The strategic decisions of Dred Scott's attorneys provide a striking example of the complex interactions of racism and patriarchy in mid-nineteenth century legal thought. The laws that applied to Harriet as a slave reduced her to property, but recognized her productivity—both as a worker and as a child bearer. Albeit for all the wrong reasons, the antebellum legal system attributed to Harriet the slave a high economic value, and provided that her children would inherit their status, as free or slave, from their mother. Ironically, Harriet's claims to freedom, on which her daughters' claims depended, were made invisible because her abolitionist lawyers treated her as Dred Scott's wife—defining her not as a free person, but as the consort of a man claiming his freedom. Viewed by laws of slavery as a chattel, she belonged to her owner, and so did her children. Viewed by her abolitionist champions as a woman, she belonged to her husband, and so did her children. Because her attorneys saw her in the culturally and legally ascribed role of dependent, which described the norm for all "free" women, they assumed Harriet's case depended on Dred's, and that the key to her freedom lay in proving that Dred was a free man. In fact, argue VanderVelde and Subramanian, the key to Dred Scott's case lay in Harriet's story.[35] If Harriet was free, her children were free. Moreover, if Harriet was free, then Dred himself was free, since no man could be both a slave and a "free" woman's husband.[36] Blinded by their absorption in Dred Scott's claim to human rights, those who shaped the history of the case and directed its litigation overlooked Harriet's rights, and robbed her of "agency"—the power to function as an actor, not just as an object.

ELIZA AND LIZZIE: DISCOVERING DRED AND HARRIET'S DAUGHTERS

Hidden between the lines of Mrs. Dred Scott's story, however, there is another story that remains largely unexplored—that of Eliza and Lizzie. Like Harriet Scott,

35. *See id.* at 1040-41.

36. Nor could a free Black man legally marry a female slave. One manumitted slave purchased his "wife" from her master in order to insure that they could not be separated. Unfortunately, he went bankrupt and his debtors attached and sold his wife as an article of his property and used the proceeds to satisfy his debts. *See* Kyler v. Dunlap, 57 Ky. (18 B. Mon.) 561 (1857).

Lizzie and Eliza were treated by history as mere appendages of a famous man. Arguably, the *Dred Scott* case, which in some small part precipitated a war and crystallized conflicting visions of our Constitution, was driven not by the father's story, but by the elder daughter's story. It was Eliza Scott's claim of freedom that actually forced the Supreme Court to decide the issue of the constitutionality of the Missouri Compromise. While Taney, as a scholar of conflict of laws, might assert that the property rights of Dred and Harriet's masters could not be defeated by their migration from a slave to a free state, it was clear that Eliza had been born in free territory. According to the Missouri Compromise, Eliza was free at birth, and her status depended directly on the application of federal law. An early twentieth century scholar of slave law, Helen Catterall, remarks: "Eliza, though born of a slave mother, was free. Consequently the constitutionality of the Missouri Compromise act had to be decided in order to reach a determination of her case."[37] Why has Eliza's case, so pivotal to the decision, been neglected by history?

Not only was Mrs. Dred Scott deemed to be "one" with her husband, the Scott girls' identity has also been subsumed in that of their father. This concentration in the head of the household of power over both women and children is illustrated by the theory behind the claim which Dred Scott's lawyers used to gain access to the federal courts. In 1853, in his bid to be recognized as a "citizen" of Missouri for purposes of federal diversity jurisdiction, Dred Scott filed a claim "in trespass" alleging that John F.A. Sanford, a citizen of New York, had assaulted himself, his wife, and his daughters. He asked $3000 damages for the assault against himself, plus $2500 for loss of the services, comfort, and society of Harriet, his wife, and $2500 for the loss of services, comfort, and society of Eliza and Lizzie, "then and still infant daughters and servants of the plaintiff . . . ."[38]

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37. 5 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 121 (Helen Tunnicliff Catterall ed., 1968) (internal footnotes omitted) [hereinafter JUDICIAL CASES VOL. 5].

38. DRED SCOTT, PL[AINTIFF] IN ER[ROR]. V. JOHN F. A. SANDFORD. IN ERROR TO THE CIRCUIT COURT U.S. FOR THE DISTRICT OF MISSOURI, *reprinted in* 3 SOUTHERN SLAVES IN FREE STATE COURTS: THE PAMPHLET LITERATURE 3-4 (Slavery Race and the American Legal System 1700-1872: A Sixteen Volume Facsimile Series Reproducing Over One Hundred and Seventy Rare and

Some historical background is necessary to understand Dred Scott's claim. Recall that Dred Scott and his family were property of a Dr. Emerson. At Dr. Emerson's death, he left a life estate in his property to Mrs. Emerson, with the remainder for his daughters. The widow's brother, John Sanford, became executor of the estate when his sister remarried, since her remarriage disqualified her as executor.[39] Apparently enraged by the Scotts' state court lawsuit to gain their freedom, on January 1, 1853, Sanford had accosted the Scotts at the place where they were working, accused them of being "worthless and insolent," whipped them viciously, locked them in a barn, and then proceeded to whip their young daughters.[40] These acts provided the basis for Dred Scott's claim of trespass, and the fact that Dred Scott was claiming Missouri citizenship, and Sanford was a New York citizen, provided the factual predicate for federal diversity jurisdiction. Sanford's defense was twofold: first, that the federal court lacked jurisdiction because Dred Scott was not a citizen at all; and second, that the blows had been inflicted in the course of instruction in obedience, a perfectly legal act when done by a master or master's surrogate to a slave.

As we have seen, the same theory—the patriarch's right to administer physical correction to maintain control of household members—would have provided a defense to any husband and father charged with beating his wife and children. The rights of a "freeman" bore disturbing similarities to the rights of masters over their slaves. The power to control one's subordinate family members appeared as a core element in defining the rights of free "men," and contradicted basic principles of self ownership for women and children.

Given the vulnerability of slave children to sudden dislocation, it is not surprising that the historians who focused the spotlight on Mrs. Dred Scott treat concerns about her two daughters as important elements in the likely formation by their mother of a strategy to keep the family together. But because of their status as children, the

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Important Pamphlets, Series I, Paul Finkelman ed. 1988) [hereinafter SOUTHERN SLAVES]; *see also* VINCENT C. HOPKINS, DRED SCOTT'S CASE 23-25 (1967).

39. *See* HOPKINS, *supra* note 38, at 23 n.3. The Supreme Court documents apparently spelled his name with an extra "d" as "Sandford." *Id.*

40. CHARLES MORROW WILSON, THE DRED SCOTT DECISION 21-22 (1973).

daughters appear as passive objects of concern rather than as actors in their own right. They seem deprived of agency and individual identity even in VanderVelde and Subramanian's skillful retelling of Mrs. Dred Scott's story.

All sources, however, appear to agree that Eliza was born north of the Missouri state line, "indisputably in free territory," a fact that ought to have given added force to her claim of freedom.[41] Although the records of the second daughter's age are more confused, it seems most likely that Lizzie was about a year or so younger than her sister.[42] Using the probable dates of their births as a template, we can imagine that Eliza was eight and Lizzie about seven when Dred Scott and Harriet Scott filed their first state court case in 1846. The girls were sixteen and fifteen at the time of the federal case filing in 1853, and young women of nineteen and eighteen when the Supreme Court handed down its opinion deciding their parents' case in 1857. Undoubtedly, this case must have dominated the sisters' childhood, framing their understanding of their own status and prospects in life, much as Master Hugh's diatribe on the evils of teaching slaves to read had framed the issue of "slavery for life" for eight year old Fred Bailey.[43]

As girls, Dred Scott's daughters occupied a status both like and unlike Fred Bailey's. Protected by loving parents, yet subject to different constraints and forms of exploitation because of their gender, these girls inhabited a very different urban landscape. To imagine the impact of minority, gender, and slavery on these two young girls, one must try to imagine being young, Black, and female in St. Louis, Missouri, not today—a time when childhood for girls

41. *E.g.*, DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 125 (1981) (discussing passages from the autobiography of fellow passenger, Reverend Alfred Brunson).

42. As with many of the facts in the *Dred Scott* case, inconsistencies exist between the historical record and reports or recitations in the court records. The trial judge in the federal case, tried in 1854, apparently instructed the jury that Eliza was about fourteen but she may have been as old as sixteen. *Compare* THE CASE OF DRED SCOTT IN THE UNITED STATES SUPREME COURT: THE FULL OPINIONS OF CHIEF JUSTICE TANEY AND JUSTICE CURTIS, AND ABSTRACTS OF THE OPINIONS OF THE OTHER OPINIONS OF THE OTHER JUDGES 3-4 (Horace Greeley & Co. 1860), *reprinted in* SOUTHERN SLAVES, *supra* note 38, at 179, *with* VanderVelde & Subramanian, *supra* note 22, at 1042 n.27 (indicating that Eliza's most probable year of birth was 1838, and noting that one historian estimates that, in 1857, Eliza was nineteen years old and Lizzie was eighteen).

43. *See supra* notes 5-7 and accompanying text.

of color in urban America is tough enough—but between 1846 and 1857. Simply because they were females, their experience in St. Louis was hardly likely to have been the liberating experience that the slave child Fred Bailey found in Baltimore.[44] A boy (even a slave like Fred) might be apprenticed to learn a trade. A girl was destined to do laundry, cleaning, and cooking—then as now, menial tasks. Physical abuse was a constant for girls as well as boys. When Fred was fifteen, as I have noted, he was sent to a plantation to be taught his place with the lash.[45] Eliza was fifteen when Sanford seized her father and mother, and whipped them. The *coup de grace* in Sanford's exercise of dominion, however, was his "spanking" of Dred's daughters, a "collective indignity" designed to show their father his subservient place.[46]

One cruel aspect of patriarchy, especially when compounded by racial or ethnic hatred, is the notion that a man can be humiliated by abusing his human possessions, his wife and children, especially his "innocent" daughters. In slavery, as in war, girls such as Eliza and Lizzie could expect to be used as object lessons for males, and their subservience enforced not only by physical assault, but by sexual assault. Had Eliza and Lizzie been sold down-river, their sexuality would have been included in their economic value, which treated every form of the slave women's labor including childbirth, as an asset of the master. Subject to being abused by white men, "bred" to Black men not of their own choosing, unable to nurse or keep the babies to whom they had given birth, and prohibited from legal marriage or divorce, females in slavery experienced a different and even more profound form of oppression than males. Of all females, young girls were most vulnerable. As VanderVelde and Subramanian point out, surely Harriet knew the dangers of separating from her daughters and feared for their futures.[47]

Historians have questioned why Dred and Harriet Scott did not flee north when they were in free territory, or conversely, why they did not bring their suit earlier. VanderVelde and Subramanian's re-examination of the

44. *See supra* note 18 and accompanying text.
45. *See supra* note 19 and accompanying text.
46. HOPKINS, *supra* note 38, at 23.
47. VanderVelde & Subramanian, *supra* note 22, at 1075-76.

Scott's history, from Harriet's perspective, highlights the value Harriet would have placed on keeping the family together.[48] Flight was an especially risky option for a family, as opposed to a single male. Many escapes were foiled, and families ripped apart, by the difficulty of bringing a band including children and women to safety.[49] For many years, the status quo must have seemed preferable to flight.

Even when pressed, court action may have seemed a safer route than becoming a fugitive. Harriet's suit was the first to be filed. It seems likely that the timing of her suit was prompted by fear that Emerson's widow intended to sell her human chattels, as she had sold other portions of her husband's estate. An estate sale raised dramatically the likelihood that the Scott family members would be separated, and sold to different owners. You will recall that Fred Bailey was taken from his grandmother's home at age six, and shipped to Baltimore to work as a house servant at age eight.[50] Eliza and Lizzie, at eight and seven, were reaching the stage at which slave children were put to work, raising the specter that the girls might be sold away from their mother, perhaps to a trader traveling to the cotton and sugar plantations of Mississippi and Louisiana. From a mother's perspective, there was much to fear. What about the child's perspective? How much of this context did the girls understand, and how did it shape their childhood and girlhood? Eliza and Lizzie had lived a relatively secure life in St. Louis, but surely, as they grew older and more savvy in reading between the lines of adults' conversations, they began to understand the ominous uncertainty of their futures.

Fear of losing Eliza and Lizzie must have loomed large not only for their parents, but for their owner. It is unclear whether they were hired out by day as servants, but if they were, they might have brought home considerable wages. Sold at auction, a healthy adolescent girl would command over three hundred dollars.[51] But who owned these girls and

48. *See id.* at 1062, 1074-77.

49. *See* Deborah Gray White, *Female Slaves in the Plantation South*, *in* BEFORE FREEDOM CAME: AFRICAN-AMERICAN LIFE IN THE ANTEBELLUM SOUTH 101, 106-07 (Edward D.C. Campbell, Jr. & Kym S. Rice eds., 1991).

50. *See supra* note 13 and accompanying text.

51. VanderVelde & Subramanian, *supra* note 22, at 1063 n.126 (estimating the value of the Scott family members using statistics compiled in 1914 by Harrison Anthony Trexler) (citing HARRISON ANTHONY TREXLER, SLAVERY IN

their labor? Here again we see how the essentials of "freedom" are strangely contextual and can vary depending on one's status and one's perspective. In helping the Scott family members gain their freedom, it is unlikely that the Scott's volunteer attorneys, Harriet's free Black minister, or Dred's sympathetic white supporters thought to question the notion that one of Dred Scott's "rights" as a free man would be the right to collect his daughters' wages.

Well into the twentieth century, a father's vested rights in a child's wages were a recognized economic asset.[52] This asset was gender-linked in more ways than one. Fathers, not mothers, owned a child's wages. The 1872 Kentucky case of *Allen v. Allen* illustrates the common law exception that proved the rule. A Black woman who had born a child while in slavery won her lawsuit against the child's father, also a former slave, on appeal due to a technicality. After emancipation, the father had left the mother, taking the child with him. Instead of contracting a valid marriage with his child's mother, he had married another woman, and had hired out the child of the earlier relationship, collecting her wages. The mother prevailed in recovering the wages, although not the child, by arguing that, since slave marriages were illegal when the child was born, the boy was a bastard, and therefore his wages belonged not to the father, but to the mother.[53]

Clearly, one of the valuable "rights" gained when slave parents were emancipated was the right to claim the labor value of one's own child. In the backlash following Reconstruction, this right was trampled by the Black Codes, which empowered agents to bind Black children in indentures and apprenticeships to former slave holders based on the natural parents' supposed inability to support or properly raise them. Thus children's minority, and the power it created in the State to control their movement and training, was used to re-enslave Black children even after their parents had been emancipated.[54]

MISSOURI 1804-1865, at 38-39 (1914)).

52. *See* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY. L. REV. 995, 1064 (1992).

53. *See* Allen v. Allen, 8 Bush 490 (Ky. 1872), *reported in* 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 467 (Helen Tunnicliff Catterall ed., 1968) [hereinafter JUDICIAL CASES VOL. 1].

54. *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 152-53 (1997).

Gender, in tandem with minority, made a large difference in the Black child's labor prospects and paths to freedom. Fred Bailey, being a male, was able to negotiate a *de facto* emancipation from his master. He became an independent young man living on his own by agreeing to support himself and pay his master a bounty over and above his market as the price of being permitted to function as an independent entrepreneur. "Free" boys apparently made similar bargains with their fathers. Consider, in contrast, the experience of Fred's grandmother, Betsy Bailey. Fred inherited his entrepreneurial spirit from Betsy, who managed to devise a way of living independently. She won permission to "marry" a free Black man and her garden and household were her own. While Betsy's husband assumed responsibility for her maintenance, he could not give her or her children their liberty. Her child-bearing and child-rearing labor as mother and grandmother still belonged to her white owner, and she was expected to nurse her children and grandchildren through helpless infancy until they were old enough to be of value to their legal owner.[55]

In addition, where Fred Bailey saw ships sailing north up the coast towards New England, and freedom,[56] Eliza and Lizzie were more likely to see Mississippi side-wheelers carrying slave traders' coffles down-river toward the plantations of the deep South. Free soil was tantalizingly close for Eliza and Lizzie–but unattainable. Just across the river, in East St. Louis, was the free state of Illinois. But rarely was a Black girl able to negotiate the distance between St. Louis, Missouri, and the free side of the river.

For boys, the cases on fugitive slaves show that river boats were a prime vehicle for making an escape. A slave boy named Lewis, worth $900, was hired out to work on a river boat as a fireman. He escaped when the boat docked at Cincinnati, Ohio.[57] Remarked the court, in finding for the defendant steamboat captain, "it is not the custom for boats hiring slaves on board to iron them or confine them when they enter a free port. If that should become common, the

55. For a comprehensive history of the childhood and youth of Frederick Douglass, see WILLIAM S. MCFEELY, FREDERICK DOUGLASS (1991).

56. *See supra* note 8 and accompanying text.

57. Meekin v. Thomas, 17 B. Mon. 710 (Ky. 1857), *reported in* JUDICIAL CASES VOL. 1, *supra* note 53, at 428-29.

practice of hiring slaves on steamboats would be at an end."[58] Masters were warned that a slave hired as a boat hand would find many opportunities to escape, yet they continued with this lucrative practice:[59]

> Where a slave is hired as a boat hand, we must presume that the owner is fully aware, that every facility for escape is afforded by the very nature of the service. He is apprised, that the boat will touch and be detained at the wharves of populous towns; that it passes near the banks, and will stop at the landings of States where slavery is not tolerated; and that his slave will be associated with free negroes, and others who will not be likely to leave him ignorant of the various opportunities which present themselves for escape. The owner is aware of all this, and must be presumed to contract with reference to it. He insures his slave, or indemnifies himself for the increased risk by the increased wages.[60]

While the economic value of clever boys was best exploited by giving them greater liberty, that of girls was exploited by keeping them close to home.

Adolescent girls were a particularly closely-guarded commodity because of their future reproductive value. Even an enlightened and progressive slave holder would be loathe to free a girl of fifteen or sixteen, just entering her reproductive years. Many reported cases show how girls were promised freedom, but only *after* they had passed their child-bearing years or produced a certain number of offspring for the master's benefit. For example, Catherine Bodine's will set her slave Jenny free "whenever she should cease child-bearing,"[61] and Kitty's benevolent master Mr. Winston promised her freedom in twelve years, but meanwhile sold her for $150 to a Mr. Chambers, "to have and to hold said girl Kitty for the term aforesaid, and her increase during said term absolutely and forever."[62] One enlightened Kentuckian provided by will that his slave

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58. *Id.* at 429.

59. *See* Perry v. Beardslee, 10 Mo. 568 (1847), *reported in* JUDICIAL CASES VOL. 5, *supra* note 37, at 172.

60. *Id.*

61. Catherine Bodine's Will, 4 Dana 476 (Ky. 1836), *reported in* JUDICIAL CASES VOL. 1, *supra* note 53, at 334.

62. Kitty v. Commonwealth, 18 B. Mon. 522 (Ky. 1857), *reported in* JUDICIAL CASES VOL. 1, *supra* note 53, at 429; *see also* Lee v. Sprague, 14 Mo. 476 (1851), *reported in* JUDICIAL CASES VOL. 5, *supra* note 37, at 183 (holding that children born to female slaves before their "time of service expired" are not automatically entitled to freedom).

Hannah should be free after reaching age thirty-one, and stipulated that all the children she might have before reaching thirty-one should be slaves until they reached age twenty-five, "and their increase to the latest generation, are to be and remain slaves until they shall respectively arrive to the full age of twenty-five years."[63] Sadly, the rule against perpetuities defeated even this small measure of qualified future freedom for Hannah's children and grandchildren.

Even in narratives of slavery, the least chivalrous of institutions, the notion that a girl needs a male protector forms a recurrent theme, sometimes appearing as a restraint on her ability to flee, and sometimes as a threat to coerce her into sexual compliance. In a telling passage of *Incidents in the Life of a Slave Girl*,[64] yet another Harriet—Harriet Jacobs, writing under the pseudonym of Linda Brent—describes a period in her adolescence when she was tormented by the unwanted sexual attentions of her master. She recalls planning with her younger brother William how they would someday escape to the free states. One major impediment was the opposition of her grandmother, a woman who, like Fred's grandmother, had a home of her own—and nursed the hope of earning enough money through baking cakes not only to raise her offspring, but to eventually buy them. Here is how Harriet describes the tension between her own youthful passion for freedom and her grandmother's mature fears:

> As for grandmother, she was strongly opposed to her children's undertaking any such project. She had not forgotten poor Benjamin's sufferings, and she was afraid that if another child tried to escape, he would have a similar or a worse fate. To me, nothing seemed more dreadful than my present life. I said to myself, "William *must* be free. He shall go to the north, and I will follow him." Many a slave sister has formed the same plans.[65]

The modern reader is struck by the contrast between the girl's spirited resolve and her assumption that freedom was for men. She could not think of her own escape until a fourteen-year-old boy, two years her junior, had gone ahead.

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63. Ludwig (of color) v. Combs, 1 Met. 128 (Ky. 1858), *reported in* JUDICIAL CASES VOL. 1, *supra* note 53, at 435.

64. HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (L. Maria Child ed., 1861), *in* THE CLASSIC SLAVE NARRATIVES, *supra* note 4, at 341.

65. *Id.* at 374.

Like Harriet Scott, Harriet Jacobs was constrained by both her race and her gender. While some narratives of girls in slavery reflect vulnerability and dependency, the stories of others like Sojourner Truth and Harriet Tubman run counter to such "feminine" images. These females were often depicted, even by their friends within the abolition movement, as oddities, noble savages, or exotic Amazons. By their enemies, they were depicted as de-sexed Aunt Jemimas or over-sexed Jezebels.[66] All girls, but especially colored girls, were caught between the stereotypes that defined the sexes in dichotomous stereotypes: strong or helpless; powerful or fragile; and chaste or promiscuous. As female children and adolescent girls, Eliza and Lizzie were situated at a very complex time and place made extraordinarily dangerous by the confluence of race, gender, and minority.

What were their beliefs and behaviors, confronted with the facts of slavery and emancipation? How did they act to "make their own world?" Were these girls passive objects or did they possess some "agency" of their own? There are hints in the meager historical record that Eliza and Lizzie may have shown more independence and power than conventional images of girlhood would have allowed them. Contemporary reports noted that the girls had "run away" while the case was pending. We do not know whether they planned their escape with or without the blessing of their parents. Young people and their parents do not always place the same priorities on personal freedom and family unity. Just as we must struggle to recognize Harriet Scott as an individual with agency, we must do the same for her teen-aged daughters. The narratives of slavery indicate that children began to understand that they were slaves around the age of six or seven, that slavery was a topic of intense discussion with other children during pre-

66. *See* ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH 290-292 (1988); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989); Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309 (1996); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1 (1995); Joan R. Tarpley, *Black Women, Sexual Myth, and Jurisprudence*, 69 TEMPLE L. REV. 1343 (1996).

adolescent years, and, by early adolescence, many were already plotting their escapes. Many a slave, male and female, ran away while still legally a child, leaving a father, mother, or grandmother behind who could not or would not leave.[67]

The Scott girls did not return to their parents' home until they were no longer slaves, and no longer minors. In May of 1857, two months after the Supreme Court decision was announced, in a move that surprised many observers and still baffles historians, Dred Scott and his family were manumitted by their owner. Newspapers covering this development reported that Dred's daughters "were, virtually, free before, having achieved their freedom by their heels what the more conscientious Dred could not secure by ten years of litigation. Their whereabouts have been kept a secret." The reporter speculated, perhaps reflecting stereotypes about paternal omnipotence, that "[t]heir father knew where they were, and could bring them back at any moment. He will doubtless recall them now."[68]

The Scotts were free at last, but the Dred Scott decision would live on as legal precedent until overruled by the passage of the Fourteenth Amendment in 1868. *Dred Scott v. Sandford* brought joy to the slave holders but was roundly condemned by abolitionists, including an aspiring politician named Abraham Lincoln. On June 26, 1857, Lincoln delivered a speech attacking the decision which had been defended by his opponent Judge Douglas. Lincoln clearly understood the incalculable value of legal personhood to Black girls like Eliza and Lizzie. Pointing to their special vulnerability, he ridiculed the claim made by Judge Douglas that upholding slavery would prevent mixing of the races:

> The very Dred Scott case affords a strong test as to which party most favors amalgamation, the Republicans or the dear Union-saving Democracy. Dred Scott, his wife, and two daughters were all involved in the suit. We desired the court to have held that they were citizens so far at least as to entitle them to a hearing as to

67. *See, e.g.*, JACOBS, *supra* note 64, at 374 (describing the pain that Harriet Jacobs, assuming the pseudonym Linda Brent, and other youthful family members felt in going against the pleas of a beloved grandmother who opposed their flight from slavery).

68. VanderVelde & Subramanian, *supra* note 22, at 1074 (quoting *Dred Scott Free at Last, supra* note 1).

> whether they were free or not; and then, also, that they were in fact and in law really free. Could we have had our way, the chances of these black girls ever mixing their blood with that of white people would have been diminished at least to the extent that it could not have been without their consent. But Judge Douglas is delighted to have them decided to be slaves, and not human enough to have a hearing, even if they were free, and thus left subject to the forced concubinage of their masters, and liable to become mothers of mulattos in spite of themselves . . . .[69]

By 1858, the girls had returned to their parents' home.[70] Dred Scott died in 1858, and apparently Harriet and Eliza died shortly thereafter, most likely of tuberculosis, the great equalizer which had also claimed their and his master, Dr. Emerson. Lizzie reappears briefly as a figure in the commemorative events surrounding the 100th anniversary of Dred Scott's birth, and then disappears for good. Unlike Frederick Douglass, neither of the Scott girls left us a narrative of her childhood, so we can only imagine what these girls thought of the case that made their father's name famous. We do know, however, from the narratives of girls like Harriet Jacobs that slavery held uniquely different terrors for girls than for boys, and we know that their gender circumscribed their avenues of escape. As Henry Louis Gates, Jr. says of *Incidents in the Life of a Slave Girl*, "Jacobs[] . . . charts vivid detail by vivid detail precisely how the shape of her life and the choices she makes are defined by her reduction as a sexual object, an object to be raped, bred, or abused."[71] We also know that many slave girls, in spite of or because of this specter, did "take to their heels" at great peril to themselves, and against the wishes of parents who feared losing their child to the unknown more than they feared the known evils of slavery.

BLACK URBAN GIRLS AND THE FOURTEENTH AMENDMENT

What does it matter today that the traditional story of *Dred Scott v. Sandford* treats Lizzie and Eliza as

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69. Abraham Lincoln, Address in Springfield, Illinois on the Dred Scott Decision, (June 26, 1857), *reprinted in* FAMOUS SPEECHES: ABRAHAM LINCOLN 30-31 (Peter Pauper Press 1935).

70. FEHRENBACHER, *supra* note 41, at 295.

71. THE CLASSIC SLAVE NARRATIVES, *supra* note 4, at xvii.

nonentities? Their very anonymity confirms how often one must search the historical record in vain for evidence of the experiences of children who participated in history, both by living it and by shaping it. Especially likely to be overlooked or misunderstood are the experiences of those children caught in a complex matrix of overlapping categories—race, sex, class, and minority—which together combine to distort their stories and render them "unimportant" and "marginal."

The stories of these girls, and of their mother and father, also illustrate the mutually reinforcing qualities of race, sex, and age which generate cultural stereotypes and laws based on these generalizations. As we can see, these elements combine and re-combine in complex formulae that unjustly empower or disempower classes of persons, without regard to individual qualities and merits. Such stereotypes seem to have a symbiotic relationship, each feeding on and nourishing the others. As Professor Dorothy Roberts has observed, "[r]acism makes the experience of sexism different for Black women and white women. But it is not enough to note that Black women suffer from both racism and sexism, although this is true. Racism is patriarchal. Patriarchy is racist. We will not destroy one institution without destroying the other."[72]

The same can be said of the interlocking disabilities experienced by girls like Lizzie and Eliza. The experiences of Lizzie and Eliza were not the same as the experiences of boys like Fred Bailey or grown women like Harriet Scott. However, the cultural and legal images of women, children, and people of color as naturally subordinate beings lacking in rational capacity were rooted in the same fertile soil of inequality. Discrimination against children seemed to thrive in symbiotic relationship with discrimination against Blacks, the poor, and females. A challenge to injustice towards any of these groups tends to expose the interconnections among them.

In the words of one scholar studying the intersections of race and gender, "[s]lavery was the architect of prevailing stereotypes of Black women, but equally, it was the source of sexual and racial ideologies that determined the roles of

72. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 3 (1993).

men, both white and Black, and of white women."[73] Ideologies of citizenship and freedom clashed with ideologies of gender inequality and racial inferiority, and combined in strange and ambiguous ways to perpetuate old injustices. In one Reconstruction Era case, an emancipated slave was indicted for beating his wife—a highly unlikely outcome had the husband and wife been white. Legal historian Reva Siegel notes the inherent ambivalence of this case: "Was it to ensure that the woman was not treated like a 'slave,' or to prevent her recently emancipated husband from asserting the 'privileges' of a master?"[74] I would add another dimension to this relational matrix by calling attention to the ways in which stereotypes about race and gender drew upon stereotypes of childhood and youth, and, in turn, reinforced those disabling stereotypes. The mythology that branded women and slaves as children tended not only to infantilize women and justify slavery, but also to reinforce the essentialist myth of children's incapacity as a class. Children, women, and slaves were by nature "childish" and lacking rational capacity, "naughty" and needing physical correction, "innocent" and needing to be sheltered from reality, "indolent" and needing to be caned and whipped at school or in the home, "primitive" and unfit for adult society, and "fibbers" or "fantasizers" and not to be trusted to tell the truth or accurately report events they witnessed. Such generalizations, while having some basis in children's reality, were used to justify laws which disabled all children as a class, allowing them to be exploited, abused, and silenced with impunity.

Because historically children have been silenced by convention—seen but not heard—we must try especially hard to uncover their hidden and neglected stories. Many children are not free to tell their stories until adulthood, and very young children often cannot tell their own stories and must depend on adults to do so.

There is always a danger, however, in one group's taking up arms in self-appointed defense of another. Modern African American scholars such as bell hooks and Cheryl I. Harris have highlighted the history of

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73. Cheryl I. Harris, *supra* note 2, at 388.

74. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2135 (1996) (discussing *Fulgham v. State*, 46 Ala. 143 (1871)).

appropriation by white feminists of Black women's stories of slavery in order to lend rhetorical power to their own struggle for equal rights.[75] Similar dangers accompany the use of children's stories of slavery to lend rhetorical power to the notion that all children historically were held in bondage. There is a fine line between drawing analogies to such stories to make more visible the reality of children's oppression as a class, and seeming to suggest that children in slavery experienced nothing very different from children in general. This would be patently untrue. But, as Harris points out, the solution is not to ignore or deny the existence of stories of oppression, or prohibit others from hearing them, but rather to "attend more closely to [such voices] as a gateway to exploring the relational matrix between race, gender, and property forged in slavery . . . ."[76] Similarly, we need to hear the voices of these children as clearly as we can, enabling these young protagonists to speak with as much authenticity (even in translation) as is humanly possible. The cautious note struck by critics such as hooks and Harris tells us to be wary of the risk to children in having others tell their stories, but not to turn a deaf ear.

Male abolitionists appropriated the narratives of women and children by simply folding dominance over women and children into the definition of a free man's rights. White women suffragists and feminists appropriated the stories of women and girls of color by assuming that their own experiences of subordination were equivalent to their Black sisters' experiences of chattel slavery. They too often played upon stereotypes of Blacks instead of allowing Black women their own voices. Early feminists appropriated children's stories to make their case for gender equality, and used the disabling power of domesticity to create an intimate realm in which children—especially female children—played the role of cherished but compliant subjects.

We see this same phenomenon of misappropriation in abolitionist rhetoric. A recurring theme in the literature about slavery is the claim that slavery deprived parents of their rights of custody and control over their children, and gave other adults dominion over their offspring. While

75. Cheryl I. Harris, *supra* note 2; HOOKS, *supra* note 66.
76. Cheryl I. Harris, *supra* note 2, at 392.

adults experienced this deprivation as a painful limit on their abilities to protect their children from harm, they also saw it as a deep personal injustice, robbing them of their rights. Children, however, may have experienced the same events differently, as a form of terror and confusion that left them not knowing where they belonged and whom they ought to love, fear, and obey. Here is a passage describing the plight of William, Linda Trent's younger brother:

> One day, when his father and his mistress both happened to call him at the same time, he hesitated between the two; being perplexed to know which had the strongest claim upon his obedience. He finally concluded to go to his mistress. When my father reproved him for it, he said, "You both called me, and I didn't know which I ought to go to first."
>
> "You are *my* child," replied our father, "and when I call you, you should come immediately, if you have to pass through fire and water."[77]

Viewed from a parent's perspective, this vignette illustrates the valiant attempt to keep a sense of family structure intact despite the destructive laws of slavery. Certainly, the parent acted to assert the child's dignity as much as he acted to assert his own by showing William that he must never let his identity be defined as chattel, rather than son. William's father acted as he should have under the circumstances forced upon him. Yet this should not overshadow the possibly different meaning of this story for the child. William experienced the evil of slavery in a way that was unique—small and dependent on others, he was torn between two "masters," each attempting to command his obedience and define his identity. This is a story of a parent asserting his rights; it is also a story about a child caught in the struggle for dominance.

The neglected stories of families in slavery, as Peggy Cooper Davis suggests, provide an interpretive tool that gives meaning and dimension to concepts like equality, due process, and human dignity.[78] These values, which are the antithesis of slavery, were made a part of our Constitution in response to the evils of slavery. What we condemned as a society in rejecting slavery is the converse and foil to the

77. JACOBS, *supra* note 64, at 345.
78. *See* DAVIS, *supra* note 54, at 226.

positive values reflected in the Civil War Amendments.[79] These interpretational tools must be used to explore the meaning of "liberty" for children as well as adults, so that the evils that formed children's experiences of slavery will not be perpetuated.

Contemporary scholars look to the experiences of nineteenth century children and see many troubling similarities with today's children. Today, 600,000 children, a disproportionate number of them children of color, live in foster care as wards of the state. The legal status of children remains problematic. Even in cases involving termination of their family ties, they often lack standing or party status. Whether wards of the state or captives in abusive homes, too many children remain at the mercy of unloving adults who claim absolute ownership. Such children are at risk of physical and sexual abuse, deprived of the opportunity to grow physically and intellectually, and subject to being torn arbitrarily from familiar surroundings and people. Teenagers are still being reprogrammed—summarily shipped off to strangers, some of them trained as spirit-breakers, without due process of law. Children caught in custody battles and contested adoptions are in constant confusion about where their loyalties lie and the identity of their "real" parents. Too often, they are treated as objects rather than persons. These continuing injustices toward children, whether perpetrated by the state or by the parent under color of state law, evoke the stories of children in slavery. The stories I have told of girls (and boys) at the intersections of race and patriarchy should make us wary when denial of due process to children and children's subjugation are defended as a "liberty" conferred on adults by the Civil War Amendments.

79. *See* U.S. CONST. amends. XIII-XV.