

Speak to Your Dead, Write for Your Dead: David Galloway, Malinda Brandon, and a Story of American Reconstruction

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Speak to your dead. Write for your dead. Tell them a story. What are you doing with this life? Let them hold you accountable. Let them make you bolder or more modest or louder or more loving, whatever it is, but ask them in, listen, and then write.¹

*someone will remember us
I say
even in another time²*

For over ten years, the state of Tennessee prosecuted a Black man and a white woman, first for living together and then for marrying one another. Their names were David Galloway and Malinda Brandon, and this is their story. It is also the story of American Reconstruction—a singular moment in American history in general, and American constitutional jurisprudence in particular, when, for a brief instant, between Dred Scott v. Sandford and Plessy v. Ferguson, between the Civil War and Jim Crow, between the bondage of cotton plantations and the segregation of drinking fountains, between the charnel house of Gettysburg and the strange fruits hanging from Southern trees, the old world of racial slavery had fallen into pieces and had not yet rebuilt itself into the new social order of racial apartheid; everything seemed, again for a brief moment, possible, everything changing, in flux, in motion. W.E.B. Du Bois once eulogized Reconstruction as a “splendid failure” which, had it succeeded, would have given birth to “a different world.” David and Malinda were two ordinary people whose lives—diminished, damaged, broken—were, in that liminal flicker of Reconstruction, an emblem of the different world whose passing Du Bois would in time come to mourn.

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1. ALEXANDER CHEE, *How to Write an Autobiographical Novel*, in HOW TO WRITE AN AUTOBIOGRAPHICAL NOVEL 244, 277 (2018).

2. SAPPHO, IF NOT, WINTER: FRAGMENTS OF SAPPHO 147 (Anne Carson trans., 2003).

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PROLOGUE

This is a story about twelve French Catholic nuns who sailed across the Atlantic in search of paradise in New Orleans, Louisiana; about a white banker who once owned every Black inmate in Tennessee's prison system; about a riverboat captain who sailed the Ohio in search of a port that would take in the hundreds of female sex workers the Union Army had conscripted to his care; about a Black prophet named Pap Moses who led an exodus of his people out of the cotton plantations of the South in search of a new Canaan in the Great Plains of Kansas; about a former Confederate soldier who single-handedly tried to block Tennessee's ratification of the Fourteenth Amendment and whose grandson would in time sign the Southern Manifesto to block implementation of *Brown v. Board of Education*; about a former governor of Mississippi who once defended slavery but spent the last decades of his life challenging Jefferson Davis to a duel and calling for an end to white supremacy; and about a civil rights lawyer who spent his dying days in an Alabama commune mourning the death of his daughter and spinning dreams of Black liberation out of the cocoons of silkworms.

These characters—the nuns, the banker, the riverboat captain, the prophet, the Confederate general, his grandson, the Mississippi governor, the sericulturist—are not principal players; they are supporting actors orbiting the story's main

characters: David Galloway, a biracial Union veteran who was returned to slavery after the Civil War, and Malinda Brandon, a white girl made orphan in the time of cholera in Nashville, Tennessee, who, when of age, chose for a while to pass for Black. Here and there, the story turns to these secondary players because it is a story about race and slavery and, like black holes that cannot be seen but only sensed in the gravitational pull and superheated reflection they cast on nearby stellar matter, so too the central characters in race and slavery stories can often be seen only in the shadow they throw on those around them and the echo they leave behind.

And, like all race and slavery stories, the story of David Galloway and Malinda Brandon cannot be told in a linear fashion; it toggles between past and present; time moves forward so swiftly that small settlements become large cities overnight; it moves backwards so relentlessly that, like “boats against the current,” we are “borne back ceaselessly into the past.”³ And, again like most race and slavery stories, the story of David and Malinda has gaps in it; people are born, live, and die barely leaving behind a public trace that they were here. But these leaps in time and these lapses in chronology are to be expected because “[e]very 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.”⁴

This story takes place mostly during Reconstruction, and to write about Reconstruction is to constantly imagine a series of counter-factual narratives and counter-constitutional doctrines—what would the American constitutional experiment have amounted to had Reconstruction been made to work, and the second Founding not been killed off in its infancy? What would have been our modern conception of substantive rights had the Supreme Court not hollowed out the Privileges and Immunities Clause in *Slaughter-House*?⁵ Would *Plessy v.*

3. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 121 (1925).

4. SAIDIYA HARTMAN, *WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF SOCIAL UPHEAVAL* xiii (2019).

5. 83 U.S. 36 (1873). Between its 1872 decision in *Blyew v. United States*, 80 U.S. 581 (1872), when the Court considered for the first time the reach of federal power under the Reconstruction Amendments, and its 1906 ruling in *Hodges v. United States*, 203 U.S. 1 (1906), when it unequivocally declined to read the Reconstruction Amendments as granting a markedly greater role for the federal government in the protection of individual rights, the Court issued eleven decisions in which it purportedly attempted to grapple with the meaning of the Reconstruction Amendments and Congress’s power to enforce them: *Blyew*, 80 U.S. 581 (1872); *Slaughter-House Cases*, 83 U.S. 36 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879); *Neal v. Delaware*, 103 U.S. 370 (1881); *United States v. Harris*, 106 U.S. 629 (1882); *The Civil Rights Cases*, 109 U.S. 3 (1883); and *Hodges*, 203 U.S. 1 (1906). In some of these rulings, namely *Strauder*, *Ex parte Virginia*, *Rives*, and *Neal*, the Court conceded that whatever else the framers of the Reconstruction Amendments intended, at a bare minimum they meant for the Amendments to invalidate state laws or state actions that on their face denied Black people solely on account of their race those rights and immunities that were already guaranteed to others either under the 1789 Constitution or under the constitution of a particular state. See *Strauder*, 100 U.S. at 310; *Ex parte Virginia*, 100 U.S. at 347;

*Ferguson's*⁶ American apartheid have come to pass if the majority in the *Civil Rights Cases* had gone the way of Justice Harlan's dissent that the Reconstruction Amendments "established and decreed universal *civil freedom* throughout the

Rives, 100 U.S. at 318; *Neal*, 103 U.S. at 397. But, in the main, a majority of Justices remained steadfastly unwilling to consider the far less obvious but arguably far more significant question whether the Amendments created a new fundamental right and a new responsibility on the part of the federal government to enforce it against both state and private action. Thus, *Slaughter-House*, in which New Orleans butchers sued to enjoin a Louisiana statute regulating the slaughtering of animals within city limits, presented the Supreme Court with the first opportunity to interpret and apply the Thirteenth and Fourteenth Amendments. See *Slaughter-House Cases*, 83 U.S. at 43–44. In their submissions, the butchers argued that the statute, which compelled them to use a state-chartered company to slaughter their animals, was a form of involuntary servitude in violation of the Thirteenth Amendment, and that it abridged their privileges and immunities, and denied them equal protection and due process in violation of the Fourteenth Amendment. *Id.* at 50–51, 56. In a majority opinion authored by Justice Miller, the Court acknowledged that the case presented a question of far greater consequence than the plight of the New Orleans butchers. *Id.* at 67 ("No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."). It was a call to gauge the effect of the Reconstruction Amendments upon the 1789 Constitution. Nonetheless, the majority concluded that, while the Reconstruction Amendments did establish full citizenship for newly freed slaves, they left intact the basic 1789 constitutional framework, according to which states, rather than the federal government, defined and defended the people's civil rights. *Id.* at 77–78 ("Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.").

6. In *Plessy v. Ferguson*, the Supreme Court gave its imprimatur to racial apartheid and constructed the judicial edifice for Jim Crow when it announced the so-called separate-but-equal doctrine and affirmed that it "cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable." 163 U.S. 537, 550–51 (1896). The fact is that almost from the moment it announced the doctrine of separate-but-equal, the Court found it increasingly difficult, not to say impossible, to administer with any degree of fairness or coherence the idea that in all aspects of public life, ranging from education to transportation, the two races could indeed be provided with separate accommodation that would be equal in fact and not just in name.

Thus, as early as 1899, a mere three years after it decided *Plessy*, the Court took up a lawsuit by African-American parents and their children to enjoin the decision by a local school board in Georgia to maintain a high school for white people without a corresponding one for Black people in *Cumming v. Richmond County Board of Education*. 175 U.S. 528 (1899). The Court ruled in favor of the local board, finding that local authorities were within their discretion in deciding that it was for the greater good to use tax funds to maintain an elementary school for 300 Black children rather than a high school for sixty. *Id.* at 544–45. But even though the Court refused to address the argument, plaintiffs pointed out that the constitutional remedy to their suit would have been to admit the sixty Black children to the white high school, thereby making it clear that *Plessy* was the real target and that they had no intention of quietly acquiescing to the doctrine of separate-but-equal. See *id.* at 530–31. It would take close to sixty years, and five separate decisions, for the Supreme Court to finally unwind in *Brown* the moral obscenity that was *Plessy*. See *McCabe v. Atchison, Topeka & Sante Fe Ry. Co.*, 235 U.S. 151 (1914); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950).

United States"?⁷ Would Black political power have survived the racial terror campaign in former Confederate states had the Court used *Cruikshank*⁸ to back federal prosecution of white violence?

7. *Civil Rights Cases*, 109 U.S. at 34 (Harlan, J., dissenting). More than anything else, the question whether the Reconstruction Amendments taken together mean something more than the prohibition against formal discriminatory state action was at the heart of the one case that scholars do agree marked the end of Reconstruction. See John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 856 (1966); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 524 (1986); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1007 (2002); Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 483 (2006). On the surface, the simple question presented by the decision was whether Congress had the power under Section 5 of the Fourteenth Amendment or Section 2 of the Thirteenth Amendment to enact the Civil Rights Act of 1875. See *Civil Rights Cases*, 109 U.S. at 9–10, 20. In sum and substance, the Act declared a right to equal public accommodation and created a private cause of action for its denial. *Id.* at 9. In holding that Congress lacked the power to reach private discrimination, the Court reasoned that “[t]he first section of the Fourteenth Amendment, . . . after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character and prohibitory upon the States.” *Id.* at 10. As such, “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.” *Id.* at 11. “Positive rights and privileges,” the Court conceded, “are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges . . .” *Id.* In short,

until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.

Id. at 13. As to congressional power under the Thirteenth Amendment, the Court acknowledged that Congress was not limited to enacting legislation directed at state action. But, the Court wondered, “[c]an the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant . . . ?” *Id.* at 24. The answer, according to the Court, was that “such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State.” *Id.*

8. See generally *United States v. Cruikshank*, 92 U.S. 542 (1876). *United States v. Cruikshank*, like so many Reconstruction cases, began with an act of racial violence. See generally CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008). On Easter Sunday, April 13, 1873, 300 white men, most mounted on horseback and armed with rifles, surrounded the Grant Parish Courthouse in Colfax, Louisiana. Inside the courthouse were approximately 150 Black men who had gathered there to defend the new local Republican government from the 1872 Louisiana election. In that election, two separate candidates for Louisiana governor declared victory: William Pitt Kellogg, a Republican and supporter of Reconstruction, and John McEnery, a Democrat and former Confederate commander. While the disputed election made its way through the federal courts, each candidate and their supporters began to appoint local officials loyal to their cause. In Grant Parish, Kellogg issued commissions for parish judge and sheriff, while the outgoing governor, a supporter of McEnery, put up a slate of anti-Reconstruction officials for the same positions. The white mob attacked the courthouse and set fire to it, killing over 150 Black freedmen as they tried to surrender. The United States indicted several members of the white mob under the Civil Rights Act of 1870, charging that they had “banded and conspired” to deprive the murdered freedmen of their lives and liberty without due process, and to deny them of their right to equal protection of the laws, to peaceably assemble, to lawfully bear arms, to vote, and to enjoy the privileges and immunities granted them as Louisiana citizens. The Court dismissed every one of the charges, finding that some of the charges were too vague to be sustainable under the indictment, and,

These parallel universes, in which racial lynching is a crime serious enough to merit federal attention and the bare minimum of personhood is a Black person eating unmolested at a lunch counter, often turn upon wayward opinions of federal judges, or the public pronouncements and private thoughts of those whose power and position guaranteed their words would be preserved and remembered.⁹ But, far from a mere theoretical alternative reality, that lost world was actually made real by the generation born in slavery, raised in the war, and formed in Reconstruction. These ordinary people—many were former enslaved persons and children of former enslaved persons—by the very example of their lives, by the very fact of their daily existence, sought to redefine the Constitution. They did not always succeed; indeed, more often than not, they were victims of, and witness to, the birth of American Apartheid. And yet, they used their very bodies to enact citizenship¹⁰ and, in the process, they made real, even if only for a short while, and even if only at a terrible price, the lost world of Reconstruction we so often, so fitfully try to reanimate using dissenting opinions by Justices who could not command a majority to their views, and the radical teachings of men and women who conceived of a second Founding but upon whom the country has never seen fit to confer the title of Founder.

more significantly, that Congress exceeded its Reconstruction powers when it made violations of what the Court considered to be state-granted rights a federal crime under the Civil Rights Act of 1870.

9. One of my favorite works in this “what-might-have-been” genre is *A Rift in the Clouds*, which examines the career of three white Southern federal judges—Jacob Trieber of Arkansas, Emory Speer of Georgia, and Thomas Goode Jones of Alabama—and what the author characterizes as “their forgotten struggle for racial justice and civil rights.” BRENT J. AUCOIN, *A RIFT IN THE CLOUDS: RACE AND THE SOUTHERN FEDERAL JUDICIARY, 1900–1910*, at 2 (2007). Aucoin shows that, unlike their Reconstruction-era contemporaries, Trieber, Speer, and Jones tried to read the Reconstruction Amendments broadly. *See id.* at 13. In *United States v. Morris*, Trieber ruled that the Thirteenth Amendment empowered Congress to protect Black people from racial violence. *See id.* at 23–26 (citing *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903)). In *United States v. McClellan*, Speer ruled that peonage was a form of slavery outlawed under the Thirteenth Amendment. *See id.* at 45 (citing *United States v. McClellan*, 127 F. 971 (S.D. Ga. 1904)). And, in *Ex parte Riggins*, Jones held that the Thirteenth and Fourteenth Amendments imposed an affirmative obligation on the federal government to protect Black people from being lynched by white people. *See id.* at 64–68 (citing *Ex parte Riggins*, 134 F. 404 (N.D. Ala. 1904)). Aucoin does not sentimentalize them; he readily concedes that, as proponents of the New South Creed, the three advocated for the fair treatment of African-Americans but not for true equality. *Id.* at 14. Rather, Trieber, Speer, and Jones were racial paternalists who believed that “the solution to the South’s ‘race problem’ was for whites to treat blacks as parents treat their children, and for blacks to relate to whites as a child does a father.” *Id.* But, in the end, Aucoin’s thesis is to imagine what might have been had the Supreme Court not “aided and abetted the southern counterrevolution.” *Id.* at 90.

10. I take credit neither for the idea nor the phrase that the history of America is the story of Black people using their bodies to enact citizenship; both the idea and the phrase belong to Professor Peggy Cooper Davis, though she has yet to state as such in writing. Over the years, I have co-taught a seminar with Professor Davis at New York University School of Law, titled “Critical Narratives in Civil Rights,” in which her central message to students has always been the ways in which, from slavery to the modern civil rights movement, the lived experiences of Black people have been nothing less than a demonstration of the promises of the Constitution. For a discussion of how Black liberation movements have always taken the form of people taking to the streets to enact freedoms that should have been guaranteed to them, see Peggy Cooper Davis, Aderson François & Colin Starger, *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 360–61 (2017).

Nearly three quarters of a century after the end of the Civil War, W.E.B. Du Bois eulogized Reconstruction as a “splendid failure”¹¹—a failure because, with the North’s acquiescence, the South replaced “equality with caste”;¹² splendid because, in spite of it all, “back to the wall, outnumbered ten to one,” Black people had fought “the battle of all the oppressed and despised humanity of every race and color, against the massed hirelings of Religion, Science, Education, Law, and brute force.”¹³ Perhaps with the benefit of hindsight, Du Bois could see then that which we can see now: that from the start Reconstruction was fated to end in failure.¹⁴ And no doubt, Du Bois was right that “[i]f the Reconstruction of the Southern states, from slavery to free labor, and from aristocracy to industrial democracy, had been conceived as a major national program of America, whose accomplishment at any price was well worth the effort, we should be living today in a different world.”¹⁵ But the Reconstruction generation did not know—and could not have possibly known—that the odds had always been too decidedly against Reconstruction succeeding. Nor did they did know—nor could they have known—the different world Du Bois imagined would remain beyond their reach. If Reconstruction is a story of splendid failure, so too it is a story of everyday people, by the simple ordinary acts of daily life, trying to build the “different world” Du Bois would in time come to mourn.

In her biography of Jane Franklin, Benjamin Franklin’s sister, historian Jill Lepore writes of the difficulty of retelling the lives of those whose days were not documented. “History is what is written and can be found,” she says, “what isn’t saved is lost, sunken and rotted, eaten by earth.”¹⁶ David Galloway and Malinda Brandon were not the sort of people whose days were documented; very little about them was saved; even less was written. Their life together, whatever joys and sorrows it held, was long ago lost, eaten by earth. And yet, I want to tell you their story because they lived and died at the exact moment in American history in general, and American constitutional jurisprudence in particular, when the old world of racial slavery had fallen into pieces and had not yet rebuilt itself into the new social order of racial apartheid and, for a brief moment, Du Bois’s different world seemed possible.

11. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880*, at 708 (The Free Press 1998) (1935).

12. *Id.* at 707.

13. *Id.* at 708.

14. Du Bois believed that Reconstruction was fated to end in failure because from the start there were too many forces arrayed against it. *See id.* He described the fight for Reconstruction as

Athanasius contra mundum, with back to the wall, outnumbered ten to one, with all the wealth and all the opportunity, and all the world against him. And only in his hands and heart the consciousness of a great and just cause; fighting the battle of all the oppressed and despised humanity of every race and color, against the massed hirelings of Religion, Science, Education, Law, and brute force.

Id.

15. *Id.*

16. JILL LEPORE, *BOOK OF AGES: THE LIFE AND OPINIONS OF JANE FRANKLIN* 6 (2014).

I. THE ORPHAN AND THE SISTERS OF CHARITY OF NAZARETH

The story of Malinda Brandon starts on February 22, 1727—when twelve Catholic nuns from the Order of St. Ursula, accompanied by a delegation of Jesuits, left the port of L’Orient, France, aboard the ship *La Gironde* bound for New Orleans, Louisiana, on a mission to establish a convent and school in the French territory.¹⁷ The youngest of the party, twenty-year-old Marie Madeleine Hachard, wrote a farewell letter to her father, a bourgeois bureaucrat in nearby Rouen, describing the lower Mississippi Valley—a place to which she had never been—as “the blessed country for which I long as if it were the Promised Land.”¹⁸

The crossing took five months. On July 23, the nuns landed at La Balize, a French fort and settlement at the mouth of the Mississippi River that would later become the site of Plaquemines Parish, Louisiana, home to Fort Jackson, the last Confederate redoubt before the fall of New Orleans to the Union in the Civil War.¹⁹ At La Balize, they transferred to small boats for the final leg of their voyage up river to New Orleans, where they arrived the morning of August 6.²⁰ Looking back over their nearly six-month journey from L’Orient to New Orleans, twelve nuns berthed together in a single small compartment, beset by storms, stalked by pirates, and nearly drowned by drunken sailors.²¹ Mother Superior Marie Tranchepain de St. Augustin, the leader of the expedition, who would pass away barely six years after arriving in New Orleans, ascribed their safe arrival to nothing less than divine providence.²²

Founded in 1535 in Brescia, Italy, and named for their patron Saint Ursula, the Ursulines took as their mission the education of girls and the care of the sick and needy.²³ From Italy, the Order first spread to France and Belgium, then to Austria, Germany, Holland, Poland, and Great Britain, before establishing its first outpost in North America in 1639, where, for almost a century prior to their 1727 arrival in New Orleans, the Ursulines educated Native and French colonial girls in Quebec, Canada.²⁴ New Orleans became the second outpost of the Ursulines in

17. Mary Viatora Schuller, *A History of Catholic Orphan Homes in the United States, 1727 to 1884*, at 6 (June 1954) (Ph.D. dissertation, Loyola University Chicago) (available at https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1466&context=luc_diss [<https://perma.cc/WSC8-72WW>]); Marion Ware, *An Adventurous Voyage to French Colonial Louisiana: The Narrative of Mother Tranchepain, 1727*, 1 LA. HIST. J. LA. HIST. ASS’N 212, 214 (1960).

18. Letter from Marie Madeleine Hachard to Her Father (Feb. 22, 1727), in *VOICES FROM AN EARLY AMERICAN CONVENT: MARIE MADELEINE HACHARD AND THE NEW ORLEANS URSULINES, 1727–1760*, at 22 (Emily Clark ed., 2007).

19. Schuller, *supra* note 17.

20. *Id.*

21. Ware, *supra* note 17, at 216, 217, 220, 225.

22. *See id.* at 228.

23. Ettie Madeline Vogel, *The Ursuline Nuns in America*, in 1 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA, 1884–86, at 214, 214 (1886).

24. *Id.* at 214–16; Carol Mattingly, *Black Robes/Good Habits: Jesuits and Early Women’s Education in North America*, in TRADITIONS OF ELOQUENCE: THE JESUITS AND MODERN RHETORICAL STUDIES 116, 116–18 (Cynthia Gannett & John C. Brereton eds., 2016).

North America when the Company of the Indies, which had been granted a monopoly over the Louisiana Territory by the French crown, entered into a contract for the nuns to take charge of the local hospital and open up a school.²⁵ For their first two years in New Orleans, the Ursulines ran the first free day school in America and a boarding school for young women.²⁶ That changed in 1729 when they accepted into their charge a large group of young girls made orphans after members of the Natchez Native American nation on the night of November 28, 1729, attacked and killed nearly the entire French settlement at nearby Fort Rosalie.²⁷

From their humble beginning, the Ursulines grew into a potent social, economic, and political force in New Orleans.²⁸ The city had organized itself into a “full-blown slave society,” becoming the largest slave market in the United States.²⁹ The Ursulines joined in the city’s main industry and became slaveholders. They did so early and with little seeming compunction.³⁰ So, while the Jesuits accompanying Sister Tranchepain’s nuns brought white skilled tradesmen to help them settle in New Orleans, Marie Madeleine Hachard, the young novice who so excitedly described Louisiana as the Promised Land, wrote in that very same letter to her father that the nuns chose to bring their own African servant.³¹ “[D]o not be scandalized,” she wrote her father, “it is the manner of the country, we took a Moor to serve us.”³² By 1770, a little over forty years after their arrival in New Orleans, the Ursulines were in the top six percent of plantation slaveholders in the lower Mississippi valley.³³

For nearly a century, the Ursulines served as the only Catholic order in the Mississippi Valley until 1829, when the Sisters of Charity, an American order founded on the East Coast in 1809, arrived in New Orleans and, for a time, took over running the orphanage from the Ursulines.³⁴ From New Orleans, the Sisters of Charity would go on to establish Catholic orphanages across the United States, including one in 1842 in Nashville, Tennessee.³⁵ There, they set up St. Vincent’s Orphan Asylum, an orphanage for young girls, where in 1850 lived seven nuns

25. See HENRY CHURCHILL SEMPLE, *THE URSULINES IN NEW ORLEANS AND OUR LADY OF PROMPT SUCCOR: A RECORD OF TWO CENTURIES, 1725-1925*, at 69 (1925).

26. Ware, *supra* note 17.

27. Sophie White, *Massacre, Mardi Gras, and Torture in Early New Orleans*, 70 *WM. & MARY Q.* 497, 501–02 (2013); Schuller, *supra* note 17, at 11.

28. EMILY CLARK, *MASTERLESS MISTRESSES: THE NEW ORLEANS URSULINES AND THE DEVELOPMENT OF A NEW WORLD SOCIETY, 1727–1834*, at 208–09 (2007).

29. See LAWRENCE N. POWELL, *THE ACCIDENTAL CITY: IMPROVISING NEW ORLEANS* 223 (2012).

30. CLARK, *supra* note 28, at 161–62.

31. Letter from Marie Madeleine Hachard to Her Father, *supra* note 18, at 33.

32. *Id.*

33. CLARK, *supra* note 28, at 169.

34. *Id.* at 256.

35. JULIA GILMORE, *COME NORTH! THE LIFE-STORY OF MOTHER XAVIER ROSS, FOUNDRRESS OF THE SISTERS OF CHARITY OF LEAVENWORTH* 33 (1951). *The Catholic Advocate* of Nashville wrote the following line on September 15, 1842: “The Sisters of Charity arrived in our city on Thursday, the 25th of last month. These were the Sisters from Nazareth.” *Id.* at 33–34 (quoting Father Stokes, Letter, *CATH. ADVOC.*, Sept. 15, 1842).

and seventeen orphans, including a seven-year-old girl by the name of Malinda Brandon.³⁶

II. MALINDA BRANDON

The city the Sisters found when they arrived in Nashville in 1842 was still, in their own words, “a backwoods town.”³⁷ They had come to Nashville at the behest of Bishop Richard Pius Miles, whom Pope Gregory XVI assigned to minister the “spiritual desert” of Tennessee.³⁸ At the time, there were no more than a hundred Catholic families scattered across the state,³⁹ and Bishop Miles hoped the Sisters would help expand the diocese of Nashville.⁴⁰ Over the next few years, the Sisters opened St. Mary’s Academy, a boarding and day school; St. Vincent’s Orphan Asylum for girls, an orphanage for young girls; and St. John’s Hospital, a place where Catholic orphan girls learned how to help the Sisters care for the sick according to the Sisters’ pedagogical philosophy of teaching discipline of mind and character.⁴¹ To that end, the Sisters implemented strict rules, including the prohibition of reading fiction, which they believed to be damaging to a “vigorous mental culture” and led to “intellectual imbecility.”⁴² In 1852, when a smallpox epidemic came to the city, the Sisters enlarged the orphanage in order to take in “children left parentless by the pestilence.”⁴³

Like the Ursulines of New Orleans, the Sisters of Charity kept Black people as slaves to perform menial tasks but, unlike the Ursulines, they did not derive an income from slavery.⁴⁴ Indeed, because the Sisters had virtually no independent

36. Malinda Brandon and the nuns of the Sisters of Charity appear on pages 145 and 146 of Schedule I of the Free Inhabitants in the City of Nashville in the County of Davidson for the State of Tennessee in the 1850 Census. The entry shows seven nuns and eighteen orphan girls between the ages of four and fourteen years old. See U.S. CENSUS BUREAU, SCHEDULE I.—FREE INHABITANTS IN THE CITY OF NASHVILLE IN THE COUNTY OF DAVIDSON STATE OF TENNESSEE 145–46 (1850), reprinted in APPENDIX OF PRIMARY SOURCES (François comp., 2022), <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/10/Speak-to-Your-Dead-111.1-Online-Appendix.pdf> [<https://perma.cc/C4QX-Y676>]. For a discussion of the Sisters of Charity’s orphanage work in Nashville, see GILMORE, *supra* note 35, at 32–33. Malinda was probably made orphan by cholera. During the nineteenth century Tennessee suffered cholera epidemics in 1834, 1849, 1873, and 1892. See *Disasters in Tennessee*, TENN. STATE LIBRARY & ARCHIVES, <https://sharetn.gov.tnsosfiles.com/tsla/exhibits/disasters/epidemics.htm> [<https://perma.cc/7YCS-Q27L>] (last visited Sept. 19, 2022). The disease hit Nashville between 1849 and 1850 where, among others, it claimed the life of former President James K. Polk. See W.K. BOWLING, CHOLERA, AS IT APPEARED IN NASHVILLE, IN 1849, 1850, 1854 AND 1866, at 3–4 (1866).

37. GILMORE, *supra* note 35, at 34.

38. Schuller, *supra* note 17, at 239 (citations omitted).

39. *Id.*

40. See V.F. O’DANIEL, THE FATHER OF THE CHURCH IN TENNESSEE: OR THE LIFE, TIMES, AND CHARACTER OF RICHARD PIUS MILES 377 (1926).

41. Schuller, *supra* note 17, at 239–245.

42. GILMORE, *supra* note 35, at 57–58.

43. *Id.* at 63.

44. Unlike the Ursulines, however, who at one point were among the wealthiest slaveholders in New Orleans, see CLARK, *supra* note 28, the Sisters of Charity remained a poor religious order. Though incomplete, some of the records from the Sisters of Charity’s time in Nashville remain with the Catholic Diocese of Nashville archives. In those records, there is a letter from Sister Xavier Ross to a Sister Claudia on or about 1850 to 1851. The letter ends with “Best love to all the Sisters, Mother first, though

income of their own, they and their orphan charges lived off the generosity of Nashville's merchants: "Six mornings in the week, two little girls went from the orphanage to the marketplace with a basket swinging between them. They made the rounds of the meat counters without a word spoken. Each meat vendor understood their errand and put a contribution into their basket."⁴⁵ By the summer of 1858, the Sisters had fallen so deeply into debt that they had no choice but to sell the Academy and close the orphanage in order to repay their creditors.⁴⁶ Boarders with families were returned to their parents or guardians;⁴⁷ young, orphaned girls were placed with families, while others accompanied the Sisters to their new home in Kansas;⁴⁸ the rest, with no family and past the age to be taken in, went out on their own.⁴⁹ So, at the close of 1858, Malinda Brandon, sixteen, still an orphan, no longer under the Sisters' tutelage, was now on her own in Nashville.

III. THE INVALID SOLDIERS OF THE 64TH UNITED STATES COLORED INFANTRY

Nashville may have been in 1842, as the Sisters of Charity considered it, "a backwoods town,"⁵⁰ but it was then, and had been since its founding a half-century prior, a multiracial community. In 1787, 105 Black enslaved persons joined whites to form the settlement that would in time become Fort Nashborough on a western bluff overlooking the Cumberland River.⁵¹ From the start, along with enslaved people, who cleared trees, removed stones and boulders, and dug wells to raise Fort Nashborough, there also lived among white settlers free Black people.⁵² By 1804, when the area surrounding Fort Nashborough became Davidson County, Black people comprised twenty-two percent of the 477 settlers.⁵³ Nearly two decades later, the county had 20,154 residents, including 7,088 Black people, nearly thirty-five percent of the population.⁵⁴ As the Black population grew, so did the free Black middle class: "There were 18 free Negroes in Davidson County in 1791, 14 in 1800, and 130 by 1810. By 1820, some 70 free Negroes (nearly 40 percent of the county's total) lived in Nashville proper. . . . Free Negroes represented 9 percent of Nashville's black population by 1830," and twenty-three percent by the 1850s.⁵⁵ And, "[e]ven though they were merely

she never thinks of me now. I wonder what I have done to her—remember me to Bell, Puss and Lou." Letter from Sister Xavier, Louisville, to Sister Claudia, Nashville (Dec. 1850 or Jan. 1851), *reprinted in* APPENDIX OF PRIMARY SOURCES, *supra* note 36. An undated footnoted annotation to the letter states: "Bell, Puss, and Lou were slaves who had been sent from Nazareth to Nashville to assist the Sisters there." *Id.*

45. GILMORE, *supra* note 35, at 56.

46. Schuller, *supra* note 17, at 244–45.

47. *Id.*

48. *Id.* at 245.

49. *Id.*

50. GILMORE, *supra* note 35, at 34.

51. BOBBY L. LOVETT, *THE AFRICAN-AMERICAN HISTORY OF NASHVILLE, TENNESSEE, 1780–1930: ELITES AND DILEMMAS* 3 (1999).

52. *Id.* at 3–4.

53. *Id.* at 4.

54. *Id.*

55. *Id.*

persons who struggled to make a living in frontier Fort Nashborough, the early free blacks formed the foundation for an elite group of Negroes in the midst of an urban slave society.”⁵⁶ Nashville and surrounding Davidson County remained slave communities in the antebellum period. And, unlike the Deep South “the separation of the races seemed more invisible than visible, more metaphysical than physical, and more psychological than social.”⁵⁷ Prior to the war, to be free and Black was to live under a constant cloud of suspicion such that two years before the war, a local newspaper maintained that “[t]he free Negro population of this county, although it may contain worthy and meritorious individuals, is, as a class, corrupt, vicious, and degraded” and “[i]ts evil influence upon the slave population is apparent to all who have given the subject any investigation.”⁵⁸

When war came, “Davidson County men voted 5,635 to 5,572 to separate but voted against representation in the Confederate States of America.”⁵⁹ The rest of the state broke along Union and Confederate lines with “Middle Tennessee white males vot[ing] by a 15,000-vote margin for separation from the United States,” and “east Tennesseans cast[ing] 70 percent of the state’s 47,238 votes against secession” and “later conven[ing] the Greeneville Convention to denounce the illegal secession and propose a separate, loyal state.”⁶⁰ As for Nashville, on June 18, 1861, “a large crowd witnessed the raising of the Confederate flag over the state capitol.”⁶¹ But the Confederacy did not hold the city for long. The Confederate Army of Tennessee had planned to supplement its ranks by having owners volunteer their slaves as support workers, but few owners complied, even after the General Assembly authorized “a military labor draft for free Negro males between the ages of fifteen and forty-five.”⁶² As for Tennessee’s free Black people, most men of military age successfully escaped forced Confederate military conscription.⁶³ Less than a year after the Confederate flag flew over the state capital, on February 25, 1862, “the 6th Ohio Volunteers’ regimental band marched from the gunboat *Diana* and up Broad Street, playing a triumphant song, *Hail Columbia*” and replaced it with the Union Flag.⁶⁴

At first, the Union Army that took over the city organized the city’s Black population into “military-like labor battalions,” including Black women who “washed clothes, cooked food, nursed the wounded, worked in officers’ homes, and handled wagons and wheelbarrows on large construction projects.”⁶⁵ But, a

56. *Id.* As early as the city’s founding, free Black people lived next to enslaved Black people. *See id.* at 3–4. While not fully equal to white people, free Black people enjoyed access to education, economic opportunities, and public accommodations denied to enslaved people. *See id.* at 7–8.

57. *Id.* at 7.

58. *Id.* at 43 (citation omitted).

59. *Id.* at 45.

60. *Id.*; *see also* Charles F. Bryan, Jr., *A Gathering of Tories: The East Tennessee Convention of 1861*, 39 TENN. HIST. Q. 27, 27 (1980) (discussing the convention).

61. LOVETT, *supra* note 51, at 45.

62. *Id.*

63. *Id.*

64. *Id.* at 49.

65. *Id.* at 51.

year after Union forces marched into Nashville, on May 22, 1863, the United States War Department issued General Order Number 143 establishing a specialized bureau to organize Black enlisted troops.⁶⁶ Infantrymen were accepted in companies, and then consolidated into battalions and regiments.⁶⁷ The Adjutant General numbered their unit by the order of their acceptance.⁶⁸ Their formal designation became the United States Colored Troops.⁶⁹ Altogether, close to 180,000 Black soldiers served in the Union Army⁷⁰ and another 19,000 served in the Navy,⁷¹ including at least eighty commissioned officers.⁷² Black troops accounted for nearly ten percent of all Union forces and 68,178 of the Union dead or missing.⁷³ They served in artillery and infantry and also performed noncombat roles, including carpenters, chaplains, cooks, guards, laborers, nurses, scouts, spies, steamboat pilots, and surgeons.⁷⁴ Black women could not formally join the Army⁷⁵ but “served as nurses, spies, and scouts, the most famous being Harriet Tubman . . . who scouted for the 2d South Carolina Volunteers.”⁷⁶ “Three-fifths of all black troops were former slaves.”⁷⁷

In Tennessee, between 1863 and 1865 the United States Colored Troops experienced every facet of war. In the spring of 1863, Brigadier General Lorenzo Thomas, appointed Commissioner for the Organization of Colored Troops in Tennessee, began raising Black regiments in Memphis and had nearly one thousand troops by June.⁷⁸ At first, these regiments were designated by state and race,

66. Michael T. Meier, *Lorenzo Thomas and the Recruitment of Blacks in the Mississippi Valley, 1863–1865*, in *BLACK SOLDIERS IN BLUE: AFRICAN AMERICAN TROOPS IN THE CIVIL WAR ERA* 249, 259 (John David Smith ed., 2002).

67. *Id.*; *Black Soldiers in the U.S. Military During the Civil War*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/blacks-civil-war> [<https://perma.cc/6TBF-3UQH>] (last visited Aug. 26, 2022).

68. WILLIAM A. DOBAK, *FREEDOM BY THE SWORD: THE U.S. COLORED TROOPS 1862–1867*, at 11 (2011).

69. Meier, *supra* note 66.

70. *FREEDOM'S SOLDIERS: THE BLACK MILITARY EXPERIENCE IN THE CIVIL WAR 16–17* (Ira Berlin, Joseph P. Reidy & Leslie S. Rowland eds., 1998).

71. NAT'L ARCHIVES, *supra* note 67.

72. *Id.*; see also John W. Blassingame, *The Selection of Officers and Non-Commissioned Officers of Negro Troops in the Union Army, 1863–1865*, 30 *NEGRO HIST. BULL.* 8, 10 (1967) (footnotes omitted) (“[T]he seventy-four Negro officers of the First, Second and Third Louisiana Native Guards . . . actually led their men into combat. Furthermore, eight Negro surgeons and twelve Negro Chaplains were commissioned during the war.”).

73. NAT'L ARCHIVES, *supra* note 67; *AFRICAN AMERICAN VOICES: A DOCUMENTARY READER, 1619–1877*, at 35 (Steven Mintz ed., 2009).

74. *Id.*

75. See *ADJUTANT GEN.'S OFF., WAR DEP'T., GENERAL ORDERS NO. 143 (1863)* (establishing a specialized bureau to organize Black enlisted troops, but not making formal provisions for Black women to enlist).

76. NAT'L ARCHIVES, *supra* note 67. Black women played active roles in assisting Union soldiers and acquiring militarily sensitive information while laboring as servants in Confederate households.

77. Steven Mintz, *Historical Context: Black Soldiers in the Civil War*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-black-soldiers-civil-war> [<https://perma.cc/VQ46-65RQ>] (last visited Aug. 29, 2022).

78. DOBAK, *supra* note 68, at 178; NOAH ANDRE TRUDEAU, *LIKE MEN OF WAR: BLACK TROOPS IN THE CIVIL WAR 1862–1865*, at 47, 59 (1998).

such as the First Tennessee Volunteers infantry regiment, A.D. (African Descent).⁷⁹ But in the spring of 1864 the Union Army began to group Tennessee Black troops into numbered regiments; among them was the 64th United States Colored Infantry.⁸⁰ First organized on December 1, 1863, under the designation of 7th Louisiana Infantry (A.D.) in Memphis, Tennessee, and Hollis Springs, Mississippi,⁸¹ the 64th was classified as invalid as it was “composed of men unfit for field service but sufficiently healthy to stand guard over contraband camps, plantations, warehouses full of government supplies, and wood yards.”⁸² While the Union Army designated white soldiers wounded in battle as “invalids” and organized them into a Veterans Reserve Corps, it deliberately signed up Black men for duty who had been rejected by medical examiners; such was the case for the 64th.⁸³ Over the course of the war, the 64th served along the Mississippi River, from Memphis to Natchez, guarding forts and railroads from guerilla raids.⁸⁴ They also protected and helped maintain freed people’s settlements on former plantations, including a settlement at Davis Bend, Mississippi, the site of two plantations—Hurricane Plantation and Brierfield Plantation—that belonged to Jefferson Davis, the former president of the Confederate States of America, and his brother Joseph.⁸⁵ In Tennessee, Black fighting regiments mustered out of service as early as August 1865.⁸⁶ Black invalid regiments such as the 64th continued for another year to perform police duties both on plantations, where, under the direction of the Freedmen’s Bureau, former enslaved persons were now expected to work for wages for their old masters,⁸⁷ as well as in cities, including Memphis and Nashville, where Black people settled as they fled slavery on nearby plantations.⁸⁸ On or about March 13, 1866,

79. See DOBAK, *supra* note 68, at 179.

80. *Id.*

81. *Id.*

82. *Id.* at 246, 385.

83. *Id.* at 246.

84. *Id.* at 385.

85. See *id.* Jefferson Davis and his brother Joseph inherited from their father around five thousand acres of land at Davis Bend, Mississippi, on the Mississippi River, south of Vicksburg. Joseph’s share of the land became Hurricane Plantation; Jefferson’s became Brierfield. See SHEARER DAVIS BOWMAN, *AT THE PRECIPICE: AMERICANS NORTH AND SOUTH DURING THE SECESSION CRISIS* 162 (2010); see also JOAN E. CASHIN, *FIRST LADY OF THE CONFEDERACY: VARINA DAVIS’S CIVIL WAR* 37 (2006) (identifying the Davis family’s plantations).

86. DOBAK, *supra* note 68, at 474.

87. *Id.* at 465.

88. See Kevin R. Hardwick, “Your Old Father Abe Lincoln Is Dead and Damned”: Black Soldiers and the Memphis Race Riot of 1866, 27 J. SOC. HIST. 109, 111–12 (1993) (discussing Memphis); GABRIEL A. BRIGGS, *THE NEW NEGRO IN THE OLD SOUTH* 36 (2015) (discussing Nashville). Memphis served as a magnet for former slaves during the war because the presence of Black soldiers in Memphis both was a powerful symbol “of the victorious Union army” and helped “in the efforts of the former slaves to redefine their position within southern society.” Hardwick, *supra*, at 110. Similarly, in Nashville, where the Union mustered out Black regiments such as the 64th, the Black population nearly tripled between 1860 and 1870, representing nearly forty percent of the city’s total population. See BRIGGS, *supra*.

soldiers of the 64th mustered out in Nashville;⁸⁹ among them was a Private named David Galloway.⁹⁰

IV. THE PREACHER AND THE BROTHELS OF SMOKY ROW

David was about twenty-six years old when he settled in Nashville after his discharge from the army.⁹¹ He was born into slavery between 1830 and 1835 in Columbia, the county seat of Maury County, Tennessee.⁹² His owners, from whom he inherited his last name, were the Galloways, a planter family with three hundred acres of land.⁹³

For a while after the army, David made a living as a laborer working for local white landowners.⁹⁴ During the war, Nashville's council had authorized local police to act as slave catchers to apprehend runaway slaves and hold them in jail

89. DOBAK, *supra* note 68, at 474.

90. Army records show that David Galloway was a Private in Company A in the United States Colored Infantry, 64th Regiment. See *Soldier Details*, NAT'L PARK SERV., <https://www.nps.gov/civilwar/search-soldiers-detail.htm?soldierId=F6F6DB9F-DC7A-DF11-BF36-B8AC6F5D926A> [<https://perma.cc/272U-QEH2>] (last visited Aug. 29, 2022).

91. David most likely settled in Nashville in 1866, the year the 64th Colored Regiment was mustered out. See DOBAK, *supra* note 68, at 474. He was first incarcerated in the Tennessee Penitentiary in January 1872. For David's entry in the archives of the Penitentiary Records, see *Convict Records: State Penitentiary, Nashville, Tenn.*, Volume 44, Slide 1072, Roll RG25-13 (1831-1992), *reprinted in* APPENDIX OF PRIMARY SOURCES, *supra* note 36 [hereinafter *1872 Convict Records*]. The entry lists him as forty-two years old in January 1872 and notes that he was born in Columbia, Tennessee. *Id.* The Slave Schedule for the 1850 Census for Maury County, Tennessee, shows the Galloway family as owning three enslaved persons: two females, ages twenty-two and fourteen respectively, and one male, age fourteen. U.S. CENSUS BUREAU, SCHEDULE 2: SLAVE INHABITANTS IN DISTRICT 5 IN THE COUNTY OF MAURY, STATE OF TENNESSEE 2 (1850). That young enslaved boy was in all likelihood David; his age of fourteen in 1850 and forty-two in 1872 falls within the range of him having been born at some point between 1830 and 1835. Slave schedules at the time rarely included the names of enslaved persons but only their gender and age, though they were often imprecise about an exact age. David's 1872 penitentiary record also remarks that at the time of his imprisonment he had a scar on his forehead "from a fractured skull." *1872 Convict Records, supra*. That is consistent with him having been enlisted in the 64th United States Colored Infantry, which comprised Black men who had been rejected by medical examiners but were recruited for garrison and other guard duties. See DOBAK, *supra* note 68, at 246.

92. See U.S. CENSUS BUREAU, *supra* note 91.

93. The Agricultural Census for Maury County, Tennessee, shows Thomas Galloway as the owner of eighty acres of improved agricultural land and fifty-six acres of unimproved land, and F[rancis] M[arion] Galloway as the owner of sixty acres of improved agricultural land and 106 acres unimproved. U.S. CENSUS BUREAU, SCHEDULE 4: PRODUCTIONS OF AGRICULTURE IN DISTRICT NO. 5 IN THE COUNTY OF MAURY IN THE POST OFFICE COLUMBIA (1860). The 1850 Census shows Thomas Galloway, then sixty years old, as being married to Margaret Galloway, fifty years old. U.S. CENSUS BUREAU, SCHEDULE I: FREE INHABITANTS IN DISTRICT 9, IN THE COUNTY OF MAURY, STATE OF TENNESSEE (1850). Their son, Francis Galloway, twenty-seven years old, lived next door, and was himself married with two children of his own. *Id.* In the 1850 slave schedule for Maury County, Tennessee, the Galloway family is listed as owning one male slave of approximately thirteen years of age. U.S. CENSUS BUREAU, *supra* note 91. The 1860 Slave Schedule for Maury County lists Thomas Galloway as owning seven enslaved persons, ranging from ages fifty to as young as four. *Id.* Three other members of the Galloway family, including Francis and Marion, appear to own five persons. *Id.*

94. We know David made his living as a laborer because his name appears on the list of Black laborers who were fired by landowners following the Nashville mayoral election of 1867, when Black people helped elect the Radical Republican ticket. See *Records of the Assistant Commissioner for the State of Tennessee Bureau of Refugees, Freedmen, and Abandoned Lands, 1865-1869, National*

and work crews until their masters could reclaim them.⁹⁵ When the Union Army took over the city, it used runaway slaves as laborers to support Union forces.⁹⁶ Once the war ended, the Black population in Nashville, as with many urban centers around the state, nearly tripled in size.⁹⁷ The local Freedmen's Bureau adopted a policy of forcibly relocating Black people from the city to nearby farms and plantations, where they were now expected to work for wages.⁹⁸ In October 1865, the Bureau relocated as many as 4,000 Black people from Nashville;⁹⁹ the Bureau even permitted white farmers to pay off the fines of Black people, who had been detained for one reason or another, and take them back to plantations where they worked off the amount that had been paid to free them.¹⁰⁰ The Bureau's objective was less the welfare or political empowerment of newly freed people than reducing unemployment in urban areas and reviving the agricultural economy of nearby farms.¹⁰¹ And indeed, the Bureau's policy brought into conflict Black people beginning to exercise full citizenship and white elites determined to keep them in as close to a state of slavery as possible.¹⁰² This conflict played out in the August 1867 election, when Black Nashville residents overwhelmingly voted for the "Radical Republican" ticket in the Nashville mayoral election, while white Nashville voters supported conservative candidates.¹⁰³ Although many conservatives initially denounced secession during the war, they did not necessarily approve of Black emancipation and, in any event, certainly opposed Reconstruction.¹⁰⁴ Following the August 1867 election, white landowners retaliated against Black laborers for voting the Radical ticket by firing them from their jobs; David was among those fired.¹⁰⁵

Archives Microfilm Publication M999, Roll 34, FREEDMEN'S BUREAU ONLINE, <http://freedmensbureau.com/tennessee/reports/discharg.htm> [<https://perma.cc/VZ77-XGHR>] (last visited Aug. 29, 2022).

95. LOVETT, *supra* note 51, at 72.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 73.

103. *Id.* at 210; Ben H. Severance, *Reconstruction Power Play: The 1867 Mayoral Election in Nashville, Tennessee*, in *SISTER STATES, ENEMY STATES: THE CIVIL WAR IN KENTUCKY AND TENNESSEE* 320, 320 (Kent T. Dollar et al. eds., 2009). The 1867 Nashville mayoral election pitted Mayor W. Matt Brown, an incumbent backed by supporters of the former Confederacy and whites opposed to Reconstruction, against a number of candidates supported by various factions of Radical Republicans—including A. E. Alden, who ultimately won the election. *Id.* at 322, 329.

104. Severance, *supra* note 103, at 321.

105. See *Records of the Assistant Commissioner for the State of Tennessee Bureau of Refugees, Freedmen, and Abandoned Lands, 1865–1869, National Archives Microfilm Publication M999, Roll 34*, *supra* note 94. White landowners firing Black people for electing Radical Republicans was not limited to Nashville and Davidson county but was a fairly common occurrence nationwide. See *New York Dispatches*, *NASHVILLE UNION & DISPATCH*, Nov. 3, 1867, at 1 ("Two hundred and thirty-seven negroes have reported to the Freedmen's Bureau in Richmond[, Virginia,] as having been discharged by their employers for voting the Radical ticket.").

David and Malinda met in Nashville between 1866 and 1869 and started living together soon after.¹⁰⁶ In the 1870 census they reported themselves as part of the same household, with Malinda listing herself as Black and sharing David's last name.¹⁰⁷ In June 1872, the two were arrested for violating an 1857 statute, outlawing interracial cohabitation, and an 1870 state constitutional amendment banning interracial marriage.¹⁰⁸ Three months later, on September 26, 1872, a Nashville grand jury indicted them for living together and being married.¹⁰⁹ The indictment charged David, "a mulatto man," and Malinda, a white woman, for "willfully, knowingly, unlawfully, and feloniously" marrying, and for "unlawfully and feloniously liv[ing] and cohabit[ing] together as man and wife, dividing and intruding the morals of the good citizens of the aforesaid county contrary to the statute and against the peace and dignity of the State."¹¹⁰

In one form or another, interracial relationships had been banned in Tennessee as far back as 1741, when the state's territory was part of North Carolina.¹¹¹ Following statehood, Tennessee enacted its own anti-miscegenation laws, first in 1822, making it a subject of civil fine for "white men and women" to marry "a negro, mustee, or mulatto,"¹¹² and again in 1857, this time rendering it a criminal misdemeanor for such unions to take place,¹¹³ and finally in 1870, making these marriages a felony punishable by up to five years in the state penitentiary. The 1870 felony statute was enacted to enforce a provision of the 1870 Tennessee

106. We do not have the exact year when David and Malinda started living together, but what we do know is this: as evidenced from the 1860 Census, Malinda remained a resident of Nashville after the Sisters of Charity closed their orphanage. See U.S. CENSUS BUREAU, SCHEDULE I: FREE INHABITANTS IN THE 4TH WARD OF THE CITY OF NASHVILLE, IN THE COUNTY OF DAVIDSON, IN THE STATE OF TENNESSEE (1860), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36. While David was enslaved on the nearby Galloway plantation prior to the war, his regiment was mustered out in Nashville in 1866. The two of them first formally appear together four years later in the 1870 census, which means they were likely living together at least a year prior to the census being completed. See *infra* note 107. Therefore, we can place David and Malinda's initial meeting somewhere between 1866, when David is mustered out of the army, and 1869, when they would have provided information for the 1870 census.

107. In the 1870 census, David and Malinda appear on lines two and three. See U.S. CENSUS BUREAU, SCHEDULE I: INHABITANTS IN THE 4TH WARD OF THE CITY OF NASHVILLE, IN THE COUNTY OF DAVIDSON, IN THE STATE OF TENNESSEE (1870), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36. They are both listed as Black. *Id.* His age is listed as thirty-four or thirty-nine, which would place his date of birth at either 1836 or 1831. *Id.* Her age is listed as twenty-five, which would place her date of birth at 1845. *Id.*

108. See *Miscegenation: A Modern Othello and His Desdemona Arrested*, TENNESSEAN, June 18, 1872, at 4. For more on the statute, see Byron Curti Martyn, *Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation* 324–25 (June 1979) (Ph.D. dissertation, University of Southern California) (available at https://digitalibrary.usc.edu/asset-management/2A3BF151AZ14?FR_1&W=1440&H=848 [<https://perma.cc/MPG8-NPS4>]). For the constitutional amendment, see TENN. CONST. art. XI, § 14 (repealed 1977).

109. Transcript at 2–3, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

110. *Id.*

111. PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 343 n.43(2009).

112. *Id.* (citations omitted); see Martyn, *supra* note 108.

113. Martyn, *supra* note 108.

Constitution,¹¹⁴ stating that “[t]he intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive or their living together as man and wife in this state is prohibited.”¹¹⁵ That provision would not be repealed until 1977.¹¹⁶

While awaiting trial, the two were incarcerated in Nashville’s workhouse, the local county jail.¹¹⁷ Authorized by statute in 1855¹¹⁸ and erected in 1858,¹¹⁹ the Nashville workhouse was a pauper’s prison where the city incarcerated people who could not afford or refused to pay fines associated with minor convictions.¹²⁰ Once incarcerated, prisoners were required to discharge their fines by working for seventy-five cents a day,¹²¹ fifty cents per day was added to the original fine for each day an inmate refused or was unable to work.¹²² The workhouse also housed slaves and mules and carts used by the city to clean mud, animal waste, and other refuse from the streets.¹²³ More than a century after it first opened, the workhouse was still in operation when, in 1960, the city arrested hundreds of young students staging sit-ins at Nashville lunch counters and department stores in protest against racial segregation.¹²⁴ The Nashville sit-ins, which protesters described as a new language aimed at expressing “the dissatisfaction and anger of

114. *See id.*

115. TENN. CONST. art. XI, § 14 (repealed 1977).

116. Article XI, Section 14 was repealed as part of Tennessee’s 1977 constitutional convention. *See AMENDMENTS TO THE CONSTITUTION PROPOSED BY THE LIMITED CONSTITUTIONAL CONVENTION OF 1977*, at 19 (1977), https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1012&context=utk_mtaspubs [<https://perma.cc/P2SS-K8GL>].

117. An article dating from October 15, 1874, in the *Nashville Union and American* recounts the case by noting that David spent ten months in the workhouse for miscegenation before marrying Malinda and then married her after he was released. *See Miscegenation. An “Outrage” for the Chattanooga Shriekers*, NASHVILLE UNION & AM., Oct. 15, 1874, at 4. That is most likely incorrect. David received a 130-day sentence in the workhouse beginning in November 1870 for assault, larceny, and lewdness. *See The Courts*, TENNESSEAN, Nov. 1, 1870. Assuming he served his full sentence, he would have been released on or about April 1871. He subsequently married Malinda approximately four months later on August 28, 1871. MARRIAGE RECORD 169 (1871), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36. David’s 1870 sentence most likely involved Malinda, then known as “Malinda Vines,” as she too was sentenced on the same day to twenty-seven days in the workhouse for lewdness. *See The Courts*, *supra*. David and Malinda lived together and, even though not yet married, listed themselves in the 1870 Census as one household and sharing the same last name of Galloway. *See U.S. CENSUS BUREAU*, *supra* note 107. So, it is likely that the circumstances of their November 1870 arrest and sentence to the workhouse grew out of their living together. That said, nothing in the 1870 prosecution indicates that it was for miscegenation. *See The Courts*, *supra*.

118. A COMPILATION OF THE GENERAL LAWS OF THE CITY OF NASHVILLE: TOGETHER WITH THE CHARTERS OF THE CITY, GRANTED BY THE STATES OF NORTH CAROLINA AND TENNESSEE, AND A LIST OF THE CHIEF OFFICERS OF THE MUNICIPAL GOVERNMENT OF NASHVILLE, IN EACH YEAR FROM 1806 TO 1860, at 141 (James E. Rains ed., 1860).

119. *Id.* at 143.

120. *Id.* at 141.

121. *Id.*

122. *Id.* at 142.

123. *Id.* at 143.

124. Jessica Bliss, *Kicked, Spat on and Burned, Nashville’s Sit-in Protesters Persevered Through Acts of Violence*, TENNESSEAN (Feb. 26, 2020, 10:00 PM), <https://www.tennessean.com/story/news/politics/2020/02/27/nashville-civil-rights-protests-lunch-counter-sit-ins-john-lewis-arrested/4806564002/>.

the black community toward white indifference,¹²⁵ helped catalyze student protests throughout the South.¹²⁶ Convicted of disorderly conduct and fined fifty dollars, the students refused to pay; they were sentenced to thirty-three days in the workhouse, where they were put on work detail shoveling snow from the streets.¹²⁷

David and Malinda married on August 28, 1871, after obtaining a valid marriage license two days prior on August 26, 1871.¹²⁸ A preacher named Armstead Shelby performed the ceremony late one evening in a house in west Nashville.¹²⁹ Years later, after David and Malinda had been convicted and David's lawyers were litigating habeas petitions to obtain his release, Shelby would claim in a newspaper interview that he had never met David or Malinda before marrying them that evening and had not seen them again since; that it was so dark in the room during the ceremony he could hardly see David and Malinda's faces; and that for all he knew Malinda was just one of the many light-skinned Black women walking around Nashville at the time:

That man Galloway came to me after dark one night and said he wanted me to perform a marriage ceremony at a house in West Nashville. I went into the room, which was so dark that I couldn't see the parties very well, but I saw the woman was a yaller woman,—but then she mout a bin a white woman. I was there 'bout five minutes, I never saw the man or woman afore nor since. . . . but the fact is I didn't pay much attenshun to either of 'em. You know there's some mighty white colored people in Nashville, and as to there bein' any trouble about it, I thought the man what made out the licenses fixed them things.¹³⁰

Shelby was a preacher, a cook, and a whitewasher.¹³¹ He was also a civil rights activist, standing as one of twenty-five delegates who represented Davidson County in the 1871 Tennessee Colored State Convention that met over four days in Nashville beginning on February 22, 1871¹³²—barely six months before Shelby would marry David and Malinda. Among other concerns, the Convention reported on poor funding for public schools, racial discrimination in public

125. EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 65 (2010).

126. BENJAMIN HOUSTON, THE NASHVILLE WAY: RACIAL ETIQUETTE AND THE STRUGGLE FOR RACIAL JUSTICE IN A SOUTHERN CITY 82, 120–21 (2012).

127. *Nashville Then: 1960 Civil Rights Movement in Nashville*, TENNESSEAN (Mar. 2, 2017, 12:14 PM), <https://www.tennessean.com/picture-gallery/news/2017/02/06/nashville-then-1960-civil-rights-movement-in-nashville/97558166/>.

128. MARRIAGE RECORD, *supra* note 117.

129. *Galloway's Bride: Nuptials That Sent a Man and Brother to the Penitentiary*, NASHVILLE UNION & AM., May 1, 1874.

130. *Id.*

131. *See id.* (noting Shelby “blends the business of whitewashing with that of preaching”); KING'S NASHVILLE CITY DIRECTORY 194 (1870) (listing Shelby as a “cook”); KING'S NASHVILLE CITY DIRECTORY 214 (1873) (identifying Shelby as a “whitewasher”); KING'S NASHVILLE CITY DIRECTORY 357 (1879) (labeling Shelby as a “whitewasher”).

132. PROCEEDINGS OF THE COLORED STATE CONVENTION, HELD IN NASHVILLE, FEB. 22D, 23D, 24TH & 25TH., at 1, <https://omeka.coloredconventions.org/files/original/9bc74455b84cdc7fbbd6caaaa0872a65.pdf> [https://perma.cc/6QPG-LN37].

accommodation, Black Codes that kept Black people in a state of near-slavery, and violent campaigns by the Ku Klux Klan, the White Brotherhood, and other terrorist organizations.¹³³ The Convention resolved to demand from the state and federal government equal access to higher education for Black people, establishment of a national public school system, protection for organized labor, and federal lease of lands to Black people to help them achieve economic independence.¹³⁴

When he married David and Malinda, Shelby lived on Market Street near Nashville's Cumberland River waterfront.¹³⁵ That area, known as Smoky Row, the site of the city's first settlements and now a wealthy tourist destination with luxury condominium developments,¹³⁶ was for a time Nashville's red-light district and came to operate legally during the Civil War, though it predated the war.¹³⁷ For much of its history, the city barely regulated prostitution. In early November of 1854, Nashville's Board of Aldermen passed an ordinance "requiring two weeks notice be given 'to occupants of houses of ill fame, or to owners of houses rented to occupants of ill fame' prior to their removal."¹³⁸ A few months later, in January 1855, the Board followed up with an ordinance that made the advertisement of prostitution, but not the act itself, illegal.¹³⁹ The ordinance made it "a penal offense for Lewd Women to expose their persons at their front doors or to use vulgar language to persons passing by."¹⁴⁰

But, these laws notwithstanding, prostitution continued to thrive in the city such that by 1860, at least 207 sex workers who lived in Nashville operated openly enough that their profession was recorded in the federal census.¹⁴¹ When the war began and the Union captured Nashville, the city went from a population

133. *Id.* at 3–16.

134. *Id.* at 14–16.

135. See sources cited *supra* note 131. Market Street is now First Avenue. See David Kaser, *Nashville's Women of Pleasure in 1860*, 23 TENN. HIST. Q. 379, 382 (1964).

136. The term "Smoky Row" was used by locals to refer to the waterfront area in Nashville where prostitution flourished. See Lenette S. Taylor, *Uncle Sam's Landlord: Quartering the Union Army in Nashville in the Summer of 1863*, 61 TENN. HIST. Q. 242, 246 (2002). The Nashville Downtown Partnership, a nonprofit corporation with the mission of promoting the riverfront neighborhood that used to include Smoky Row, describes the area as a "compelling urban center in the Southeast in which to LIVE, WORK, PLAY and INVEST." See *About*, NASHVILLE DOWNTOWN P'SHIP (capitalization altered), <https://nashvilledowntown.com/about> [<https://perma.cc/KZA6-VAAG>] (last visited Aug. 31, 2022).

137. See Jeannine Cole, "Upon the Stage of Disorder:" *Legalized Prostitution in Memphis and Nashville, 1863–1865*, 68 TENN. HIST. Q. 40, 40–41 (2009); James B. Jones, Jr., *Municipal Vice: The Management of Prostitution in Tennessee's Urban Experience. Part I: The Experience of Nashville and Memphis 1854–1917*, 50 TENN. HIST. Q. 33, 34–35 (1991).

138. Jones, Jr., *supra* note 137, at 33 (citation omitted).

139. *Id.*

140. *Id.* (citation omitted).

141. See Kaser, *supra* note 135, at 380 ("The real professional prostitutes . . . totaled 207 out of the 13,762 free Nashville residents reported in the 1860 census.").

of around 17,000 in 1860 to nearly 26,000 by 1870.¹⁴² The increased presence of Union troops also brought an increase in prostitution.¹⁴³ In 1862 the number of female sex workers in Nashville was over 1,500.¹⁴⁴ “At least 8.2 percent of Union troops would be infected with [syphilis or gonorrhea] before war’s end—nearly half the battle-injury rate of 17.5 percent”¹⁴⁵ In July 1863, Major General William Rosecrans, leader of the Union Army of the Cumberland, ordered the Nashville Provost General, Lieutenant George Spalding, “without loss of time to seize and transport to Louisville *all prostitutes* found in the city or known to be here.”¹⁴⁶ Spalding commandeered the *Idahoe*, a new luxury passenger riverboat, placed approximately 111 women sex workers on board, and directed its captain to take the women to Louisville, Kentucky.¹⁴⁷ The *Idahoe* left Nashville on July 8, 1863,¹⁴⁸ and arrived a week later in Louisville, but city officials refused to let the women disembark and instead directed the captain to take them to Cincinnati, Ohio.¹⁴⁹ Cincinnati too refused to take them in, forcing the captain to anchor the ship for two weeks across the river in Newport and Covington, Kentucky.¹⁵⁰ Finally, unable to find a port that would take the women in, and running out of rations, the captain sailed back to Nashville, where the women

142. Between 1860 and 1870, the population of Davidson County grew by about thirty-four percent, from 47,055 to 62,897. BUREAU OF THE CENSUS, DEP’T OF COM., FOURTEENTH CENSUS OF THE UNITED STATES, STATE COMPENDIUM TENNESSEE: STATISTICS OF POPULATION, OCCUPATIONS, AGRICULTURE, DRAINAGE, MANUFACTURES, AND MINES AND QUARRIES FOR THE STATE, COUNTIES, AND CITIES 11 (1925). The 1860 Census reported the white population of Davidson County at 31,056, the “free Colored” at 1,209, and the slave population at 14,790. See U.S. CENSUS BUREAU, STATE OF TENNESSEE, TABLE NO. 1 – POPULATION BY AGE AND SEX 466 (1860). By 1870, whites numbered 37,468, and “Free Colored” numbered 25,412. See U.S. CENSUS BUREAU, POPULATION BY COUNTIES – 1790–1870, TABLE II. STATE OF TENNESSEE 62. Nashville proper saw similar increases. There, the African American population nearly tripled between 1860 and 1870, representing nearly forty percent of the city’s total population. See BRIGGS, *supra* note 88.

143. See Jones, Jr., *supra* note 137, at 35.

144. Angela Serratore, *The Curious Case of Nashville’s Frail Sisterhood*, SMITHSONIAN MAG. (July 8, 2013), <https://www.smithsonianmag.com/history/the-curious-case-of-nashvilles-frail-sisterhood-7766757/> [<https://perma.cc/DMS6-VWVN>].

145. *Id.*

146. MARY ELIZABETH MASSEY, *WOMEN IN THE CIVIL WAR* 76–77 (1966).

147. *Id.* at 77.

148. Per the *Nashville Dispatch* on July 9, 1863:

Yesterday [8th] a large number of women of ill-fame were embarked upon three or four steamers, and transported northward. The number has been estimated at from one thousand to fourteen hundred[—]probably five or six hundred would near the mark. Where they are consigned to, we are not advised, but suspect the authorities of the city in which they landed will feel proud of such an acquisition to their population. We hope the commanding officer will issue an order as soon as possible, ordering off all contraband prostitutes[—]they contribute considerably more toward the demoralization of the army than any equal number of white women, and certainly have no more claims upon our sympathy.

In 19th Century Nashville, S. HIST. (July 9, 2008), <https://www.southernhistory.co/2008/07/in-19th-century-nashville.html> [<https://perma.cc/MG4F-7NU2>].

149. Serratore, *supra* note 144.

150. *Id.*

disembarked and presumably resumed their profession on Smoky Row.¹⁵¹

A year before the war began, of the 207 women who recorded their profession as “prostitute” in the 1860 Census, nearly all were listed as having been born of “Anglo-Saxon extraction,” though nine were listed as “Mulatto.”¹⁵² When the *Idahoe* sailed away from Nashville, all 111 women on board were white.¹⁵³ At least one Nashville newspaper soon complained that, far from eliminating prostitution in the city, authorities had merely created a market for Black women to fill the absence of white women:

The sudden expatriation of hundreds of vicious white women will only make room for an equal number of negro strumpets. Unless the aggravated curse of lechery as it exists among the negresses of the town is destroyed by rigid military or civil mandates, or the indiscriminate expulsion of the guilty sex, the ejection of the white class will turn out to have been productive of the sin it was intended to eradicate¹⁵⁴

Once the *Idahoe* returned, Rosencrans and Spalding gave up any effort of exiling sex workers; instead, they essentially legalized prostitution in Nashville. Female sex workers had to submit to regular medical exams; they received a license or certificate of good health and had access to a specialized hospital when they needed treatment.¹⁵⁵ When the war ended and civilian authorities regained control of the city, Nashville abandoned the experiment—but, while it lasted,

151. All in all, the *Idahoe* sailed for over thirty days on its maiden, and ultimately last, voyage as a luxury passenger riverboat. With his vessel berthed at various ports, the captain, a skeleton crew of four and no soldiers at his disposal, was powerless to stop men from coming on board to patronize the prostitutes. On his return to Nashville, he submitted a bill to federal authorities for \$1,000 for damages to furniture caused by the women and their customers and \$4,300 for purchases of food and “medicine peculiar to the diseased of women in this class.” Serratore, *supra* note 144. When army authorities balked at reimbursing him, the captain, John Newcomb, wrote directly to the Secretary of War. Captain Newcomb reminded Stanton he had not taken on the task willingly and the reputation of his boat as a luxury passenger vessel had been irreparably ruined:

I protested against their putting these women on my boat. She being a new boat, only three months built, her furniture new, and a fine passenger boat. I told them it would forever ruin her reputation as a passenger boat if they were put upon her. (It has done so. She is not and has since been known as the floating whore house [*sic*])

In 19th Century Nashville, *supra* note 148. He noted that before leaving Nashville, he had asked but been refused soldiers to help guard the women and as a result could not stop unruly customers at various ports from coming on board:

When leaving Nashville I applied for a guard to be put on board. Gen. Morgan told me I did not need any, but to take charge of them myself. Having no guard I could not keep men along the route from coming on board to these women, when at anchor, and being angered because I strove to drive them away both themselves and these bad women destroyed and damaged my boat and her furniture to a great extent.

Id. Eventually, Secretary Stanton arranged to have Captain Newcomb’s \$6,000 bill paid. *See* Serratore, *supra* note 144.

152. Kaser, *supra* note 135, at 380.

153. *See* Serratore, *supra* note 144.

154. *Id.*

155. Cole, *supra* note 137, at 47.

legalization reduced the incidence of venereal disease among Union troops stationed in the city.¹⁵⁶

During and after the war, the many brothels of Smoky Row were “located in a quarter only two blocks wide and four blocks long.”¹⁵⁷ That quarter consisted of “the first block north and the first block south of Spring (now Church) Street, on Front, Market, College, and Cherry (now First, Second, Third, and Fourth Avenues) Streets.”¹⁵⁸ Among the brothels of Smoky Row was one run by a man named Joseph Overby, who lived there with his wife and kids and eight female sex workers.¹⁵⁹ One of these women was Malinda Vines, also known as Malinda Brandon.¹⁶⁰

Years later, after she had begun living with David and married him, Malinda would abandon Vines and revert to Brandon, her birth name; the Sisters of Charity reported it as such on the 1850 census, when Malinda lived with them as

156. *Id.* at 50, 61.

157. Kaser, *supra* note 135.

158. *Id.*

159. The 1860 federal census shows Joseph Overby’s household, which includes, in addition to his wife and six children, at least eight women listing their profession as prostitute. *See* U.S. CENSUS BUREAU, *supra* note 106. Among them is Malinda Vines.

160. *See id.* As noted previously, Malinda is listed as “Brandon” in the 1850 Census, when she lived in the orphanage of the Sisters of Charity, as “Vines” in the 1860 Census, when she worked in Overby’s brothel, and as Vines in an 1870 newspaper article, when she is arrested for “lewdness.” *Compare* U.S. CENSUS BUREAU, *supra* note 36, with U.S. CENSUS BUREAU, *supra* note 106, and *The Courts*, *supra* note 117. In prison records, she is listed as “Malinda Galloway, alias Vines.” *See 1872 Convict Records*, *supra* note 91. In none of the newspaper articles about David and Malinda’s case is she identified as a sex worker. Yet, a number of the articles adopt a barely suppressed mocking tone about David and Malinda’s relationship, perhaps as if to insinuate that as a Black man, David was so eager for an intimate relationship with a white woman that he was willing to go to prison over a sex worker. For example, here is how the *Nashville Union and American* described David’s case upon his being rearrested for returning to Malinda after his release from the penitentiary:

It has been said that the course of true love never did run smooth, and some events in the lives of David Galloway, colored, and Melinda [sic] Vines, white, seem to corroborate the truthfulness of the adage. . . . Galloway was sent to the work-house for ten months for cohabiting with the female mentioned above. At the expiration of his time, he took the woman who had kindled such a flame in his breast, went before a colored preacher, and the twain were united in the holy bonds of matrimony. For this little violation of the law, the groom was sentenced to the penitentiary for two years. After serving twenty-one months of his time, he was released last Saturday. He was again rearrested last night, by officers Broderick and Jackson, on the charge of cohabiting with a white woman. Galloway and his Melinda [sic] found lodgings in the workhouse through the night.

Miscegenation: An “Outrage” for the Chattanooga Shriekers, *supra* note 117. For another example, here is how a newspaper described David and Malinda being denied their motion to be released from the workhouse after being rearrested:

Daniel [sic] Galloway and Malinda Vines, white, still reside at the palace beside the Lake of Como, Judge Baxter having refused yesterday to grant them the writ of certiorari and supersedeas for which they applied to bring their intermarriage before the Circuit Court, and release them from their present abode.

Wouldn’t Release Them., TENNESSEAN, NOV. 17, 1874, at 4.

a seven-year-old orphan.¹⁶¹ Throughout her miscegenation trial, the court repeatedly and pointedly referred to her as “Malinda Brandon, alias, Malinda Vines,” as though local authorities had reasons to know her by Vines as an alias.¹⁶² So, Armstead Shelby, delegate to the 1871 Colored State Convention, cook, whitewasher, and longtime resident of Market Street on Smoky Row until he passed away,¹⁶³ had been, for a time, a neighbor of Malinda Brandon, also known as Malinda Vines, when she lived and worked on Smoky Row in Overby’s brothel.¹⁶⁴

V. DAVID AND MALINDA

David’s and Malinda’s cases were severed; David went to trial first on October 10, 1872,¹⁶⁵ followed by Malinda on October 15.¹⁶⁶ Presiding over both trials was

161. Malinda Brandon and the nuns of the Sisters of Charity appear in the 1850 Census. U.S. CENSUS BUREAU, *supra* note 36. The entry shows seven nuns and eighteen orphan girls between the ages of four and fourteen years old. *Id.*

162. *See* Transcript at 4, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

163. *See supra* notes 131, 135, and accompanying text; DEATHS REGISTER FOR DAVIDSON COUNTY 1878–1879 (1879) (showing Shelby Armstead died on February 21, 1879); *Galloway’s Bride: Nuptials That Sent a Man and Brother to the Penitentiary*, *supra* note 129.

164. It is, of course, possible that Shelby told the truth when he claimed to a reporter in 1874 that he had never met David and Malinda before marrying them, and had not seen them since, and that, as far as he could tell in that darkened room, he performed a marriage ceremony for two light-skinned Black people. *See supra* note 129 and accompanying text. More likely, Shelby thought it safer to play the “hapless negro” when speaking to the reporter because, on close scrutiny, his story does not hold up. As a longtime resident of Nashville and a delegate to the Colored State Convention, it is unlikely that Shelby would have agreed in the middle of the night to marry two random people he had never met before, particularly when he was not sure whether one of them was white or biracial. And that one of these people, Malinda, just happened to live in his neighborhood makes it even more likely that Shelby married the couple because he was acquainted with one or both of them and probably knew that Malinda was white. Indeed, in 1868, Tennessee prosecuted a Black minister, Charles Jacobs, for performing a marriage ceremony for an interracial couple. *See Jacobs v. State* (Tenn. Aug. 20, 1868) (unpublished) (on file with author). In the one-year span prior to David and Malinda’s marriage, four prosecutions for violation of the state’s anti-miscegenation laws went all the way to the Tennessee Supreme Court. *See Green v. State* (Tenn. Aug. 21, 1871) (unpublished) (on file with author); *Lonas v. State*, 50 Tenn. (3 Heisk.) 287 (1871); *Pryor v. State* (Tenn. Aug. 29, 1871) (unpublished) (on file with author); *Robeson v. State*, 50 Tenn. (3 Heisk.) 266 (1871). None of this is to say that Shelby was necessarily acquainted with every single one of these cases, but Tennessee aggressively enforcing the anti-miscegenation statute during the period between 1871 and 1873 makes it all the more unlikely that Shelby would have unthinkingly married two random strangers he had never met when one of them looked white. What is less clear is when Malinda met David or whether Shelby knew David before marrying the couple. Malinda was recorded as a sex worker in the 1860 census but in the 1870 census, she no longer resided in Overby’s brothel but instead was recorded as part of the same household as David. *See supra* notes 106–07, 159–60 and accompanying text. It is not clear whether or when she stopped being a sex worker. Prostitution was prevalent in Nashville during the Civil War and, as discussed in above, was even legalized in the city in an attempt to reduce the outbreak of venereal diseases among Union troops. *See Jones, Jr.*, *supra* note 137, at 34–35; *Cole*, *supra* note 137, at 50, 61. For his part, David does not appear to have been a resident of Nashville before the war and most likely met Malinda when he arrived in Nashville as part of his deployment with the 64th United States Colored Infantry Regiment.

165. Transcript at 9–10, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

166. *See The Courts*, NASHVILLE UNION & AM., Oct. 15, 1872.

Judge Thomas N. Frazier,¹⁶⁷ who had regained his seat on the bench after being impeached and removed by Tennessee's legislature for standing in the way of the state ratifying the Fourteenth Amendment.¹⁶⁸

Back in 1866, Tennessee Governor William "Parson" Brownlow, who had been elected by a coalition of white supporters of the Union and newly enfranchised Black people, called a special session of the legislature to ratify the Fourteenth Amendment, making Tennessee the first Southern state, and third state overall, to do so.¹⁶⁹ White unionists, who up until then had supported Brownlow, balked, interpreting what they imagined to be the Amendment's promise of "social equality" for Black people as a bridge too far. After two members denied the legislature the requisite quorum to ratify the Fourteenth Amendment by refusing to show up, the legislature directed the Sergeant-at-Arms to arrest them.¹⁷⁰ Once arrested, the legislators were counted for purposes of a quorum in ratifying the Fourteenth Amendment, even though they refused to vote.¹⁷¹ Meanwhile, one of the absentee legislators petitioned Judge Frazier for a writ of habeas corpus; Frazier issued the writ commanding the legislature's Sergeant-at-Arms to produce the legislator.¹⁷² This resulted in the legislature passing a resolution denying Frazier's authority to issue the writ.¹⁷³ Frazier in turn refused to recognize the validity of the resolution and instead ordered the sheriff of Davidson County to arrest the legislature's Sergeant-at-Arms for contempt of court for refusing to release the absentee legislators.¹⁷⁴ When the Sergeant-at-Arms showed no intention of releasing the legislators, the sheriff deputized a local *posse comitatus* to go after the Sergeant-at-Arms.¹⁷⁵ Matters came to a head when the legislature passed a second resolution demanding that the sheriff, members of his *posse comitatus*, and Judge Frazier himself appear in person before the chamber to answer any charges that might be brought against them.¹⁷⁶ Months later, even though Tennessee had already ratified the Fourteenth Amendment, the legislature impeached Judge Frazier, tried and convicted him, and, on June 3, 1867, removed him from the bench, until 1870, when the next legislature restored him as district judge of Davidson and Rutherford County where, two years later, he sat in judgment of David and Malinda.¹⁷⁷ Years later,

167. Transcript at 1, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

168. See generally PROCEEDINGS OF THE HIGH COURT OF IMPEACHMENT, IN THE CASE OF THE PEOPLE OF THE STATE OF TENNESSEE, VS. THOMAS N. FRAZIER, JUDGE, ETC. (1867), <https://babel.hathitrust.org/cgi/pt?id=yale.39002022162490&view=1up&seq=11> [<https://perma.cc/W6KQ-MGUZ>].

169. See Lucy Dunaway Zeier & Charles D. Zeier, *Tumultuous Times: Tennessee's Passage of the Reconstruction Amendments to the U.S. Constitution*, 73 TENN. HIST. Q. 90, 99–106 (2014).

170. Cortez A. M. Ewing, *Early Tennessee Impeachments*, 16 TENN. HIST. Q. 291, 327–28 (1957).

171. *Id.* at 328.

172. *Id.* at 329.

173. *Id.*

174. *Id.* at 328–29.

175. *Id.* at 329.

176. *Id.*

177. See Transcript at 1, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36 (acknowledging Frazier's role sitting in judgment of David and Malinda); PROCEEDINGS OF THE HIGH COURT OF IMPEACHMENT, IN THE CASE OF THE PEOPLE OF THE STATE OF

Frazier's son, James Frazier, would serve as Tennessee Governor and United States Senator;¹⁷⁸ his grandson, James B. Frazier, Jr., representing Tennessee's Third Congressional District in the House of Representatives, would sign the Southern Manifesto, opposing desegregation of public schools in the wake of *Brown v. Board of Education*.¹⁷⁹

After a two-day trial, David was convicted. As punishment, he was disqualified from serving as a witness or juror in court and from holding elected office, ordered to pay the costs of his prosecution, and sentenced to two years in the state penitentiary.¹⁸⁰ Malinda, for her part, went to trial on October 15, 1872, and she too was convicted.¹⁸¹ The jury sentenced her to one year in the state penitentiary with a recommendation that she serve her time in the local jail, but Judge Frazier commuted it to six hours in jail and a twenty-five dollar fine.¹⁸² She served her time on October 16 and was likely released the same day.¹⁸³

On January 2, 1873, the Tennessee Supreme Court heard oral argument in David's appeal.¹⁸⁴ His lawyers before the court were Henry S. Foote, the former antebellum Mississippi governor, who served in the Confederate congress during

TENNESSEE VS. THOMAS N. FRAZIER, JUDGE, ETC., *supra* note 168, at 4 (1867) (noting Frazier's impeachment); 1 NOTABLE MEN OF TENNESSEE: PERSONAL AND GENEALOGICAL WITH PORTRAITS, at 36 (John Allison ed., 1905) (discussing how Frazier was "chosen criminal judge of his old district" in 1870).

178. James Beriah Frazier served as Governor of Tennessee from 1903 to 1905. *Gov. James Beriah Frazier*, NAT'L GOV. ASSOC., <https://www.nga.org/governor/james-beriah-frazier/> [<https://perma.cc/BMX8-2Y4H>] (last visited Aug. 31, 2022).

179. James Beriah Frazier, Jr., represented Tennessee's Third Congressional District in the United States House of Representatives from 1949 to 1962. *FRAZIER, James Beriah, Jr.*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://perma.cc/L3MH-YNLJ> (last visited Aug. 31, 2022). On March 12, 1956, nineteen Senators and eighty-two members of the House of Representatives signed the so-called Southern Manifesto, a resolution calling the United States Supreme Court decision in *Brown v. Board of Education* "a clear abuse of judicial power" and encouraging states to resist its implementation. 102 CONG. REC. 4515-16 (1956) (statement of Rep. Howard W. Smith); *see also The Southern Manifesto of 1956*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/> [<https://perma.cc/243X-226A>] (last visited Aug. 31, 2022). Frazier was one of six members of Tennessee's delegation in the House of Representatives to sign the Southern Manifesto. 102 CONG. REC. 4516 (1956).

180. Transcript at 11-12, *Galloway v. State* (Tenn. 1872), *reprinted in* APPENDIX OF PRIMARY SOURCES, *supra* note 36.

181. *Galloway's Bride: Nuptials That Sent a Man and Brother to the Penitentiary*, *supra* note 129.

182. *Id.*; *The Courts*, TENNESSEAN, Oct. 16, 1872, at 4 (noting that Malinda was fined twenty-five dollars and sentenced to six hours in jail). Malinda's commutation was grounded in the text of the 1870 statute, providing that "the Court may in the event of a conviction, on the recommendation of the Jury, substitute in lieu of punishment in the penitentiary, fine and imprisonment in the county jail." 2 A COMPILATION OF THE STATUTE LAWS OF THE STATE OF TENNESSEE OF A GENERAL AND PERMANENT NATURE, COMPILED ON THE BASIS OF THE CODE OF TENNESSEE, WITH NOTES AND REFERENCES, INCLUDING ACTS OF SESSION OF 1870-'71, at 1096-97 (Seymour D. Thompson & Thomas M. Steger eds., 1872) (citing sections of Tennessee code on "Marriage. . . Whites, negroes, etc., not to intermarry or cohabit. . . To do so, felony, imprisonment"). Presumably the jury made no such recommendation for David.

183. On October 17, 1872, a local paper posted a list of individuals released from the local jail; among them was "Malinda Galloway." *The Courts: At the Jail*, TENNESSEAN, Oct. 17, 1872, at 4. Although court records listed Malinda as either Brandon or Vines and not Galloway, this was surely her as the paper noted that she had been jailed after being "accused of intermarrying with a negro." *See id.*

184. *The Courts*, NASHVILLE UNION & AM., Jan. 4, 1873; *The Courts*, NASHVILLE UNION AND AM., Jan. 3, 1873.

the war, only to become a Republican in 1875, and John Alexander Campbell, a former Tennessee state judge who had long harbored political ambitions of his own.¹⁸⁵ This was not Campbell's first miscegenation case before the Tennessee Supreme Court. Prior to oral arguments in David's case, the court had delivered an opinion in *State v. Bell*, in which Campbell represented a white man and Black woman charged with violating Tennessee's 1870 anti-miscegenation law even though they had legally married in Mississippi before moving to Tennessee.¹⁸⁶ After a grand jury returned an indictment against the Bells, Campbell moved to quash and Judge Frazier, who would later preside over David and Malinda's trial, granted the motion.¹⁸⁷ Tennessee's Attorney General appealed, and the Supreme Court reversed, remanding the case back to Judge Frazier for trial.¹⁸⁸

Before the *Bell* Supreme Court, Campbell previewed the principal argument he would ultimately use in David's case, namely that the Bells' marriage was a contract Tennessee was obligated to recognize.¹⁸⁹ In rejecting the argument, the court reasoned that the general rule that "a marriage good in the place where made after the forms and usages of that place, shall be good everywhere" does not apply to instances where the marriage in question is against the "good morals" of a community.¹⁹⁰ Otherwise, were Tennessee to recognize the Bells' marriage just because it was legal in Mississippi, it would be similarly forced to accept "the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited."¹⁹¹ Rather, the court concluded, "[t]he Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us."¹⁹²

So, in David's brief to Tennessee's Supreme Court, Foote and Campbell conceded at the outset that "[the] case presents a question for decision, which is not altogether a stranger in this court,"¹⁹³ and they now proposed "to discuss a question which has been already adjudicated before the very judges themselves from whom that decision has emanated."¹⁹⁴ Nonetheless, Campbell and Foote insisted,

185. See Letter from John Alexander Campbell to Andrew Johnson (Dec. 23, 1867), in 13 THE PAPERS OF ANDREW JOHNSON: SEPTEMBER 1867–MARCH 1868, at 357, 358 (Paul H. Bergeron ed., 2000); Letter from John Alexander Campbell to Andrew Johnson (Nov. 30, 1874), in 16 THE PAPERS OF ANDREW JOHNSON, MAY 1869–JULY 1875, at 623, 623 (Paul H. Bergeron ed., 2000); see also *The Union National Convention*, NASHVILLE UNION & AM., July 6, 1866; *Republican Convention in Maury*, NASHVILLE UNION & AM., Sept. 3, 1872. It does not appear that Campbell was ever elected to office in Nashville. During one of his campaigns, a local newspaper derided him as a favorite lawyer of miscegenationists. See *The Election Next Tuesday*, NASHVILLE UNION & AM., Nov. 1, 1874, at 1.

186. *State v. Bell*, 66 Tenn. 9, 9 (1872).

187. *Id.*

188. *Id.* at 11.

189. *Id.* at 9–10.

190. *Id.* at 10–11.

191. *Id.* at 11.

192. *Id.*

193. Brief for Petitioner at 1, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

194. *Id.* at 6–7.

even though the two cases both raised the question of the validity of a marriage contract, David's case differed from that of the Bells in one key respect: unlike *Bell*, which concerned the respect Tennessee owed to Mississippi to give full faith and credit to a marriage made valid under Mississippi law,¹⁹⁵ David's case was

emphatically one of constitutional liberty and equality; involving not only the safety and welfare of that numerous class of our population who have recently emerged from a long, continued, and debasing condition of servitude, but also as I conceive, the permanent quietude and prosperity of our whole forty-millions of free people.¹⁹⁶

Much of the Foote–Campbell brief, consisting of sixty-six handwritten pages,¹⁹⁷ is dedicated to defending the proposition that marriage involves the freedom to contract and Tennessee violated the Fourteenth Amendment, the Civil Rights Act of 1866, and the Civil Rights Act of 1870¹⁹⁸ in seeking to punish “for marrying a woman, for the marrying of a [sic] whom by a white man no punishment would be inflicted.”¹⁹⁹ As the brief explained, “[b]y the Civil Rights Law our colored citizens are authorized to make all contracts that white citizens may make. It is not disputed that a white citizen may make a contract of marriage with a white woman. Then, a colored citizen may make the same.”²⁰⁰

But in the closing few pages, both the tone and the handwriting of the brief abruptly change. Whereas the first forty-eight pages studiously avoid the topic of interracial sex by putting forward a fairly anodyne defense of marriage as a matter of contract law,²⁰¹ the remaining eighteen pages are nothing less than an unabashed rejection of white supremacy and an unembarrassed declaration that there was nothing so unique about white blood that mixture with Black blood would somehow taint it.²⁰² The war was over, the brief declared, and “it is high time we should realize the radical changes in the framework of our civil polity, which great and memorable causes have been bringing about the last [twelve] years.”²⁰³ Black people had a constitutional right to be free from the “oppressive tyranny” of white people.²⁰⁴ As for the so-called taboo of interracial sex,

It is not a question of taste, or prejudice, but of constitutional law. If persons of African [descent] are to be allowed to marry at all, they must be allowed to marry among the sons and daughters of our people, since they are themselves an element of the great *populus americanus*, made so by the Constitution and the law, yea by the Supreme law of the land.²⁰⁵

195. *State v. Bell*, 66 Tenn. 9, 10 (1872).

196. Brief for Petitioner at 4–5, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36. Here “T” refers to the attorneys.

197. *Id.* at 66.

198. See generally *id.*

199. *Id.* at 13–14.

200. *Id.* at 16–17.

201. See generally *id.* at 1–48.

202. See generally *id.* at 49–66.

203. *Id.* at 50.

204. *Id.* at 63.

205. *Id.* at 59–60.

And the idea that whites were somehow a superior race was so much nonsense because:

There was a time in England, when neither our Celtic nor our Anglo-Saxon ancestors were recognized as British citizens, nor were they allowed by law to intermarry with the proud Norman. . . . This monstrous [deprivation] of civil rights our ancestors endured for centuries; but as Christianity and civilization advanced this dishonoring and unwise discrimination was gotten rid of. . . . In regard to the African race, we have only followed in the wake of these well-known historical examples; and, for one, I rejoice in the belief that [unnumbered] blessings are yet to flow from the complete emancipation of children of a long-suffering and singularly amiable and unoffending segment of our people from all the impediments to happiness and moral advance, with which the oppressive tyranny of former ages have on all sides surrounded them.²⁰⁶

In short, David's lawyers did not merely make two separate arguments to the Tennessee Supreme Court; in the guise of a single document they seemingly presented two entirely separate briefs to the court that differed so much in tone, style, and substance that the arguments were not the product of a single author or, indeed, two authors collaborating toward a common goal.

VI. BLACK MOSES AND THE EXODUS TO THE NEW CANAAN OF KANSAS

It is unlikely Campbell wrote to the justices of the Tennessee Supreme Court that it was high time Black people were freed from the tyranny of white people. For a time in Nashville, his representation of Bell and Galloway had earned him the reputation of a "favorite lawyer with the miscegenationists."²⁰⁷ He no doubt found this an impediment to his political ambitions because, even in the midst of working on Galloway's habeas appeal, he made it a point to explain that he was not in favor of full social equality for Black people.²⁰⁸ The bill that would eventually become the Civil Rights Act of 1875, banning racial discrimination in places of public accommodation, was the subject of intense debate in Nashville during the 1874 election season; support of or opposition to the bill came to serve as a litmus test for a candidate's position on civil rights.²⁰⁹ Campbell, notwithstanding his representation of interracial couples, publicly opposed the bill.²¹⁰

More likely, Foote wrote the closing pages of the brief. A native Virginian, Foote moved to Mississippi in his twenties, becoming the governor of the state in 1851 by defeating the future President of the Confederacy, Jefferson Davis.²¹¹

206. *Id.* at 60–64.

207. *The Election Next Tuesday*, *supra* note 185.

208. *Id.*

209. For a discussion on the role of passage of the Civil Rights Act of 1875 in the 1874 elections in Tennessee, see Aderson Bellegarde François, *A Lost World: Sallie Robinson, the Civil Rights Cases, and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence*, 109 *GEO. L. J.* 1015, 1043–44 (2021).

210. *The Election Next Tuesday*, *supra* note 185.

211. See MICHAEL E. WOODS, *ARGUING UNTIL DOOMSDAY: STEPHEN DOUGLAS, JEFFERSON DAVIS, AND THE STRUGGLE FOR AMERICAN DEMOCRACY* 21, 108–09 (2020).

For much of his life and prior to the war, Foote was an ardent defender of slavery. During an 1848 congressional debate, he threatened antislavery Senator John Hale of New Hampshire to “visit the good state of Mississippi” so that he could “grace one of the tallest trees of the forest, with a rope around his neck . . . [and] [i]f necessary, [Foote] should [himself] assist in the operation.”²¹² But Foote was also a unionist who opposed secession,²¹³ and resolutely turned Republican after the war ended.²¹⁴

Throughout Reconstruction and for the remainder of his life, Foote held constant two beliefs: first, that Jefferson Davis was a traitor who deserved public scorn for “his indecent and seditious attempts to keep alive in the bosoms of his countrymen, feelings of irritation and alienation, which ought never to have been brought into existence.”²¹⁵ In one letter to the editor, Foote delighted in reminding readers that he once slapped Davis in the face and took equal delight in challenging Davis to a duel if he wished to redeem his honor.²¹⁶ Foote’s second belief flowed from the first: he was convinced and publicly said that the future of the South laid in repudiating and abandoning all vestiges of white supremacy.

These two beliefs were most evident in two of his public speeches: one to students at Fisk University in December 1870,²¹⁷ the other during a memorial service at the death of Robert E. Lee in October 1870.²¹⁸ Founded in 1865 by abolitionists barely six months after the end of the war, Fisk University, which would in time become the alma mater of W.E.B. Du Bois,²¹⁹ was named after General Clinton Fisk, the director of the Freedmen’s Bureau in Kentucky and Tennessee.²²⁰ Foote told the assembled students how moved he was to see them “in the heart of this metropolitan city, in sight of the noble Capitol of a great and wealthy State.”²²¹ He called them “part of a gigantic and glorious movement,” and described their education as

our sacred duty to forward the educational welfare of that class of our young people whose ancestors participated so efficiently in clearing our forests, in tilling our lands, in building up our villages and cities, and who administered

212. DANIEL J. SHARFSTEIN, *THE INVISIBLE LINE: THREE AMERICAN FAMILIES AND THE SECRET JOURNEY FROM BLACK TO WHITE* 66 (2011).

213. See JOSEPH A. RANNEY, *A LEGAL HISTORY OF MISSISSIPPI: RACE, CLASS, AND THE STRUGGLE FOR OPPORTUNITY* 51 (2019).

214. See, e.g., John Edmond Gonzales, *Henry Stuart Foote: A Republican Appointee in Louisiana*, 1 J. LA. HIST. ASS’N 137, 138 (1960).

215. *Fighting Words*, TENNESSEAN, Jan. 29, 1874, at 3.

216. *Id.*

217. See *Lecture of Hon. H. S. Foote to the Students of Fisk University*, REPUBLICAN BANNER, Dec. 14, 1870, at 3.

218. See *Meeting of Citizens: Action in Regard to the Death of General Robert E. Lee*, REPUBLICAN BANNER, Oct. 15, 1870, at 4.

219. See Caroline Mimbs Nyce, *W.E.B. Du Bois at Fisk University*, ATLANTIC (Feb. 24, 2016), <https://www.theatlantic.com/education/archive/2016/02/web-du-bois-at-fisk-university/624867/>.

220. See *Lecture of Hon. H. S. Foote to the Students of Fisk University*, *supra* note 217; *Fisk University History*, FISK UNIV., <https://www.fisk.edu/about/history/> [<https://perma.cc/HE44-64HD>] (last visited Aug. 31, 2022) (discussing the history of Fisk University).

221. *Lecture of Hon. H. S. Foote to the Students of Fisk University*, *supra* note 217.

in former years in a thousand interesting modes, to our domestic comfort and to our social happiness.²²²

Four years later, on October 14, 1874, three days after Robert E. Lee's death, Foote gathered with other Nashville politicians and prominent citizens in the city's main courthouse to mourn Lee's passing with speeches, praising him for having been blessed with "some of the noblest qualities, which now and then fortunately graced humanity," and remembering him as "dignified, just, generous, magnanimous, patriotic, [and] philanthropic."²²³ Foote too joined in praising Lee as "a great and good man,"²²⁴ but, while perhaps giving Lee far more credit than he deserved for always having been opposed to secession, Foote also took the occasion to mock those who would "whine[] dolorously over 'the Lost Cause.'"²²⁵ He reminded his audience that secession was always and remained "a deadly and dangerous," and an "absurd and perilous" dogma.²²⁶ And he ended by declaring that he "rejoice[d] in believing also that secession is dead, dead, dead, and I trust it will never be resuscitated in all time to come."²²⁷

But Foote's volte-face turn from pre-war slavery defender to post-war commitment to Black liberation was perhaps most evident in the small part he played in the great Kansas Exodus of 1879. Between 1879 and 1881, tens of thousands of Black people left the lower Mississippi valley for the Great Plains of Kansas.²²⁸ They emigrated from Louisiana, Mississippi, Alabama, Kentucky, and Tennessee to Kansas and other points west, such as Indiana, because the hierarchical economic arrangements of the South between the white landowning class and the Black agricultural working class had consigned freedmen to a state of near-enslavement, and because the presidential election of 1876 and resulting Hayes–Tilden compromise had resulted in white Northern Republicans effectively abandoning Black Southerners to the terrorism of white Southerners.²²⁹

The end of the war may have heralded for formerly enslaved people, as Du Bois put it, "a new birthright," but, except for a brief period near the Sea Islands,²³⁰ federal and state governments rejected demands by Black people for land reform which, combined with so-called Black Codes enacted in former

222. *Id.*

223. *Meeting of Citizens: Action in Regard to the Death of General Robert E. Lee*, *supra* note 218.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. See NELL IRVIN PAINTER, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* 4 (W.W. Norton & Co. ed. 1992) (1977).

229. *Id.* at viii–ix, xiv–xv, 4–5, 54–55, 68.

230. W.E.B. Du Bois described the end of the war as Black people coming into "a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters." W. E. Burghardt Du Bois, *The Freedmen's Bureau*, *ATL. MONTHLY*, Mar. 1901, at 354, 357. For a discussion of failure of land reform in the South following the Civil War, see Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 *MISS. L. J.* 703, 719 (2018).

Confederate states, consigned Black people to a status more resembling slavery than free people.²³¹ As a result, from the very start of Reconstruction, Black people were forced into tenant farming, land-leasing, and crop-lien contractual arrangements with white property owners that “shunted black Southerners back to a way of life more nearly slave than not.”²³² By 1879, as federal troops withdrew from the South, Black freedmen were left to the mercy of white redeemers who, “with their two hundred years of experience in the science of maintaining dominance, had withstood the brief but furious challenge to their way of life, and were now gaining momentum in their struggle to put down equality of blacks.”²³³ So, Black people turned to the same survival instinct “to leave the South since that first fugitive slave had set his sight and heart on the North Star.”²³⁴ And Kansas became their new North Star.²³⁵

The Black Southern political refugees of 1879, who came to be known as “Exodusters,”²³⁶ left home for Kansas because Kansas was the ancestral land of John Brown, because the state had fought the Civil War under the banner of “Free Labor, Free Soil, Free Men,”²³⁷ and because they believed the federal government would provide them with the means of obtaining their own land.²³⁸ So, for a two-year period, they headed west in a grassroots movement that was neither controlled nor directed by any political party or elite leader—but in many ways was the brainchild of two formerly enslaved persons: Henry Adams and Benjamin “Pap” Singleton.²³⁹

Born in Georgia and raised in Louisiana, Adams became emancipated in 1865.²⁴⁰ Beginning in 1870, he organized a mass movement of Black people to emigrate to Liberia, going so far as to present a petition with over 90,000 signatures of Black Southerners ready to leave if the federal government would fund their passage.²⁴¹ When his efforts failed, he turned his sights to western territories, where Pap Singleton had begun to sponsor riverboat trips for freedmen wishing to leave the South.²⁴² Singleton too had been born in slavery and made a living

231. See James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 442–43 (2018). The drafters of the Thirteenth Amendment were keenly aware that, while Black Codes had not explicitly made Black people into slaves, they had pushed them across the line from freedom to slavery. *See id.*

232. Billy D. Higgins, *Negro Thought and the Exodus of 1879*, 32 PHYLON 39, 41 (1971).

233. *Id.*

234. *Id.*

235. *See id.* at 41–42.

236. PAINTER, *supra* note 228.

237. *See generally* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995 ed.) (discussing the causes of the American Civil War).

238. Lisa M. Frehill-Rowe, *Postbellum Race Relations and Rural Land Tenure: Migration of Blacks and Whites to Kansas and Nebraska, 1870–1890*, 72 SOC. FORCES 77, 78–79 (1993).

239. *See* PAINTER, *supra* note 228, at 108.

240. *Id.* at 71–72.

241. *Id.* at 82–83, 87.

242. *Id.* at 107.

during Reconstruction as a cabinet maker in Nashville, Tennessee.²⁴³ Early historians of the 1879 Kansas Exodus tended to dismiss him as “an ignorant negro, who in himself seemed to embody the longings and the strivings of the bewildered negro race.”²⁴⁴ Singleton was far from that; he had survived being sold into slavery several times, successfully escaped to Canada, and returned to Nashville after the war.²⁴⁵ He became adept at community and political organizing, though he insisted he was not a politician and never ran for public office.²⁴⁶ Singleton called himself “Moses”²⁴⁷ and “the Father of the Exodus”²⁴⁸ because he saw his mission as doing God’s will by delivering Black people to a new promised land, and by bringing “peace to the South” and “teaching the Southern white people a lesson.”²⁴⁹ To Singleton, “[b]y taking the Black people out of the South, he would show Southern whites that they must live with their Black neighbors in tranquility.”²⁵⁰ The 1879 Exodus was not new to Singleton. At least as far back as 1875, Singleton was already part of a movement in Nashville to emigrate out of the state because “neither the laws nor their enforcement were adequate to the protection of the negroes in their rights.”²⁵¹ He organized recruitment and fundraising meetings²⁵² and, while these events on the surface seemed like church revivals, the religious fervor masked the radical liberation message Singleton preached as he led his people in singing odes to Kansas from sheet music he sold to raise money:

We have held a meeting to ourselves, to see if we can[']t
Plan some way to live.
Marching along, yes we are marching along,
To Kansas City we are bound.
We have Mr. Singleton for our President, he will go on
before us, and lead us through.
Surely this must be the Lord that has gone before him,
and opened the way.
For Tennessee is a hard slavery State, and we find no
Friends in this country.

243. Walter L. Fleming, “Pap” Singleton, *The Moses of the Colored Exodus*, 15 AM. J. SOCIO. 61, 61 (1909).

244. *Id.*

245. PAINTER, *supra* note 228, at 109.

246. Fleming, *supra* note 243, at 65.

247. *Id.* at 61.

248. *Id.* at 71; PAINTER, *supra* note 228, at 207. In congressional testimony, Singleton not only took sole credit for the Exodus, but also spoke of his work in divine terms:

I then went out to Kansas, and advised them all to go to Kansas; and, sir they are going to leave the Southern country. . . . Right emphatically, I tell you today, I woke up the millions right through me! The great God of glory has worked in me. I have had open air interviews with the living spirit of God for my people; and we are going to leave the South.

Hearing Before the S. Select Comm. Investigating the Negro Exodus from the Southern States, 46th Cong. (1880) (testimony of Benjamin Singleton).

249. PAINTER, *supra* note 228, at 116.

250. *Id.*

251. *The Restless Race: A Gathering of the Colored Class Yesterday*, NASHVILLE UNION & AM., May 16, 1875, at 1.

252. See *The Colored Moses*, LEAVENWORTH TIMES, May 6, 1879, at 2.

Truly, it is hard, but we all have to part, and flee into a
 Strange land unknown.
 We want peaceful homes and quiet firesides; no one to
 Disturb us or turn us out.²⁵³

Singleton's movement, which Nell Painter, the foremost historian of the nineteenth-century American South, called "the Kansas Fever,"²⁵⁴ attracted federal attention in the form of congressional hearings, during which Singleton himself warned Congress that he had awakened "millions" of Black people and they were all going to leave the South.²⁵⁵ In reality, the Exodus ended barely two years after it began;²⁵⁶ the vast majority of Exodusters were poor laborers who could barely pay for their passage to Kansas and had no resources to purchase and cultivate land or start a business of their own.²⁵⁷ But, while it lasted, the movement posed a challenge to Black political elites, who understood full well, and indeed shared in, the grievances of the Exodusters but nonetheless saw the Exodus as a threat to Black electoral prospects in the South.²⁵⁸ Elite opposition was by no means uniform; for example, Richard T. Greener, the first Black graduate of Harvard College and eventual dean of Howard University School of Law, publicly cheered the Exodus,²⁵⁹ as did John M. Langston, the first person of color to

253. HESTER HICKMAN & A.D. DEFRANTZ, *THE LAND THAT GIVES BIRTH TO FREEDOM* (1877) ("Sold by 'Pap' Singleton, author of the exodus.") (singing instructions omitted).

254. PAINTER, *supra* note 228, at 184.

255. *Hearing Before the S. Select Comm. Investigating the Negro Exodus from the Southern States*, *supra* note 248.

256. "Ultimately, some ten to twenty thousand Negroes participated in the 'Exodus of 1879.' Estimates of the number of 'exodusters' varied greatly from observer to observer since anyone bothering to make an appraisal usually was trying to make a political point." Higgins, *supra* note 232, at 39. Most estimates place the number from a low of about 10,000 to a high of 80,000. For example, Historian Nell Irvin Painter places the number at around 6,000 Black freedmen from Louisiana, Mississippi, and Texas, and fewer than that from Tennessee and Kentucky, who emigrated to Kansas between 1879 and 1881. See PAINTER, *supra* note 228, at 184. Others believe the more accurate number to be around 40,000. See RANDALL BENNETT WOODS, *A BLACK ODYSSEY: JOHN LEWIS WALLER AND THE PROMISE OF AMERICAN LIFE, 1878-1900*, at 25 (Univ. Press of Kan. 2021) (1979). But whatever the final number, most commentators tend to agree that it turned out to be relatively insignificant. As one scholar noted:

Only one fact stands out about the numerical extent of the Exodus: it was relatively small. The general westward expansion, the contemporary European immigration to America, and the great influx of Southern Negroes into Northern cities following World War I all dwarf the Exodus of 1879. Despite dire warnings to the contrary by Southern black politicians and Northern white politicians, the Exodus had spent itself by the next year.

Higgins, *supra* note 232, at 39-40.

257. "In 1889, ten years after the exodus movement, a Topeka newspaper . . . said that of those coming in during 1879 and after, a portion undoubtedly had bettered their conditions, but a large number had undergone severe hardships through destitution and sickness, a good many had died, and of the survivors a considerable number remained in a poverty-stricken condition." ROBERT G. ATHEARN, *IN SEARCH OF CANAAN: BLACK MIGRATION TO KANSAS, 1879-80*, at 278 (Univ. Press of Kan. 2020) (1978).

258. PAINTER, *supra* note 228, at 243.

259. See KATHERINE REYNOLDS CHADDOCK, *UNCOMPROMISING ACTIVIST* 1, 79, 103 (2017); PAINTER, *supra* note 228, at 243, 245.

represent Virginia in Congress.²⁶⁰ But, for others, including P. B. S. Pinchback, former lieutenant governor of Louisiana,²⁶¹ and Blanche Bruce, the first Black person to be elected to a full term in the U.S. Senate,²⁶² the Exodus was being pursued “thoughtlessly” and would “bring good to no one[] who is engaged in it.”²⁶³ Indeed, so concerned were Black political leaders that none other than Frederick Douglass published an open letter in Washington, D.C., making clear that he was opposed to the Exodus “because it will pour upon the people of Kansas and other Northern States a multitude of deluded, hungry, homeless people to be supported in a large measure by alms,” that conditions in the South were “steadily improving,” and that Black people would “ultimately realize the fullest measure of liberty and equality accorded and secured in any section of our common country.”²⁶⁴

As for white landowners, faced with the prospect of losing their main source of cheap labor, they vacillated between insisting that Black people were content in the South and were being misled by “demagogues,”²⁶⁵ and arguing that the South would be better off if the Exodusters left because it would improve the work force and “white immigration, now kept back by negroes, [would] come this way.”²⁶⁶ But, in truth, white planters were sufficiently panicked about the Exodus that they appealed to the governor of Mississippi to call for a biracial convention of landowners and workers “to take steps to check the emigration of laborers to Kansas.”²⁶⁷ The meeting, which came to be known as the Mississippi Valley Labor Convention, took place over two days in Vicksburg, Mississippi, on May 5 and 6, 1879, and received national press coverage.²⁶⁸ Its intended purpose was, according to the Southern press, to achieve “a good and proper understanding

260. LANGSTON, *John Mercer*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/16682> [<https://perma.cc/8KLT-V2PK>] (last visited Aug. 31, 2022); PAINTER, *supra* note 228, at 245.

261. PAINTER, *supra* note 228, at 244.

262. BRUCE, *Blanche Kelso*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/10029> [<https://perma.cc/3853-ZDWS>] (last visited Aug. 31, 2022).

263. PAINTER, *supra* note 228, at 243.

264. *Remarks on This Exodus by Frederick Douglass*, 4 J. NEGRO HIST. 56, 56–57 (1919); see also ATHEARN, *supra* note 257, at 99 (noting that Douglass “advis[ed] his listeners not to leave, not to join this fruitless exodus, but rather to stay in the South, the home of the Negro” and was “sharply criticized” for this position). In contrast to Douglass, radical abolitionists, among the fiercest opponents of slavery before the war, supported the Exodus. PAINTER, *supra* note 228, at 247. Sojourner Truth called it “the greatest movement of all time.” *Id.* Such abolitionists as William Lloyd Garrison, Wendell Phillips, Henry Highland Garnet, and George T. Downing all championed it. *Id.*

265. PAINTER, *supra* note 228, at 236.

266. *Id.*

267. ATHEARN, *supra* note 257, at 96. In an open letter addressed to “the People of the Mississippi Valley,” J. M. Stone, governor of Mississippi, described the Vicksburg Convention as “a matter of great importance” and “call[ed] upon every county, parish and city in every State in the Valley interested in the growth of cotton and sugar, to send delegates of both races to this Convention, selected from their ablest and most influential citizens.” J.M. Stone et al., *The Negro Exodus: Mississippi Labor Valley Convention*, CLARION LEDGER, Apr. 23, 1879, at 2.

268. See *Mississippi Valley Labor Convention*, DAILY COMMONWEALTH, May 6, 1879 at 1 (noting the convention met on May 5); *Adjournment of the Vicksburg Convention*, MEMPHIS DAILY APPEAL, May 7, 1879, at 1 (noting the convention adjourned on May 6); see also *The Flight of the Blacks*, N.Y. TIMES, May 7, 1879, at 2 (discussing the convention results).

between the races.”²⁶⁹ White organizers published newspaper notices, in which they “earnestly call[ed] upon the colored people to send to the Convention such delegates as they choose to appoint to participate in its deliberations, and discuss with us fully and freely the important questions which it will be called upon to determine.”²⁷⁰

On the second day of the convention, the chairman of the committee on resolutions, a former Confederate officer by the name of Colonel William L. Nugent,²⁷¹ brought to the floor a resolution, offering five reasons to

269. VICKSBURG HERALD, Apr. 24, 1879, at 1.

We believe . . . in allowing the negroes to emigrate to Kansas, or wherever else they may wish to go . . . and think at the same time it would be a blessing to our Southern land if they should all leave, as then our vacant fields would soon be occupied by a more intelligent and industrious class of laborers—white people—who would add vastly more to the wealth and prosperity of the South.

Colored Emigration, DEMOCRAT-STAR, May 2, 1879, at 2.

270. Stone et al., *supra* note 267.

271. From the start “it was patently clear which race dominated the proceedings. Among the various officers elected, the titles ‘general,’ ‘colonel,’ and ‘judge’ abounded, suggesting that the establishment had the managerial situation well in hand.” ATHEARN, *supra* note 257, at 96. William Lewis Nugent, the author of the resolution, is a characteristic example of how the convention was intended, above all else, to defend the interests of Southern white landowners. Nugent was a soldier in the Confederate army who became a wealthy planter after the war as the owner of two plantations in Bolivar County, Mississippi. Kent Toby Dollar, “Soldiers of the Cross”: Confederate Soldier-Christians and the Impact of War on Their Faith 221 (Aug. 2001) (Ph.D. dissertation, University of Tennessee, Knoxville) (available at https://trace.tennessee.edu/utk_graddiss/3237 [<https://perma.cc/F9ZD-PZVD>]). Though known as “Colonel” until his death in 1897, he never rose above the rank of “Captain” during the war. *Id.* at 20. Born in Louisiana, he grew up on his father’s sugar plantation. *Id.* at 21. At nineteen, he travelled to and settled in Greenville, Mississippi, where he met and married his wife Nellie. *Id.* at 22. Nugent was not himself a slaveholder but he believed in the institution of slavery and supported the war to uphold it. *Id.* at 23. In fact, for much of his war service, he used one of his employer’s slaves as a body servant. *Id.* at 23–24. When war came, Nugent ardently supported it. Writing to his wife at the start of the war, Nugent insisted: “Almost everyone I meet has come to the determination to vindicate the rights of our outraged section if need be at the point of bayonet.” JARRET RUMINSKI, *THE LIMITS OF LOYALTY: ORDINARY PEOPLE IN CIVIL WAR MISSISSIPPI* 19 (2017). As the war raged on, he never wavered: he wrote to Nellie on July 28, 1863, that “[w]e are now driven to fight to the bitter end, if conquest itself be the result. The ruling majority are contending to emancipate our slaves, and if the negroes are freed the country, as a general thing, is not worth fighting for at all.” MY DEAR NELLIE: THE CIVIL WAR LETTERS OF WILLIAM L. NUGENT TO ELEANOR SMITH NUGENT 116–17 (William M. Cash & Lucy Somerville Howorth eds., 1977). On September 7, 1863, he wrote to his wife:

I own no slaves and can freely express my notions, without being taxed with any motive of self interest. I know that this country without slave labor would be wholly worthless, a barren waste and desolate plain—We can only live & exist by this species of labor: and hence I am willing to continue the fight to the last.

Id. at 131–32. Nugent grew in wealth and prominence after the war—he became president of the Mississippi Bar Association, and played a crucial role in ending Republican Reconstruction and “recaptur[ing]” Mississippi to Democratic control. Dollar, *supra*, at 221–23. In time, his daughter, Eleanor “Nellie” Nugent Sommerville, would serve as the first woman elected to the Mississippi state legislature. *Nellie Nugent Sommerville*, MISS. ENCYC., <https://mississippiencyclopedia.org/entries/nellie-nugent-somerville/> [<https://perma.cc/8VCW-MCGQ>] (last visited Aug. 31, 2022). His granddaughter, Lucy Somerville Howorth, was also elected to the Mississippi legislature. DOROTHY S. SHAWHAN & MARTHA H. SWAIN, *LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH* 67 (2006).

explain the Exodus, none of which included an honest reckoning with the economic exploitation and political violence freedmen were experiencing in the South. Instead, the Nugent resolution cited to: (1) the low price of cotton and the prior year's partial crop failure; (2) "irrational" planting practices; (3) predatory credit practices that mortgaged crops before they were planted; (4) "apprehension" on the part of Black people based on "insidious reports . . . that their civil and political rights [were] endangered"; and (5) "hurtful and false rumors . . . that by emigrating to Kansas, the colored people would obtain lands, mules[,] and money from the government without cost to themselves, and become independent forever."²⁷² The resolution expressed "astonishment" that Black people would give credence to "idle stories circulated of a promised land," and reassured them that nowhere but in the South could the "honest toil" of "unskilled" Black labor achieve "a larger return."²⁷³ In conclusion, the document resolved that

this convention does affirm that the colored race has been placed by the constitution of the United States and the States here represented, of the laws thereof, on a plane of absolute legal equality with the white race; and does declare that the colored race shall be accorded the practical enjoyment of all rights, civil and political, guaranteed by the said constitution and laws.²⁷⁴

From the start, Black political leaders were wary of the Mississippi Valley Labor Convention.²⁷⁵ In fact, most prominent Black leaders did not come to Vicksburg but rather chose to attend a meeting of the National Conference of Colored Men taking place at the same time in Nashville, Tennessee.²⁷⁶ The Kansas Exodus dominated discussions at the conference²⁷⁷ and Black leaders adopted their own resolution, making it clear that the Exodus was caused by "a determined and irrepressible desire, on the part of the colored people of the South, to go anywhere where they can escape the cruel treatment and continued threats of the dominant race in the South."²⁷⁸ Black people wanted out of the South, the resolution continued, because "[t]hey are now told, and . . . made to feel, the full force of this declaration: That this is a white man's government, and that none but white men shall govern it, rule in it, or dominate it."²⁷⁹

272. *Proceedings of a Mississippi Migration Convention in 1879*, 4 J. NEGRO HIST. 51 (1919).

273. *Id.*

274. *Id.* at 53.

275. ATHEARN, *supra* note 257, at 96.

276. The Mississippi Valley Labor Convention took place on May 5 and 6, 1879, in Vicksburg, Mississippi. *See supra* note 268. The National Conference of Colored Men of the United States took place on May 6, 7, 8, and 9, 1879, in Nashville, Tennessee. *See* PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES, HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE (1879).

277. *See generally* PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES, HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE, *supra* note 276.

278. *Report of the Committee on Migration*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE 100, 100 (1879)

279. *Id.*

Back in Vicksburg, the few Black delegates who did attend the meeting remained circumspect in stating their views, having been “cautioned . . . against voting on various issues on the ground that the convention was bound to fail and that when it did, the responsibility should belong to the planters.”²⁸⁰ So, in response to the Nugent resolution, blaming the Exodus on the credulity of Black people, and expressing astonishment that Black laborers thought themselves mistreated, one Black delegate declared that “[h]e had strong hopes of a better feeling hereafter between the two races.”²⁸¹ But Henry Foote, who had been invited as a delegate for Louisiana, pushed back—arguing that the pending resolution avoided the real causes for the Exodus, and offering a substitute resolution that would have acknowledged that Southern states had “flagrantly violated” the Fourteenth and Fifteenth Amendments, and that the rights of Black people in the South had been “deliberately disregarded.”²⁸² Further, Foote’s resolution proposed to set up local boards in each county or parish throughout the South with the power to arbitrate complaints by Black laborers.²⁸³

White planters opposed Foote’s substitution, with at least one delegate calling him a “political trickster” and “demagogue.”²⁸⁴ Later, newspapers editors dismissed him as an “old and scheming politician who had gone over to the blacks,”²⁸⁵ and an “uneasy and disturbing spirit,”²⁸⁶ who “assumed all whites to be wicked and filled with animosity toward the black race, that he thought it was impossible for the two races to live side by side.”²⁸⁷ Needless to say, the convention, with only white planters voting, rejected Foote’s substitution, adopting the Nugent resolution instead.²⁸⁸

Weeks after the convention, on May 21, 1879, Foote spoke to a large Black gathering in New Orleans and, while he expressed regret at the Exodus, he confessed that “[e]ven if only a small part of the injustices admitted at [the] Vicksburg [Convention] were true . . . the offenses were sufficiently serious to justify blacks’ leaving the country.”²⁸⁹ So, the man who branded Jefferson Davis a traitor, the man who told mourners at Robert E. Lee’s memorial service to stop whining about the lost cause, the man who called Black Fisk University students “our young people,”²⁹⁰ and the man who told an audience of would-be Black refugees that the harms Southerners such as himself had visited upon Black people more than justified them wanting to leave for a place of their own, was almost

280. ATHEARN, *supra* note 257, at 96.

281. *The Flight of the Blacks*, *supra* note 268; see also PAINTER, *supra* note 228, at 218–19 (noting reactions to the convention).

282. *The Flight of the Blacks*, *supra* note 268.

283. *Id.*; see also PAINTER, *supra* note 228, at 218–19 (discussing Foote’s proposals).

284. *The Flight of the Blacks*, *supra* note 268. For more on reactions to Foote’s proposals, see PAINTER, *supra* note 228, at 219.

285. ATHEARN, *supra* note 257, at 98.

286. PAINTER, *supra* note 228, at 219.

287. ATHEARN, *supra* note 257, at 97.

288. *The Mississippi Valley Convention*, BALTIMORE SUN, May 7, 1879, at 1.

289. ATHEARN, *supra* note 257, at 97.

290. *Lecture of Hon. H. S. Foote to the Students of Fisk University*, *supra* note 217.

certainly the same man who wrote to the Tennessee Supreme Court that the Reconstruction Amendments had brought about “radical changes in the framework of our civil polity,”²⁹¹ that to keep going back to the antebellum order was akin to Rip Van Winkle sleeping away twenty years,²⁹² and that there could never be social peace until Black people were part of “the great *populus americanus*”²⁹³ even if it meant their having the right to “marry among the sons and daughters of our people.”²⁹⁴

VII. THE LIMESTONE HOUSE ON SIXTEENTH AND CHURCH STREETS

Foote spoke the truth to power but David lost his appeal.²⁹⁵ He had not been immediately remanded to the state penitentiary upon his conviction but remained in the county workhouse while Campbell and Foote argued before the Supreme Court.²⁹⁶ Once the Court upheld the conviction, the institution David walked into on January 11, 1873, was a torture chamber, a slave labor camp, and one of the earliest institutional models for mass incarceration of Black men.²⁹⁷

The penitentiary had opened in Nashville in January 1831 “on Sixteenth and Church Streets on land that is now a downtown parking lot.”²⁹⁸ The limestone building housed two hundred cells along two wings surrounded by four-foot-thick, twenty-foot-tall walls;²⁹⁹ each cell was seven and a half feet long, three and a half feet wide, and seven feet high.³⁰⁰ The new penitentiary was heralded as a modern reform institution but the humane measures it purported to adopt did little to stop the mistreatment of prisoners. Guards routinely tortured inmates in their care by lashing on their bare backs “with a three-inch wide thick leather strap fitted with a long wooden handle,” placing them in “a small iron box in the direct sunlight” to make them sweat, and locking them in solitary confinement in “dungeon-like cells on a diet of bread and water for up to thirty days at a time.”³⁰¹ Even outside of solitary confinement, cells were barely large enough for one

291. Brief for Petitioner at 50, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

292. *Id.* at 50–51.

293. *Id.* at 60.

294. *Id.*

295. Transcript at 12, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

296. *Id.* at 11–12 (“From which judgment and ruling of the Court, the Defendant by his counsel excepts in law, and pray an appeal to the next term of the Supreme Court to be held at the capitol in the City of Nashville of December next, which to him is granted. And thereupon the Defendant was remanded to jail.”).

297. See *infra* notes 301–02, 305–09, 322–27, and accompanying text.

298. Larry D. Gossett, 1 *The Keepers and The Kept: The First Hundred Years of the Tennessee State Prison System, 1830–1930*, at xii (May 1992) (Ph.D. dissertation, Louisiana State University and Agricultural & Mechanical College) (available at https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=6306&context=gradschool_disstheses [<https://perma.cc/YJ9C-QZJE>]).

299. *Id.* at 34.

300. *Id.*; Gary Shockley, *A History of the Incarceration of Juveniles in Tennessee, 1796–1970*, 43 *TENN. HIST. Q.* 229, 231 (1984).

301. Gossett, *supra* note 298, at 38.

person but quickly came to be used for two prisoners.³⁰² With no sewer system, the penitentiary dumped raw sewage on a vacant lot next door.³⁰³ “In the second year of the penitentiary’s operation, a cholera outbreak killed almost [twenty-five percent] of the [inmates].”³⁰⁴

From its inception, the penitentiary was a camp for cheap inmate labor. The first inmate, George Washington Cook, a free Black man and tailor by trade, was required to make his own uniform.³⁰⁵ Prison officials bought raw materials, processed them with inmate labor, and sold the finished products on the open market.³⁰⁶ By 1836, the state built a new hospital wing at no cost to the state using profits from the penitentiary.³⁰⁷ In 1844, the General Assembly used \$10,000 of penitentiary profits toward building the new State Capitol in Nashville.³⁰⁸ Around this time, Tennessee’s legislature enacted laws authorizing penitentiary officials to contract with outside private manufacturers to employ inmates to work behind the walls of the penitentiary.³⁰⁹ “A Nashville furniture maker, a hosiery company, and a company making soles, heels, and taps for shoes were all active in working the convicts behind the fences of the Tennessee State Penitentiary prior to the Civil War.”³¹⁰ One of the first manufacturers to rely on inmate labor, Hyatt and Briggs, a furniture maker, remains in business to this day.³¹¹

At first the war did not stop Tennessee’s exploitation of inmate labor. While Nashville was still under Confederate control, inmates worked to supply Southern forces.³¹² When Union troops occupied Nashville they turned the penitentiary into a military prison, and at one point in 1864, it held more than 2,400 Confederate prisoners.³¹³ Once war ended and the penitentiary was turned back to state control,³¹⁴ it resumed operation as a slave camp.³¹⁵

302. *Id.* at 40.

303. *Id.* at 41–42.

304. *Id.* at 40.

305. *Id.* at 36.

306. *Id.* at 46.

307. *Id.*

308. *Id.* at 46–47.

309. See Act of Feb. 27, 1856, ch. 117, § 10, 1856 Tenn. Pub. Acts. 130, 131–32; Act of Feb. 8, 1860, ch. 28, § 1, 1859 Tenn. Pub. Acts. 24, 24–25; KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871–1896, at 48 (1998) (“Once Tennessee officials succumbed to the convict lease as a method of penal administration, they first negotiated contracts with small operators who agreed to employ convicts in manufacturing enterprises within the main penitentiary. From 1865 to 1870, a Nashville firm employed the state’s felons in the production of reapers, mowers, thrashers, plows, wagons, saddles, and cedarware. The company paid forty-three cents per day per convict; under this arrangement, the welfare of the inmates remained the responsibility of the state.”).

310. Gossett, *supra* note 298, at 62–63.

311. *Id.* at 72; W. CALEB MCDANIEL, SWEET TASTE OF LIBERTY: A TRUE STORY OF SLAVERY AND RESTITUTION IN AMERICA 182 (2019).

312. Gossett, *supra* note 298, at 63.

313. *Id.* at 56, 64.

314. *Id.* at 64.

315. *Id.* at 66.

And, like its modern equivalents,³¹⁶ the penitentiary came to serve as a warehouse for Black men, often for minor property offenses.³¹⁷ A report of the penitentiary directors noted that many of the Black men were serving time “for offenses ranging from eight cents, the value of a fence rail, to all intermediate sums not reaching \$5, from remote counties of the state”³¹⁸ In a place that routinely tortured prisoners, Black people received the worst treatment. They were segregated from the rest of the population, forced to take the most menial jobs, such as hauling night waste, and punished more severely than whites.³¹⁹ Penitentiary records show that “on a per capita basis, blacks were whipped and placed in solitary confinement on restricted diets about five times as often as white convicts.”³²⁰

For its first thirty years, between 1831 and the start of the Civil War, the penitentiary’s population was mostly under eight percent Black.³²¹ That changed after the war. Whereas in 1860, Black people comprised less than three percent of the prison population, by 1866, they were thirty-three percent,³²² by 1867, fifty-eight percent,³²³ and more than sixty-six percent by 1880,³²⁴ at around the time when Galloway served his sentence.³²⁵ For the remainder of the nineteenth century and into the modern era, Black people never represented under sixty percent of inmates, though at no point did their number in the general population of Tennessee ever exceed twenty-five percent.³²⁶ The rapid increase in the prison population and requirement that prisoners be segregated by race rendered conditions inside even more intolerable for Black inmates. The penitentiary had been built with a capacity for 352 single-person cells; doubling inmates per cell increased it to 704; by 1866, the population was over 900, the vast majority of which was Black men.³²⁷ The solution was inmate leasing.³²⁸

Prior to the war, inmates worked inside the prison under the care and custody of penitentiary officials to produce goods for the private market;³²⁹ after the war,

316. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5, 17, 21 (10th Anniversary ed. 2020) (2010); see also Cynthia Elaine Tompkins, *Disparities and Mass Incarceration: Laws, Policies, & Implicit Bias, Contributing to Blacks’ Mass Incarceration and Addiction Treatment for Whites*, 57 *IDAHO L. REV.* 793, 808–10 (2021).

317. Gossett, *supra* note 298, at 66–67.

318. *Id.* at 69.

319. *Id.* at 234.

320. *Id.*

321. *Id.* at 231.

322. *Id.* at 67.

323. *Id.*

324. *Id.* at 66.

325. Galloway served his first sentence in the penitentiary between January 1873 and October 1874. For his entry in the archives of the Penitentiary Records, see *1872 Convict Records*, *supra* note 91. He would ultimately serve his second sentence between June 1882 and April 1884. See *Convict Records: State Penitentiary, Nashville, Tenn.*, Volume 51, *reprinted in* APPENDIX OF PRIMARY SOURCES, *supra* note 36 [hereinafter *1882 Convict Records*].

326. Gossett, *supra* note 298, at 67–68.

327. *Id.* at 236, 241.

328. *Id.* at 242.

329. *Id.* at 34.

Tennessee leased inmates out to private parties who not only controlled their work conditions but also were responsible for their welfare.³³⁰ Inmate leasing did not just solve overcrowding, nor was it just a matter of the state making a profit. “Next to repayment of the public debt, which consumed between 40 and 60 percent of postbellum annual budgets, the government spent more on law enforcement and costs incurred by the judiciary than it did on social services, pensions, public administration, and a host of other governmental duties.”³³¹ Rather, Tennessee, like most of its Southern neighbors,³³² used the criminal justice system in general and inmate leasing in particular to return young Black men to a state of near-slavery, while making private businesses owned by white men enormously rich:

[C]onvict leasing became a means to accomplish several important post-bellum Tennessee goals. One, it dealt very well with the problem of “free” blacks, returning the white establishment to its assumed superior position. Two, it provided a system of very inexpensive labor (43 cents per day in 1867) to industry and agriculture to replace the slavery system eliminated by the Civil War. Third, it provided relief from onerous expenditures to build and maintain prisons and to support convicts. Fourth, it provided a source of income to a badly-depleted state treasury. Fifth . . . it provided a source of building great personal wealth to a select group of Tennessee businessmen and political leaders.³³³

Starting in 1866, the General Assembly formalized the practice of inmate leasing.³³⁴ From that point on and for all practical intents and purposes, the penitentiary became a state business using Black labor for white profit. The state advertised inmate leasing in significant newspapers across Tennessee and surrounding states.³³⁵ Lease contracts between the penitentiary and private business typically “called for an annual payment to the state of \$30,000” (around \$600,000 in current value); the lessee, not the penitentiary, provided “food, shelter, and clothing” for the inmates; the lease placed restrictions on neither the type nor the conditions of work inmates were required to perform.³³⁶

330. See SHAPIRO, *supra* note 309, at 48–49.

331. *Id.* at 55. “Between 1888 and 1894, the government spent around one-fifth of taxpayers’ money on the criminal justice system, including state prosecutions, the national guard, and court costs. In comparison, education, hospitals, and oversight of the state’s human and physical resources together received only 14 to 21 percent of the budget.” *Id.*

332. See ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 186–88* (1996).

333. Gossett, *supra* note 298, at 242–43. “Between 1870 and 1890, Tennessee’s lessees paid over one million dollars into state coffers, four-fifths of which constituted a net surplus.” SHAPIRO, *supra* note 309, at 53. But, the true value of the system “lay in the savings that it represented. If the convict lease had not been in place, the state governments would have had the responsibility of transporting, housing, clothing, and feeding their prison inmates.” *Id.*

334. Gossett, *supra* note 298, at 242.

335. *Id.* at 78.

336. *Id.* at 80.

In 1871, a year before David would be convicted and sent to the penitentiary,³³⁷ Tennessee began leasing inmates to railroad companies and mine operators.³³⁸ For a period of about a dozen years (1871–1883) one man—Thomas O’Conner, the dominant figure in the Tennessee Coal, Iron, and Railroad Company—leased the entire Tennessee penitentiary system.³³⁹ So, on January 11, 1873, when David walked into the state penitentiary for marrying Malinda, he essentially became O’Conner’s property.³⁴⁰

O’Conner’s lease ended in 1883 only because, as Mark Twain would later document in his memoir, *Life on the Mississippi*, O’Conner was killed in the middle of the street in front of his bank in Knoxville, Tennessee, in a shootout with a business rival over a land deal.³⁴¹ Along with other company directors such as E.J. Sanford, father of future Supreme Court Justice Edward T. Sanford, O’Conner used inmates like David to build mining and manufacturing enterprises that came to rival J.P. Morgan’s United States Steel Corporation.³⁴² Tennessee

337. David was arrested in June 1872, convicted in October 1872, and incarcerated in the penitentiary in January 1873. See *infra* note 410.

338. See SHAPIRO, *supra* note 309, at 48–49.

339. Robert M. McBride, Book Review, 36 TENN. HIST. Q. 553, 554 (1977).

340. Here is a contemporary account of the life on an inmate working for the Tennessee Coal, Iron, and Railroad Company:

The life of a Tennessee convict whether he is worked in a coal mine, or on railroad construction, as the Tenn. Coal, Iron and Railroad Company worked some of them has been short and terrible. A writer in the New York *Sun* of Sept. 11, 1891, in giving a description of some of the convicts said in part: “They are herded about from place to place like wild animals. No life could be more horrible. The company counts upon the guards to get a certain amount of work out of each convict. As the guards are from the lowest sort of white men in the State, the treatment of the wretches can easily be imagined. Sickness is not counted as inability to work. The policy is to work him until he drops and then cure him if possible; if not let him make way for some other for there is never a lack. . . . The guard curses, kicks, clubs or kills at pleasure. The company asks no questions; the State has meagre chance of finding the truth and would be slow to act unless public indignation should be aroused. To make a dash for liberty is simply a way of committing suicide; . . . convicts frequently court death by making this bold dash. The rifle rings out its challenge. The convict runs on a bit, then his striped and ragged legs begin to totter, and then he sink down. A hole is dug and the dead zebra is put out of sight speedily.”

Imprisonment in Tennessee and Alabama, 10 J. OFFENDER COUNSELING, SERVS. & REHAB. 107, 111 (1985).

341. Twain reproduced a newspaper report of the shootout, misspelling O’Conner’s name as O’Connor. See MARK TWAIN, *LIFE ON THE MISSISSIPPI* 292–93 (Harper & Brothers Publishers ed. 1901) (1883). The Tennessee Coal, Iron and Railroad Company’s lease of Tennessee’s penitentiary system did not end with O’Conner’s death in 1883; it continued until 1896 when the state ended the practice of inmate leasing. Gossett, *supra* note 298, at 81.

342. For a discussion of how the Tennessee Coal, Iron, and Railroad Company came to rival U.S. Steel, see generally Justin Fuller, *History of the Tennessee Coal, Iron, and Railroad Company 1852–1907* (1966) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (ProQuest). For a history of the acquisition of the Tennessee Coal, Iron, and Railroad Company, see John W. McLaughlin, *The Acquisition of the Tennessee Coal, Iron, and Railroad Company by the United States Steel Corporation: A Legend Reexamined* 3–4 (Mar. 1971) (M.A. dissertation, University of Nebraska at Omaha) (ProQuest).

Coal, Iron, and Railroad Company still survives today—as part of U.S. Steel.³⁴³

VIII. DAVID AND MALINDA IN MIDDLE AGE

David served six hundred and thirty-seven days in the penitentiary; he walked in on January 11, 1873, and walked out on October 10, 1874.³⁴⁴ Like most inmates, David would have spent these twenty-one months working six days a week from sunup to sundown with one midday break for a cold meal.³⁴⁵ When working, he would have been shackled to other inmates with a heavy chain around one ankle; when not working, he would have been locked up in a cage loaded on a wagon; had he tried to escape, he would have been shot.³⁴⁶ It is a minor miracle he survived. On the page of the handwritten records of the penitentiary where David appears, a total of four inmates are listed: three Black—David Galloway, William Barrow, and John Nelson—and one white—Thomas Tate.³⁴⁷ Of the four, John Nelson, the youngest, barely made it six months into his three-year sentence for grand larceny; he entered on January 14, 1873, and died in the prison hospital on July 17, 1873.³⁴⁸

Once released, David returned to Malinda but the two were rearrested less than a week later, on October 14, 1874, for living together in violation of the miscegenation law.³⁴⁹ David was fined, and he and Malinda were sent back to the same workhouse where they had both been incarcerated while awaiting their first miscegenation trial back in 1871.³⁵⁰ Campbell, still David's—and presumably Malinda's—attorney, filed a writ of habeas corpus in federal court before Judge Connally Findlay Trigg.³⁵¹ President Abraham Lincoln appointed Trigg to the bench after Congress impeached and removed Judge West Humphreys for supporting secession and the Confederacy.³⁵² But, while Trigg was a Unionist, he

343. The Tennessee Coal, Iron, and Railroad Company no longer operates as a separate business entity but U.S. Steel does. See Fuller, *supra* note 342, at iii (noting that the Tennessee Coal, Iron, and Railroad Company's "independent career came to a close in 1907, when it was absorbed as a subsidiary of the giant United States Steel Corporation"); *United States Steel*, U.S. STEEL, <https://www.ussteel.com/> [<https://perma.cc/M5X6-VHC3>] (last visited Sept. 1, 2022) (discussing U.S. Steel's operations).

344. In the archives of the Penitentiary Records, David's entry appears in *1872 Convict Records*, *supra* note 91.

345. See Gossett, *supra* note 298, at 81.

346. See *id.* at 82. The mortality rate was horrendous. See *id.* ("[I]n 1890, there was not a single convict who had lived long enough to complete ten years on the rolls of the penitentiary, and there were only two who had survived nine years under the lessees.").

347. *1872 Convict Records*, *supra* note 91.

348. *Id.*

349. *Miscegenation. An "Outrage" for the Chattanooga Shriekers*, *supra* note 117.

350. *Id.*; *The Election Next Tuesday*, *supra* note 185; TENNESSEAN, Oct. 21, 1874, at 1.

351. *Miscegenation: Galloway Before the Federal Courts on a Writ of Habeas Corpus—An Important Case*, NASHVILLE UNION & AM., Oct. 24, 1874, at 1.

352. CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 147 (2006).

also proved himself hostile to civil rights during Reconstruction.³⁵³ In the habeas petition, Campbell argued that David could no longer be arrested for a crime for which he had previously been tried, convicted, and sentenced to the penitentiary, and that, in any event, the 1870 statute was unenforceable as a violation of the Fourteenth and Thirteenth Amendments.³⁵⁴ By then, Campbell was running for office in Nashville.³⁵⁵ On November 9, 1874, true to his anti-civil rights reputation, Judge Trigg denied the motion, holding that the court had no jurisdiction over the matter and, even if the court had jurisdiction, it would hold that the 1870 statute violated neither the Fourteenth nor the Thirteenth Amendments.³⁵⁶

Having failed to obtain relief in federal court, David's lawyers returned to state court and filed a writ of certiorari and *supersedeas* based on David taking a "pauper[s] oath."³⁵⁷ The procedure would have allowed for David and Malinda to swear that they were too poor to pay the fifty-dollar fine and be released on bond from the workhouse while pursuing further appeals.³⁵⁸ The city opposed the motion, arguing that, if granted, it would create a loophole for every person sentenced to the workhouse to avoid serving their time by claiming poverty.³⁵⁹ On November 15, 1874, Judge Nathaniel Baxter, a former Confederate officer who had originally opposed secession,³⁶⁰ granted the motion on the condition that David post a \$250 bond and directed the city recorder to release David; the recorder declined to release David, claiming that he had never been properly served with the court's order.³⁶¹

Six months prior, on May 8, 1874, the Tennessee State Colored Convention, meeting in Nashville, had taken up David's cause.³⁶² In its final resolution, the Convention, among other things, decried that

David . . . is now condemned to a felon's life through the barbarous decisions of the unjust code and constitution of the State of Tennessee, for having in civil life married . . . the wife of his choice, a white woman, a woman of mature age and every way competent to contract with whomsoever she pleased . . .³⁶³

353. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876*, at 59 (Fordham Univ. Press ed. 2005) (1985).

354. *Miscegenation, Galloway Before the Federal Courts on a Writ of Habeas Corpus: An Important Case*, *supra* note 351; *The Election Next Tuesday*, *supra* note 185, at 1; *Miscegenation*, NASHVILLE UNION & AM., Nov. 7, 1874.

355. *See The Election Next Tuesday*, *supra* note 185.

356. *Galloway's Petition Dismissed*, NASHVILLE UNION & AM., Nov. 10, 1874, at 3; *Intermixture of the Races*, PUB. LEDGER, Nov. 12, 1874.

357. *Criminal Notes*, NASHVILLE UNION & AM., Nov. 15, 1874, at 4.

358. *Id.*

359. *Out at Last*, NASHVILLE UNION & AM., Nov. 22, 1874, at 4.

360. 5 THE PAPERS OF ANDREW JOHNSON, 1861–1862, at 169 n.3 (LeRoy P. Graf & Ralph W. Haskins eds., 1979).

361. *Criminal Notes*, *supra* note 357; *Criminal Notes*, NASHVILLE UNION & AM., Nov. 21, 1874, at 4.

362. *The Negro Ultimatum*, NASHVILLE UNION & AM., Apr. 30, 1874.

363. *Id.*

The resolution declared that “[David’s] marriage was in conformity with his privilege as an American citizen in the land of his birth” and proposed to raise funds to retain lawyers to bring the case to the United States Supreme Court.³⁶⁴

David’s case never made it to the Supreme Court but it did make it into the pages of the Congressional Record. Two weeks after the State Colored Convention, while David remained locked up in Nashville’s workhouse, the Senate resumed debate over the Civil Rights Act of 1875.³⁶⁵ The bill had in fact been one of the main topics of the Convention.³⁶⁶ In addition to condemning David’s continued imprisonment, the Convention urged Congress to pass the bill, warned Republicans that Black people would boycott any member who did not support the bill, and branded former Tennessee Governor, then Republican Senator, Brownlow a “Judas” and a “traitor” to Black people for opposing the bill and betraying the people who had helped him gain office.³⁶⁷ In the August 1867 election, in which he was reelected governor, Brownlow received 5,454 out of 5,817 eligible Black voters in Davidson County, which encompasses Nashville, or close to ninety-four percent of the Black vote.³⁶⁸ In counties in western Tennessee and middle Tennessee, he received a similarly high percentage of the Black vote.³⁶⁹

When the bill that would become the Civil Rights Act came up for discussion in the Senate, John Stockton, a Democrat from New Jersey, rose to dismiss it as a “fraud” and an “affront” to the principles of majority rule and to respond to what he perceived as an insult to Brownlow’s honor.³⁷⁰ “[I]n the history of the world,” Stockton argued, “from the earliest records we have, no people belonging to a majority and a dominant race have ever attempted to take a small minority, inferior in number, inferior in education, inferior in intellect, and place them alongside of themselves as social equals and governors of the country.”³⁷¹ Stockton had the clerk read the entire resolution into the record because, in his view, its impertinent tone and substance showed that the bill’s true purpose was to “elevate the colored man above the white man.”³⁷²

Then, not wishing to let the insult to his colleague go unanswered, Stockton also had the clerk read into the record remarks from Brownlow who, being sick, was not present that day.³⁷³ In his remarks, which he had previously published as an open letter to Tennessee citizens, Brownlow reminded Black people that he

364. *Id.*

365. *See* 2 CONG. REC. 4143 (1874).

366. *The Negro Ultimatum*, *supra* note 362; *After Their Rights*, REPUBLICAN BANNER, Apr. 29, 1874, at 4.

367. *Tennessee Colored State Convention*, N.Y. TIMES, Apr. 30, 1874, at 1.

368. *See* William Edward Hardy, “Fare Well to All Radicals”: Redeeming Tennessee 1869-1870, at 49 (Aug. 2013) (Ph.D. dissertation, University of Tennessee, Knoxville) (available at https://trace.tennessee.edu/cgi/viewcontent.cgi?article=2938&context=utk_graddiss [<https://perma.cc/K9XR-UJ3D>]).

369. *Id.*

370. 2 CONG. REC. 4143 (1874) (statement of Sen. John P. Stockton).

371. *Id.*

372. *Id.*

373. *Id.*

had done much “for the colored race without owing my election to it or having the remotest idea of ever being a candidate for its votes or support.”³⁷⁴ Instead, he did what he did for Black people out of “a sense of duty and because of a sincere and unselfish desire to ameliorate its condition.”³⁷⁵ But, for Brownlow, when Black people demanded integrated public schools and equal access to public accommodation in the 1875 Act, they “seem[ed] to have reversed Taney’s decision and proclaimed in substance, that a white man has no rights which a negro is bound to respect.”³⁷⁶ To Brownlow, racial integration in schools and in public places was the “sum of villainies and quintessence of abomination,” and “the twenty-five thousand white republican voters of East Tennessee have resolved to get along without the colored voters” rather than submit to it.³⁷⁷

Brownlow’s opposition to the 1875 bill, especially on such racist terms, was hardly surprising. Prior to the war, Brownlow, a Methodist preacher, had been a proslavery ideologue.³⁷⁸ He had transformed himself into a Radical Republican who championed Black enfranchisement because he saw the opportunity to align himself with the Republican Party in general, and the Black vote in particular, as a path to power—and he took it.³⁷⁹ In reminding Black people in Tennessee that whites were “resolved to get along without [them],”³⁸⁰ Brownlow was simply returning to his roots. On the surface, the abomination Brownlow decried in his letter to Tennesseans may have been the prospect of school integration in the 1875 bill, but the actual abomination that most troubled men like Brownlow ran much deeper. Brownlow favored slavery because he viewed Black people as less than human; neither the Thirteenth nor the Fourteenth Amendments had changed that and, to him, a bill requiring equal public accommodation meant, in the words of Representative William Read of Kentucky, that the “next step will be that they [Black people] will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters.”³⁸¹ At times, Black supporters of the bill, such as Representative Richard Cain, pushed back, reminding white representatives that Black women were the ones who long had to fear the predation of white men:

Do you suppose I would introduce into my family a class of white men I see in this country? Do you suppose for one moment I would do it? No sir; for there are men even who have positions upon this floor, and for whom I have respect, but of whom I should be careful how I introduced them into my family. I

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* at 4144.

378. James C. Kelly, *William Gannaway Brownlow, Part I*, 43 TENN. HIST. Q. 25, 26, 35 (1984).

379. See Kyle Osborn, *Reconstructing Race: Parson Brownlow and the Rhetoric of Race in Postwar East Tennessee*, in RECONSTRUCTING APPALACHIA: THE CIVIL WAR’S AFTERMATH 163, 173–75 (Andrew L. Slap ed., 2010).

380. 2 CONG. REC. 4144 (1874) (statement of Sen. John P. Stockton).

381. 2 CONG. REC. app. at 343 (1874) (statement of Rep. William B. Read).

should be afraid indeed their old habits acquired beyond Mason and Dixon's line might return.³⁸²

But, for the most part, supporters of the bill, particularly Black representatives serving in the House, went out of their way to assure their colleagues that the “ne-gro is not asking social equality. We do not ask . . . that the two races should intermarry one with the other.”³⁸³ “[I]t is not social rights that [Black people] desire. We have enough of that already. What we ask is protection in the enjoyment of *public* rights. Rights which are or should be accorded to every citizen alike.”³⁸⁴

So, in using David and Malinda's marriage as an argument in favor of the 1875 Civil Rights bill, the Tennessee State Colored Convention chose to do that which supporters of the bill had carefully avoided doing: make the issue of interracial sex and interracial marriage a matter of constitutional right.³⁸⁵ Yet, it was not at all surprising that the resolution in support of David and Malinda came out of the Convention. By the time David was incarcerated in the workhouse for a second time, the defense team that sought collateral review of his case included a Black lawyer by the name of Samuel R. Lowery and it is a virtual certainty that Lowery himself, who was a delegate at the Convention, made David's incarceration a cause of the Convention and almost certainly drafted the resolution demanding his release and vowing to raise money for his defense.³⁸⁶

Born a free man in Nashville, Tennessee, between 1830 and 1832, Lowery came from a family of civil rights activists.³⁸⁷ His father, Peter Lowery, who had purchased his freedom with the help of his Native American wife,³⁸⁸ was a vice-president of the National Convention of Colored Men held in Syracuse, New York, in October 1864 and presided over by Frederick Douglass.³⁸⁹ Meeting six months before General Lee would surrender to Grant at Appomattox, the Convention reminded whites that Black people, “[h]aving shared with you, in

382. 3 CONG. REC. 957 (1875) (statement of Rep. Richard Cain).

383. 2 CONG. REC. 343–44 (1874) (statement of Rep. Joseph H. Rainey), *reprinted in Neglected Voices*, N.Y.U. L., <https://www.law.nyu.edu/sites/default/files/RaineyDec101873.pdf> [<https://perma.cc/5FQX-SDM5>] (last visited Sept. 1, 2022).

384. JOHN R. LYNCH, *CIVIL RIGHTS AND SOCIAL EQUALITY* (1875), *reprinted in MASTERPIECES OF NEGRO ELOQUENCE: THE BEST SPEECHES DELIVERED BY THE NEGRO FROM THE DAYS OF SLAVERY TO THE PRESENT TIME* 89, 91 (Alice Moore Dunbar ed., Johnson Reprint Corp. ed. 1970) (1914). This was “[a] speech delivered in the House of Representatives, February 3, 1875.” *Id.* at 89.

385. *The Negro Ultimatum*, *supra* note 362.

386. Lowery was admitted to the Bar of the United States Supreme Court in February 1880. *See* TIMES UNION, Feb. 3, 1880, at 2. Belva A. Lockwood, the first woman to be admitted to the Supreme Court Bar, moved for his admission. *Id.*; *In re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, SUP. CT. OF U.S., <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/Section2.aspx> [<https://perma.cc/8AQ2-YJ83>] (last visited Sept. 1, 2022) (noting Lockwood was “the first woman to argue before the Supreme Court”).

387. WILLIAM J. SIMMONS, *MEN OF MARK: EMINENT, PROGRESSIVE AND RISING* 77 (Johnson Publ'g Co. 1970) (1887); *PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN* 8 (1864) (listing Peter Lowery as a Vice President at the National Convention of Colored Men).

388. SIMMONS, *supra* note 387 (“His mother was a free woman, a Cherokee Indian, and his father a slave, living twelve miles from the said city, and was purchased by his wife . . .”).

389. *PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN*, *supra* note 387.

some measure, the hardships, perils, and sacrifices of this war for the maintenance of the Union and Government, . . . rejoice with you also in every sign which gives promise of its approaching termination.”³⁹⁰ The Convention also warned:

We are among you, and must remain among you; and it is for you to say, whether our presence shall conduce to the general peace and welfare of the country, or be a constant cause of discussion and of irritation,—troubles in the State, troubles in the Church, troubles everywhere.³⁹¹

Before the war, the Lowerys had themselves experienced the wages of racial troubles when white Nashville residents, fearful of a slave revolt, closed down all Black schools, outlawed church meetings after dark, and authorized the police to arrest any free Black person coming into the city from nearby counties.³⁹² The family went into exile in Ohio and Canada and did not return to the city until after 1863 when Union troops, including David’s regiment, occupied Nashville.³⁹³ From that point on, the Lowerys—father and son—were at the forefront of post-bellum political movements by Black people in Tennessee.³⁹⁴ They brought the first Colored Convention in Tennessee in 1864 and helped organize the convention of 1865.³⁹⁵ Samuel served as delegate in 1871, and again in 1874,³⁹⁶ and his father co-founded the Nashville Chapter of the National Equal Rights League, the country’s oldest human rights organization.³⁹⁷ The Lowerys’ work made them a target of the KKK. In October of 1870, Samuel filed a criminal complaint in federal court against a group of KKK members who came to his house in the middle of the night to threaten his family; he refused to withdraw it, demanding that the men be put to trial.³⁹⁸

390. *Id.* at 44.

391. *Id.* at 62.

392. In November 1856, there circulated in Nashville and surrounding counties rumors of a planned slave insurrection to take place at Christmas. See *Negro Insubordination*, NASHVILLE UNION & AM., Dec. 11, 1856, at 2; *Negroes to be Hung*, DAILY NASHVILLE, Dec. 4, 1856, at 3. In response, on December 4, 1856, Nashville adopted an ordinance, outlawing education for all Black people in the city, prohibiting Black people from attending church after sundown, and authorizing the police to arrest any free Black person immigrating into the city from surrounding counties. See *An Act in Relation to Slaves*, TENNESSEAN, Dec. 9, 1856, at 3. Samuel Lowery was still living in Nashville in May 1857, as he is reported to have gotten married in the city on May 20, 1857. See TENNESSEAN, May 23, 1857, at 3. He left Nashville soon that same year, first settling in Cincinnati, and eventually immigrating to Canada in 1858. See SIMMONS, *supra* note 387 (noting Samuel Lowery left for Canada in 1858); see also BENJAMIN FAGAN, *THE BLACK NEWSPAPER AND THE CHOSEN NATION* 107–10 (2016) (recounting letters from Lowery arguing that emigration to Canada would hasten Black liberation).

393. SIMMONS, *supra* note 387.

394. John Cimprich, *The Beginning of the Black Suffrage Movement in Tennessee, 1864–65*, 65 J. NEGRO HIST. 185, 187 (1980).

395. Judy Bussell LeForge, *State Colored Convention of Tennessee, 1865–1866*, 65 TENN. HIST. Q. 230, 232, 236 (2006).

396. *Colored State Convention*, REPUBLICAN BANNER, Feb. 26, 1871, at 4; *After Their “Rights,”* REPUBLICAN BANNER, Apr. 29, 1874, at 4; *Civil Rights, The Colored State Convention in Session at Nashville*, DAILY MEMPHIS AVALANCHE, Apr. 30, 1874.

397. LeForge, *supra* note 395, at 234; PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE NATIONAL EQUAL RIGHTS LEAGUE, HELD IN CLEVELAND, OHIO, at 6 (1865).

398. *Arrested as Ku-Klux*, NASHVILLE UNION & AM., Oct. 26, 1870, at 1; *“Let Us Have Peace,”* NASHVILLE UNION & AM., Oct. 25, 1870, at 2; *Retaliation*, NASHVILLE UNION & AM., Nov. 5, 1870.

Like his father before him, Lowery remained involved in Nashville public life, including unsuccessfully running for public office,³⁹⁹ but eventually he left the city for Huntsville, Alabama.⁴⁰⁰ There, while still practicing law, he raised silkworms on forty acres of mulberry trees grown from seeds imported from France.⁴⁰¹ One of Lowery's daughters had introduced him to silk production.⁴⁰² When she died while still a teenager, Lowery continued the practice⁴⁰³ and, for years, grieving for her, he travelled the country with samples of fine garments woven from his prize-winning silkworms to raise money for an agricultural school he established near Huntsville to teach women and children the art of sericulture.⁴⁰⁴ In the end, he founded a cooperative commune in Jefferson County near Birmingham, Alabama, and called it Lowerydale.⁴⁰⁵ In that dale, between the sandstone of Shades Mountain and the waters of Shades Creek, he spent his remaining years convinced until the last that Black people would find freedom from the slavery of tenant cotton farming in the silk cocoons of mulberry trees.⁴⁰⁶

399. See SWEETWATER FORERUNNER, Aug. 27, 1868, at 1.

400. In some ways, Samuel's life was proof that he was his father's son; he was born into and grew up in a free and educated family with a deep and rich tradition in religious service, civil rights activism, and political engagement. See *supra* notes 388, 389, 396–97 and accompanying text. But, for all of his accomplishments, like his father before him, Samuel also led a peripatetic life, always starting grand plans but never quite finishing them, always moving from one place to another, always dreaming big dreams. Here is how he described himself: "Hope is a large faculty in my organization. I have tried to abandon it and become indifferent to its inviting fields. When I do, I am really not myself; yet I know I do not hope vainly or recklessly." SIMMONS, *supra* note 387, at 80. By the time he left Nashville, most of his projects had come to naught. See *id.* at 79. He settled in Huntsville because his wife, who was probably far more practical than her husband, had a connection to the place. NANCY M. ROHR, FREE PEOPLE OF COLOR IN MADISON COUNTY, ALABAMA 142 (2015). Adora Lowery, born Adora Johnson, came from a prominent free Black family. *Id.* at 139–42. Her father, John Robinson, was born into slavery but bought his freedom and that of his wife and his five children. *Id.* at 137–38. Unlike the Lowerys, the Robinsons did not move from one scheme to the next. John was a successful businessman in Huntsville prior to and after the war; so were his children. *Id.* at 137–42.

401. SIMMONS, *supra* note 387, at 79.

402. *Id.*

403. *Id.*

404. See *Silk Culture in the South*, SPRINGVILLE J., Dec. 2, 1882, at 1; *A Colored Lawyer's Mission*, N.Y. Times, Feb. 3, 1880; cf. TENNESSEAN, May 8, 1879, at 1 (accusing Samuel Lowery of stealing the money he raised).

405. ROHR, *supra* note 400, at 146. There are no extensive scholarly descriptions of Lowerydale. Rohr's slim volume, while providing a fair amount of information about Lowery's background in Huntsville, Alabama, has less information about the community Lowery established after he left Huntsville and moved to Birmingham. See generally *id.* A number of contemporary online accounts of Lowery's life refer to the commune as Loweryvale without pinpointing its location or providing supporting documentation for the name. By contrast, contemporary newspapers called the cooperative community Lowerydale. See *To the Paris Exposition*, BIRMINGHAM NEWS, Dec. 17, 1895, at 4. It is fair to assume the newspaper accounts are more likely correct. In any event, the two terms—vale and dale—have the same meaning—a glen or valley—and the commune was in fact located in a valley in the shadow of Shades Mountain in Jefferson County, Alabama.

406. See SIMMONS, *supra* note 387, at 147 (noting that Lowery believed "the culture of the silk worm will take the place of cotton, and give to the women and children a refining and remunerative employment, which only takes six weeks in a year, and at the same time gives two- and three-fold more pay than they could earn all the year in their present employment"); see also *Silk Culture in the South*,

But back in Nashville, on November 22, 1874, when Judge Baxter granted David and Malinda's bond on a pauper's oath,⁴⁰⁷ it was Lowery who stood in court to argue the case,⁴⁰⁸ and a month later, it was Lowery who finally caused David and Malinda to be free the week before Christmas of 1874; the *Nashville Union and American*, which had written numerous articles in two years about the case, posted a notice that David, "well known to our local readers, [was] released . . . on account of good behavior during [his] confinement."⁴⁰⁹ Between the six months in Nashville's workhouse after his arrest for marrying Malinda and while awaiting trial and resolution of his appeal, the twenty-one months in the state penitentiary following conviction, and the four months back in the workhouse for returning to her on his release from the penitentiary, David had served nearly three years in prison.⁴¹⁰

By the time David and Malinda walked out of the workhouse, they were, by the standards of their time, two middle-aged people; David now in his mid-forties; Malinda, in her early thirties. Free again, they went back home.⁴¹¹ Two months after his release from the workhouse, David successfully petitioned a state court in Nashville to restore the citizenship rights that had been stripped from him upon his 1872 conviction for miscegenation.⁴¹² Malinda went back to calling herself "Brandon" again, as she had been when she first started living with David back in 1870 before they married.⁴¹³ They were still together in

supra note 404 ("[Silk culture] will give employment in a branch of domestic industry, . . . securing more profit in a few acres of land and several weeks of light work to families, than months and years of toil in the field. . . . The delightful climate of Alabama especially, and the South, will prove that its silk in the near future will rank with our cotton."). Apparently, Lowery never passed on an occasion to promote his silk ventures. In May 1879, during a convention of the National Conference of Colored Men in Nashville, Tennessee, Lowery took to the floor to read a newspaper editorial praising his silk work. See PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE, *supra* note 276, at 36.

407. *Criminal Notes*, *supra* note 357; *Criminal Notes*, *supra* note 361.

408. *Out At Last*, *supra* note 359.

409. *Free Once More*, NASHVILLE UNION & AM., Dec. 20, 1874.

410. All in all, David's period of incarceration lasted approximately thirty months based on the following information: He was first arrested and jailed for his marriage to Malinda on or about June 18, 1872, and remained incarcerated for approximately four months pending trial. See *The Courts*, NASHVILLE UNION & AM., June 18, 1872, at 4. He was convicted on October 10, 1872, and, while his lawyers pursued an appeal, he remained in the local jail for an additional three months until January 1873. Transcript at 10–12, *Galloway v. State* (Tenn. 1872), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36. Once he lost his appeal, the archives of Tennessee's Penitentiary Records show David entered the penitentiary on January 11, 1873, to October 10, 1874. See *1872 Convict Records*, *supra* note 91. Following his release from the penitentiary, he was rearrested and confined in the local jail for an additional two months from October 14, 1874, until approximately December 20, 1874. See *Miscegenation. An "Outrage" for the Chattanooga Shriekers*, *supra* note 117; *Free Once More*, *supra* note 409.

411. Following his release in 1874, David and Malinda appear together as part of the same household on lines 22 to 23 of the 1880 Census. He is listed as "David Galloway" on line 22 while she appears on line 23 as "Malinda." See U.S. CENSUS BUREAU, SCHEDULE I.—INHABITANTS IN 1ST DIVISION 14 WARD, NASHVILLE, IN THE COUNTY OF DAVIDSON, STATE OF TENNESSEE (1880), reprinted in APPENDIX OF PRIMARY SOURCES, *supra* note 36.

412. *Criminal Notes*, NASHVILLE UNION & AM., Feb. 4, 1875, at 4.

413. See *supra* notes 161–62 and surrounding text.

1880,⁴¹⁴ except David was now listing himself as “white” in the census.⁴¹⁵

IX. SPEAK TO YOUR DEAD

“Speak to your dead. Write for your dead. Tell them a story. What are you doing with this life? Let them hold you accountable. Let them make you bolder or more modest or louder or more loving, whatever it is, but ask them in, listen, and then write.”⁴¹⁶

I did not start out to write about slavery in the early Catholic Church in New Orleans, Louisiana, or orphans in the time of cholera in Nashville, Tennessee, or Black people on an exodus in search of Canaan, or postbellum state colored conventions, or female sex workers wandering the Ohio on a luxury riverboat, or sericulture in an Alabama commune. Nor did I intend to turn David and Malinda’s story into a symbol for Reconstruction itself.⁴¹⁷ From the first to the last, my more modest goal was to reconstruct these two people as completely as I could, as clearly as I could, and as honestly as I could.

414. See U.S. CENSUS BUREAU, *supra* note 411 (showing David Galloway and Malinda living in the same household as husband and wife). No last name is listed for Malinda, though a hash mark seems to imply she shares David’s last name. See *id.* This is the first instance in census records where Malinda is not listed as either Brandon or Vines. See *id.*

415. *Id.* Both David and Malinda are reported as “white” in the 1880 Census, *id.*, but it is extremely unlikely that this is a different white couple with the exact same names in Nashville. To begin with, no such couple with the same names appear in any prior census. While it is possible that this white couple moved to Nashville after the 1870 census, or simply did not happen to be recorded in prior censuses for the city, there is persuasive evidence that this is indeed David and Malinda, with David passing for white. Specifically, David and Malinda are listed as white but every single one of their neighbors appearing on the same census page is either Black or Mulatto; no one else in that neighborhood is listed as white. *Id.* In the late nineteenth century, residential racial segregation had not yet hardened in Nashville. As Nashville historian Bobby Lovett notes,

[a]lthough slavery, Civil War and Reconstruction, and then racial segregation dictated the development of black Nashville, its residents became scattered in neighborhoods in all sections of the city. Blacks and whites lived in close proximity (as in slavery times), and Negroes were not enclosed in a huge ghetto as in northern cities by the first half of the twentieth century.

LOVETT, *supra* note 51, at 71. However, it is still unlikely that the lone white couple residing in a seemingly all-Black neighborhood would happen to share the same names as the interracial couple who had been arrested on at least two separate occasions between 1871 and 1874 for being together. Far more likely, this is David and Malinda living together on a Black block. David and Malinda got married after Malinda tried passing for “colored” on their marriage license and listed herself as Black in the 1870 census; it did not work because they were ultimately arrested and convicted of miscegenation. MARRIAGE RECORD (1871) (noting “col” or “colored” next to each of their names); U.S. CENSUS BUREAU, *supra* note 107. Both David and Malinda have the notation “B” in the column marking their “color.” The column notes that “B” stands for Black. It makes sense that in the 1880 census they would have instead tried to declare David as white for purposes of the census, even though in real life, David was probably too dark-skinned to convincingly pass for white. See U.S. CENSUS BUREAU, *supra* note 411.

416. CHEE, *supra* note 1.

417. And yet, the arc of David’s life does mirror the arc of the Civil War and Reconstruction: he was born in slavery, fought in the Union Army, was consigned to near slave-labor after the war, experienced first-hand the early workings of white supremacy, and, the Thirteenth and Fourteenth Amendments notwithstanding, lived a significant portion of his adult life in de facto slavery.

I now know a lot more about David and Malinda than when I started. And yet, there remains much I still neither know nor understand. At times and in places, I have felt like an archeologist with a tiny brush, slowly clearing away soil, looking in every layer of dirt, in every particle of dust, for the faintest of fragmented traces of dead creatures and departed cultures. But, if I did not find intact artifacts at the bottom of the hole that opened up as I searched for David and Malinda, and if my sifting through the remains of their lives did not always reveal definitive answers, I have, purposefully, resisted the impulse to fill in the missing gaps—to write into the empty spaces. For all the lulls and pauses in their story, and even in the dim light of all those fading years, David and Malinda stand out more sharply than any cliché stock script I could possibly conjure up about a wounded soldier and the sex worker with a heart of gold discovering each other in the midst of war and surviving trials and tribulations to find happiness with one another.⁴¹⁸

I have no intimate insight into the nature of their relationship, nor a firm grasp of what their daily life must have been like, except that they were poor, had no family, and, through it all, they kept returning to one another. The hard lives the two seemed to have led did not begin with their incarceration for their union. More than a year before they would be married, but when they were already living together, on March 15, 1870, David was fined ten dollars in criminal court for an unknown offense.⁴¹⁹ A few months later, on November 1, 1870, the two were arrested together for the first time but not for miscegenation; David was convicted of “larceny of a coat, lewdness and assault,” and sentenced to one hundred and thirty days in the Nashville workhouse;⁴²⁰ in the same proceedings, Malinda too was convicted of “lewdness” and sentenced to twenty-seven days in the workhouse;⁴²¹ almost certainly, they were arrested as part of the same incident. Then, barely a month after completing her twenty-seven-day sentence, and with David still serving his one hundred and thirty days, Malinda was arrested for “drunkenness and disorderly conduct” on January 24, 1871, and sentenced to fifty-three days in the workhouse.⁴²² During both of her arrests, Malinda was still going as

418. Because David was born into slavery, it is difficult to arrive at definitive answers about his early life. While owners were required to report persons they enslaved, they did not have to record their names—only their gender, age, and, sometimes, distinguishing physical marks. As for Malinda, newspapers and court transcripts were inconsistent in recording her first name. It is most likely she was Malinda but at various times she was also referred to as Melinda and even Matilda. The same was true of her last name; in various sources she is listed as Brandon, Galloway, Vine, Vines, and even Nines. For a discussion of information recorded in slave schedules prior to the war, see generally *Genealogical Material from United States Censuses, 1790-1890*, 62 IND. MAG. HIST. 157 (1966); Bill Linder, *Black Genealogy: Basic Steps to Research*, 36 HIST. NEWS 21 (1981); Jeff Forret, “Deaf & Dumb, Blind, Insane, or Idiotic”: *The Census, Slaves, and Disability in the Late Antebellum South*, 82 J. S. HIST. 503, 507 (2016). For newspaper accounts misspelling Malinda’s name, see *The Courts*, *supra* note 410 (“Melinda”); *The Courts*, TENNESSEAN, June 1, 1882, at 4 (“Matilda”); *The Courts*, *supra* note 166 (“Malinda Vines”); *The Courts*, TENNESSEAN, October 15, 1872 at 4 (“Malinda Nines”).

419. *The Courts*, TENNESSEAN, Mar. 15, 1870, at 4.

420. *The Courts*, *supra* note 117.

421. *Id.*

422. *The Courts*, TENNESSEAN, Jan. 24, 1871, at 1.

Vine or Vines;⁴²³ perhaps she remained a sex worker and the arrests were incident to her trade. The two married just three months after David was released from his November 1870 conviction.⁴²⁴

I wanted to “ask [David and Malinda] in, listen, and then write,”⁴²⁵ because I wanted to understand why for more than a decade the city of Nashville and the state of Tennessee pursued two random ordinary people, seemingly of no public renown, political importance, or social standing, for being in a relationship that was neither terribly unique nor of singular public concern. Armstead Shelby—cook, whitewasher, civil rights activist, and preacher⁴²⁶—had been honest about one thing when the reporter called him inquiring about his having performed David and Malinda’s marriage ceremony:⁴²⁷ at the time of their marriage there were, and had been for a while, an awful lot of “white colored” people in Nashville, and no one would have been under any misapprehension about how they came to look the way they did.⁴²⁸

Over the years, scholars writing about David and Malinda captured them only in brief snatches—quick mentions in texts, short references in footnotes. In these works—law review articles, history books, and unpublished Ph.D. theses—David and Malinda make appearances mostly as random examples of the history and jurisprudence of miscegenation laws.⁴²⁹ None of these scholars identify their case

423. *The Courts*, *supra* note 117; *The Courts*, *supra* note 422.

424. David was arrested and sentenced to one hundred and thirty days in jail on November 1, 1870. See *The Courts*, *supra* note 117. David and Malinda were issued a marriage license on August 26, 1871, and were married on August 28, 1871. MARRIAGE RECORD (1871).

425. See CHEE, *supra* note 1.

426. See *supra* notes 131–32 and accompanying text.

427. See *Galloway's Bride: Nuptials That Sent a Man and Brother to the Penitentiary*, *supra* note 129.

428. Prior to the Civil War, Nashville had one of the largest populations of free Black people in Tennessee, and Shelby County, where Nashville is located, ranked seventh in the entire state in terms of free Black people. J. Merton England, *The Free Negro in Ante-Bellum Tennessee*, 9 J.S. HIST. 37, 37–38 (1943). Davidson County’s free Black population was made up in part by mixed couples. See *id.*

429. See Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1250 n.138 (1966); Steven A. Bank, Comment, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 334–35 (1995); Emily Field Van Tassel, “Only The Law Would Rule Between Us”: *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 915 (1995); David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L. Q. 213, 280–81 (2015); ALAN FRIEDLANDER & RICHARD ALLAN GERBER, *THE WELCOMING RUIN: THE CIVIL RIGHTS ACT OF 1875*, at 203 (2019); Paul E. Coker, *Is This the Fruit of Freedom? Black Civil War Veterans in Tennessee 185–86* (2011) (Ph.D. dissertation, University of Tennessee, Knoxville) (available at https://trace.tennessee.edu/utk_graddiss/1067/ [<https://perma.cc/TGF7-PLCY>]); Martyn, *supra* note 108. One point of clarification: Professor Upham’s article, noted above, incorrectly states that David Galloway’s counsel on appeal was former Supreme Court Justice John A. Campbell, who voted in the majority in *Dred Scott v. Sandford* and resigned his seat on the Court to join the Confederacy at the start of the Civil War. Upham, *supra*, at 280–281; see Simeon E. Baldwin, Book Review, 29 YALE L.J. 946 (1920) (reviewing HENRY G. CONNOR, JOHN ARCHIBALD CAMPBELL, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 1853–1861 (1920)) (noting Campbell was on the Supreme Court). Professor Upham argues that Campbell saw Galloway’s and other interracial marriage cases as an opportunity to advance the expansive view of the privileges and immunities clause he would later use in his argument

as being especially legally or historically significant and, in a sense, they are correct: David and Malinda's multiple prosecutions do not necessarily offer anything new in terms of doctrinal conclusions, theoretical insights, or historical developments in the country's experience with miscegenation that would not be evident from an examination of *Pace v. Alabama*,⁴³⁰ *Naim v. Naim*,⁴³¹ or *Loving v. Virginia*.⁴³²

But there is a sense in which David and Malinda's case stands out. In the main Reconstruction Era, Black civil rights litigants tended to present themselves as Black avatars of white middle-class respectability—as if the Thirteenth, Fourteenth, and Fifteenth Amendments were not enough to grant them equality, and they needed to display their pedigreed family, courteous speech, good manners, and modest dress in order to earn the right to exist freely and equally in society.⁴³³ David and Malinda were different; they carried no such insignias and symbols of propriety, flew no flag or banner of respectability. Theirs was a messy life, no doubt made harder by the persecution they faced, but, all in all, they seemed to have lived on their own terms with no apparent effort to be or become paragons of virtue who needed to prove themselves worthy of basic human rights: they quarreled, had sex, and drank; they were loud, got into brawls with others, and spent time in the workhouse long before they were persecuted for their marriage.⁴³⁴ Yes, the 1874 Colored Convention did emphasize David's patriotism and military service in advocating for his release,⁴³⁵ but the resolution made neither excuse nor concession for it was no one's business if David and Malinda

in the *Slaughter-House Cases*. See Upham, *supra*, at 280–81. In other words, just as Campbell argued in *Slaughter-House* that economic liberty was an incident of federal citizenship, so too, according to Professor Upham, he planned to claim interracial marriage as a federally protected right under the Privileges and Immunities Clause. *Id.* at 281. Unfortunately, former Supreme Court Justice Campbell was not Galloway's lawyer. As I explained earlier, David's lawyer was indeed named John A. Campbell but his middle initial "A" stood for Alexander, whereas former Justice Campbell's middle initial stood for Archibald. See *supra* note 185 and accompanying text; *John A. Campbell*, OYEZ, https://www.oyez.org/justices/john_a_campbell [<https://perma.cc/ASR7-CMNY>] (last visited Sept. 1, 2022). We know enough details of John Alexander Campbell's life for there to be no doubt that he was not the Campbell who sat on the Supreme Court before the Civil War. In any event, given Justice Campbell's well documented hostility to social equality, it is hard to fathom he would have ever brought himself to appear as counsel in defense of an interracial couple.

430. 106 U.S. 583 (1883) (addressing miscegenation law in Alabama).

431. 87 S.E.2d 749 (Va. 1955) (addressing miscegenation law in Virginia).

432. 388 U.S. 1 (1967) (invalidating Virginia miscegenation statutes).

433. See Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 L. & SOC. INQUIRY 377, 381 (1999); Barbara Y. Welke, *When All the Women Were White and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855–1914*, 13 L. & HIST. REV. 261, 279, 285 (1995); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 793 (2008).

434. As noted above, David and Malinda had criminal records before they were prosecuted for their marriage and from what we know their previous arrests involved such offenses as assault, lewdness, drunkenness, and disorderly conduct. See *The Courts*, *supra* note 117; *The Courts*, *supra* note 422.

435. The resolution adopted by the Colored Convention that met in Nashville in November 1874 described David as "loyal to the flag of his country—an ex-Federal soldier who fought to sustain during the war the Union and Government of the United States." See *The Negro Ultimatum*, *supra* note 362.

chose to be with one another.⁴³⁶ So, in the end, this former soldier with a criminal record and sex worker raised an orphan, demanding equal rights for the simple fact that they were human beings, was in its own way an enactment of citizenship far more radical than those of Black civil rights litigants who, for all their heart-breakingly earnest efforts at presenting themselves as the right sort of people, somehow never quite managed to convince white Reconstruction society they were worthy of respect.

David and Malinda are heroic figures. This can be said without the least bit of sentimentality because there is nothing sentimental about their story.⁴³⁷ Whatever their flaws may have been, in whatever ways they may have failed one another, and in whatever wretched conditions some of their days may have passed, there was something heroic about their commitment to one another, whether that commitment may have been borne as much out of convenience as out of conviction; as much out of habit as out of love.

And in their heroic commitment, David and Malinda's story holds one last lesson still: the words and phrases typically used to describe the prosecutions they and people like them endured often conceal the violence they entailed: anti-miscegenation laws, interracial marriage bans, the color line. In reality, the state enforced these laws by brutalizing its own citizens. In David and Malinda's case, the state turned its instruments of violence against two ordinary people with no power, no money, and no family, laying bare the ways in which, and the extent to which, these bans were not just state discrimination but state terrorism. David and Malinda spent much of their marriage in and out of the Nashville workhouse and penitentiary. Tennessee did not discriminate against them; it hunted them, caged them, terrorized them, and, in the end, broke them.

I first came across David and Malinda not while researching miscegenation, but while writing about the story of Sallie Robinson's lawsuit against the Memphis & Charleston Railroad Company under the Civil Rights Act of 1875.⁴³⁸ The Act, which was such a central concern of the 1874 Tennessee Colored Convention that advocated for David's release,⁴³⁹ was signed into law in March of 1875.⁴⁴⁰ Sallie used the statute to sue the Railroad after she boarded a train near midnight at Grand Junction, Tennessee, and the conductor forced her to sit in the second-class car even though she held a first-class ticket.⁴⁴¹ Her suit, which would ultimately be joined with five others to form the United States Supreme

436. The same 1874 resolution described David as having married "the wife of his choice, a white woman, a woman of mature age and every way competent to contract with whomsoever she pleased." *Id.*

437. "Sentimentality . . . is the mark of dishonesty . . . the wet eyes of the sentimentalist betray his aversion to experience, his fear of life, his arid heart; and it is always, therefore, the signal of secret and violent inhumanity, the mask of cruelty." JAMES BALDWIN, *Everybody's Protest Novel*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985*, at 27, 28 (1985).

438. See *The Civil Rights Cases*, 109 U.S. 3, 18 (1883).

439. See *supra* note 385 and accompanying text.

440. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

441. See François, *supra* note 209, at 1017.

Court decision in the *Civil Rights Cases*, invalidating the Civil Rights Act of 1875, was the first to squarely present the Court with the opportunity to hold in 1883 that under the Commerce Clause, Congress had the power to prohibit racial discrimination by private parties.⁴⁴² The Court declined to do so, stating, in spite of the evidence to the contrary, that none of the parties had made the Commerce Clause argument to the Court.⁴⁴³ Sallie had in fact made that very same argument in her brief to the Court.⁴⁴⁴ It would take eighty years for the Court to do in *Katzenbach v. McClung*⁴⁴⁵ under the 1964 Civil Rights Act that which it had refused to do in the *Civil Rights Cases* under the 1875 Civil Rights Act.⁴⁴⁶

In writing about Sallie's story, the eighty-year span between the *Civil Rights Cases* and *Katzenbach v. McClung* turned out to be, at least for me, less significant than the realization that Ollie McClung—the owner of the barbecue restaurant, who challenged the constitutionality of the 1964 Civil Rights Act in *Katzenbach v. McClung*—descended from the same family tree as Charles McClung McGhee, the owner of the Railroad that denied Sallie her seat in the first-class car in 1879, resulting in the *Civil Rights Cases*.⁴⁴⁷ And that thread, spinning out and reaching outward and over eighty years and tying together a Black woman on a midnight train from Memphis in 1879 to Black customers grabbing food out of the back takeout window of a barbecue place on a 1964 Birmingham summer night, seemed to me not merely the sort of accidental rhymed verse the passage of time habitually conjures up, but more importantly a piece of evidence of how so much of American identity is buried in the short constitutional moment of Reconstruction.

As radical an experiment as the American Constitution may have been, James Baldwin once remarked, “the establishment of democracy on the American continent was scarcely as radical a break with the past as was the necessity, which Americans faced, of broadening this concept to include black men.”⁴⁴⁸ David and Malinda were two ordinary people—two everyday people—who, by the very fact of their daily existence, made an attempt at that radical break.⁴⁴⁹ I write about them in order to speak to and write for the dead, to “ask them in, listen, and then

442. *See id.* at 1017–18.

443. *See id.* at 1071.

444. *See id.*

445. 379 U.S. 294 (1964).

446. *See* François, *supra* note 209, at 1071–72.

447. *See id.* at 1074.

448. JAMES BALDWIN, *Stranger in the Village*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985*, at 87 (1985).

449.

*Sometimes I'm right and I can be wrong
My own beliefs are in my song
The butcher, the banker, the drummer and then
Makes no difference what group I'm in
I am everyday people.*

write.”⁴⁵⁰ I write about them in order to remember the lives they led: lives that remain as artifacts of a time in American history in general, and American constitutional jurisprudence in particular, when, for a brief moment, between *Dred Scott v. Sandford* and *Plessy v. Ferguson*, between the Civil War and Jim Crow, between the bondage of cotton plantations and the segregation of drinking fountains, between the charnel house of Gettysburg and the strange fruits hanging from southern trees, the old world of racial slavery had fallen into pieces and had not yet rebuilt itself into the new social order of racial apartheid; everything seemed, again for a brief moment, possible, everything changing, in flux, in motion, like David and Malinda, two people trying for a new life in a different world together.⁴⁵¹

EPILOGUE

David and Malinda’s story does not end where I left them after their second miscegenation arrest, back home together in 1880, living in a Black Nashville neighborhood, David passing for white in the census, his citizenship rights restored.⁴⁵² They had spent nearly their entire lives in Davidson County but there was no future for them in Nashville; so long as they remained married, Tennessee was never going to stop prosecuting them. Better to leave the city; better to leave the state altogether; better to follow John “Pap” Singleton, the Negro Moses, on the Exodus out of Tennessee to the new Canaan of Kansas, where land was free for the taking to anyone willing to work it, where they would know what it feels like to be free, and, though way overdue, they would be starting anew.⁴⁵³

First, a steamboat from Nashville to Paducah, Kentucky, then on to Memphis, where they camp for weeks on the banks of the Mississippi River, waiting for passage to St. Louis, Missouri;⁴⁵⁴ then a train to Kansas.⁴⁵⁵ They put down roots near

450. CHEE, *supra* note 1.

451. “If the Reconstruction of the Southern states, from slavery to free labor, and from aristocracy to industrial democracy, had been conceived as a major national program of America, whose accomplishment at any price was well worth the effort, we should be living today in a different world.” DU BOIS, *supra* note 11.

452. See *supra* notes 412–15 and accompanying text.

453.

*I wish I knew how
It would feel to be free
I wish I could break
All the chains holdin’ me
...
I wish I could do
Al the things that I can do
And though I’m way overdue
I’d be startin’ anew*

BILLY TAYLOR, *I WISH I KNEW HOW IT WOULD FEEL TO BE FREE* (RCA Records 1963).

454. From Tennessee, Exodusters took a number of routes to Kansas, including riverboats that began in Nashville on the Cumberland River. See Benjamin “Pap” Singleton and S.A. McClure, in *Trials, Triumphs, and Transformations: Tennesseans’ Search for Citizenship, Community, and Opportunity*, MIDDLE TENN. ST. UNIV. DIGITAL COLLECTIONS, <https://cdm15838.contentdm.oclc.org/digital/collection/p15838coll7/id/237> [<https://perma.cc/VY24-LCWY>] (last visited Sept. 1, 2022) (“[P]hotograph of

Nicodemus, one of the earliest Black settlements in Kansas.⁴⁵⁶ They homestead some land; after ten years of working it, they earn title.⁴⁵⁷ They build a house; a cottage with gables, dormer windows, and a wide veranda, where, in the evening after the day's work, David sits looking out onto his fields in the setting sun; inside Malinda finished preparations for supper and now plays her piano; on the side of the cottage is a large barn and carriage house where their children play; it is almost time to come inside.⁴⁵⁸

Or, their house might have been in Topeka, Kansas, and not near Nicodemus; or perhaps it was not in Kansas at all; perhaps they settled in Indiana; or was it much further west, all the way to California? Does their exact location really matter? Was there ever really a gabled house looking out onto a field at sunset?

Some Exodusters who came to Kansas chose to remain and, even if it was not the new Canaan they had hoped for, they built their lives there and found purpose. Among them were Albert Bass and Jennie Mason, both from Missouri, who came

Benjamin ["Pap"] Singleton and S.A. McClure, superimposed over an image, apparently taken in Nashville, Tennessee, of a steamboat with passengers.")

455. St. Louis, Missouri, was a significant waypoint for Freedmen seeking final passage to Kansas. See PAINTER, *supra* note 228, at 185–87; ATHEARN, *supra* note 257, at 20, 26.

456. "The first well-known settlement of Black Kentuckians in Kansas was Nicodemus, located well out on the prairie, on the Solomon River in Graham County. . . . It was founded by Black colonists from Lexington, Kentucky, who arrived in five groups in 1877 and 1878" PAINTER, *supra* note 228, at 149–50.

457. The Homestead Act of 1862, signed by President Abraham Lincoln, parceled out millions of acres of land in Kansas and other western territories to settlers. See Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (1862); *The Homestead Act of 1862*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/homestead-act> [<https://perma.cc/2NYW-SMGY>] (last visited Sept. 1, 2022). Those eligible to apply were entitled to a 160-acre plot of land. See *The Homestead Act of 1862*, NAT'L ARCHIVES, *supra*; see generally STEVEN E. WOODWORTH, *MANIFEST DESTINIES: AMERICA'S WESTWARD EXPANSION AND THE ROAD TO THE CIVIL WAR* (2010) (providing a history of westward territorial expansion during the 1840s). Exodusters were drawn to Kansas with the promise of free land under the Act. See ATHEARN, *supra* note 257, at 252.

458. Following the Mississippi Valley Migration Convention in Vicksburg, Mississippi, an article appeared in a number of newspapers purporting to explain how deceptive advertisement duped Black people into emigrating to Kansas. See *How the Negroes Were Duped*, 4 J. NEGRO HIST. 55, 55 (1919). In the article, the writer described "[g]orgeously illuminated chromo-lithographs of Kansas scenes" being distributed to Black people to entice them to leave the South. *Id.* According to the writer, one such scene, entitled "A Freedman's Home," showed:

[A] fine landscape, with fields of ripening grain stretching away to the setting sun. In the foreground, illuminated by a marvelous sunset, stood the freedman's home. It was a picturesque cottage with gables, dormer windows, and wide verandas. . . . The colored father, who had just returned from his harvest fields, sat in an easy chair reading a newspaper, while the children and babies rollicked on the floor of the piazza. Through the open door of the kitchen the colored wife could be seen directing the servants and cooks who were preparing the evening meal. In the parlor, however, was the most enchanting feature, for at a grand piano was poised the belle of the household, and beside the piano where she was playing stood her colored lover, devouring her with his eyes while he abstractedly turned the leaves of her music. Just to one side of the dwelling appeared a commodious barn and carriage house and workmen busily engaged in putting in order their reapers and mowers for the following day.

Id.

to Kansas as part of the 1879–80 migration.⁴⁵⁹ They had a daughter named Lutie who grew up to marry a man by the name of Charles F. Brown;⁴⁶⁰ Charles and Lutie had a son they named Oliver Brown;⁴⁶¹ Oliver married Leola Williams;⁴⁶² when Oliver and Leola tried to enroll their daughter, Linda Brown, in their Topeka neighborhood school a few blocks away from their house, they were turned away and directed to a segregated school more than a mile from their home; on Linda’s behalf Oliver sued the school district and became a named plaintiff in *Brown v. Board of Education*.⁴⁶³

But for countless others, Kansas in the end proved to be an “Eldorado of their foolish dreams.”⁴⁶⁴ The majority of Black Southerners did not heed the call of Black Moses, Pap Singleton; they stayed near the place where they were born;⁴⁶⁵ so did David and Malinda. The two did not leave Nashville in the great Kansas Exodus of 1879 or any time after. A decade after their first miscegenation

459. The obituary for Albert Bass, dated January 30, 1903, states that he was born in Missouri and “came overland to Topeka[, Kansas,] in the 70’s.” *Albert Bass*, PLAINDEALER, Jan. 30, 1903, at 3. His last will and testament lists his wife as “Jennie.” ALBERT BASS, WILL (1903).

460. ALBERT BASS, WILL (1903) (listing one of Albert and Jennie’s children as “Lutie”) (on file with author); *News About Town*, TOPEKA DAILY CAP., May 26, 1901, at 5 (announcing the marriage of Charles F. Brown and Lutie Bass).

461. Lutie Brown’s household in Topeka, Kansas, appears on lines 37–45 of the 1920 Census and among her children is a son named Oliver Brown. U.S. CENSUS BUREAU, 14TH CENSUS OF THE UNITED STATES: 1920—POPULATION (1920).

462. See DEP’T OF COMMERCE – BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION SCHEDULE, SHEET NO. 13B (showing Oliver and Leola living with Leola’s parents); U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, 1950 CENSUS OF POPULATION AND HOUSING, SHEET NUMBER 73 (showing Oliver and Leola living with their two daughters, Linda and Terry); CITY CENSUS FOR TOPEKA, KS (1959) (showing Oliver, Leola, Linda, and Terry living at the same address in Topeka, Kansas).

463. See *The Determined Father who Took Linda Brown by the Hand and Made History*, WASH. POST (Mar. 27, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/03/27/the-determined-black-dad-who-took-linda-brown-by-the-hand-and-stepped-into-history/>. For the case itself, see *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954), supplemented by 349 U.S. 294 (1955).

464. ATHEARN, *supra* note 257, at 90. Historian Nell Irvin Painter, who wrote the first full treatment of the Exodus of 1879, said it best when she wrote that, while the Exodus may have been contemporaneously described as driven by economic necessity, it was above all else a political movement by a people who had been denied the other means of exercising political power:

[L]acking the classic tool for public redress—the reasonably independent exercise of the vote—their best alternative was flight. Exodusters on their way to Free Kansas said no, we do not acquiesce in Redemption; we do not believe that this is the way of American democracy. Yet, of the more than six million Blacks subjected to Southern rule, only a few thousand acted on their faith that a Promised Land of freedom and equality might exist for them somewhere in this country.

PAINTER, *supra* note 228, at 261.

465. PAINTER, *supra* note 228, at 184 n.1 (noting that the actual number of Exodusters is “exceedingly difficult” to estimate but placing the number at approximately 20,000); see also *id.* at 256 (noting that by 1880, “roughly fifteen thousand migrants still remained in Kansas”). By contrast, one year after the height of the 1879 Exodus, in Tennessee alone the Black population remained at over 400,000. See U.S. CENSUS BUREAU, U.S. DEP’T INTERIOR, POPULATION BY RACE, SEX, AND NATIVITY 378 (1880), https://www2.census.gov/library/publications/decennial/1880/vol-01-population/1880_v1-13.pdf [<https://perma.cc/99AN-X2WT>].

conviction, on May 1, 1882, they were rearrested in Nashville for remaining married; convicted, they were sentenced to the state penitentiary: David, to a term of three years; Malinda, to a term of two.⁴⁶⁶ By then, they had lost their champions: Samuel Lowery left Nashville after obtaining their release from the workhouse, and, by the time David and Malinda came up for their second miscegenation trial, Lowery was settled in Alabama, mourning his daughter's memory in the silk commune of Lowerydale;⁴⁶⁷ Foote was no longer there to help either; he had died two years earlier in Nashville on May 19, 1880.⁴⁶⁸

David and Malinda began serving their sentence the same day: June 6, 1882.⁴⁶⁹ In the penitentiary's intake pages for that day, only two inmates separate them; David appears in the top row of the page; then two Black boys in the second and third row, Leo Hodge, nineteen years old, and Bowling Townsend, twenty years old; sentenced to one year and five years respectively for larceny; and then, in the fourth row, Malinda.⁴⁷⁰ David is listed as having no education; Malinda, as having some—probably from her time in the orphanage of the Sisters of Charity.⁴⁷¹ David's entry initially reads: "wife lives in Davidson [County]" but then the entry is edited to note: "[wife] sent to [the] penitentiary for 2 years . . . June 6, 1882."⁴⁷² In the box marked "Station of Life" David is at first listed as "Married" but then, as Tennessee's final rejection of his marriage to Malinda, the word "Married" is crossed out and replaced with "single."⁴⁷³ Malinda, three rows down, is also listed as single.⁴⁷⁴

David was fifty-three years old by then; medium-build at five feet seven inches and one hundred and fifty-three pounds, dark-skinned, with dark eyes and dark hair, the years marked on his face, a scar on his right cheek, another above his left eye from an old skull fracture, a piece of his left ear missing.⁴⁷⁵ At thirty-eight, Malinda was five

466. *The Courts*, NASHVILLE BANNER, May 24, 1882, at 1; *Courts*, NASHVILLE BANNER, May 31, 1882, at 4.

467. It appears Lowery left Nashville for Alabama in between 1876 and 1877. He was still practicing law in Nashville in January 1875. See *How Costs Accrue*, NASHVILLE UNION & AM., Jan. 27, 1875. In May 1875, he appeared as a Nashville delegate to a State Emigration Convention. See *The Restless Race*, NASHVILLE UNION & AM., May 16, 1871, at 1. But by 1877, he is reported to be in Huntsville, Alabama. See *At It Again*, HUNTSVILLE INDEP., July 19, 1877, at 3. He travelled back to Nashville on occasion, including in May 1879 as an Alabama Delegate at the National Convention of Colored Men. See PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE, *supra* note 276, at 5, 13. However, he remained settled in Alabama and was not in Nashville at the time of David and Malinda's 1882 arrest and prosecution for miscegenation.

468. See *Henry S. Foote*, DAILY AM., May 20, 1880, at 1.

469. In the archives of the Tennessee Penitentiary Records, David and Malinda's entries for their 1882 conviction and imprisonment appear in *1882 Convict Records*, *supra* note 325.

470. *Id.*

471. See *supra* note 36 and accompanying text.

472. *1882 Convict Records*, *supra* note 325.

473. *Id.*

474. *Id.*

475. *Id.*

feet six inches, one hundred and forty pounds, fair-skinned, blue eyes, sandy hair, turning to gray, a ballerina tattoo on her right arm just below the elbow.⁴⁷⁶

As in the record of court proceedings, Malinda's professional name is noted in her intake form next to her married name: "Malinda Galloway, alias Vines."⁴⁷⁷ While living in the Sisters of Charity orphanage, Malinda grew up on Campbell's Hill.⁴⁷⁸ The neighborhood, which would in time become the site of the state's capitol, had once been a poor district that had turned into one of the better residential areas of Nashville—a place of "quadrille and fancy costume balls," where party guests dined on "Russian cheese, French bonbons, nougats, fancy cakes and ice cream pyramids."⁴⁷⁹ On most mornings, carrying a basket to bring food donations back from the market,⁴⁸⁰ seven-year-old Malinda Brandon would have walked out of the orphanage's front door on Vine Street—the name she would, in time, take on as her own when the orphanage closed and, alone in Nashville, she became, for a while, in Joseph Overby's brothel on Smoky Row, Malinda Vine.⁴⁸¹

Malinda served her time and was freed in Nashville, about four months early for good behavior on February 29, 1884.⁴⁸² David did not survive his second stint in the penitentiary;⁴⁸³ two months after Malinda's release, on April 13, 1884, barely a year left on his sentence, David died as he was born, in a state of slavery, a fifty-five-year-old Black man shackled at the ankle, mining coal for the Tennessee Coal, Iron, and Railroad Company in the inmate camp of Tracy City,⁴⁸⁴ near the Cumberland mountain range of East Tennessee.⁴⁸⁵

476. *Id.*

477. In the intake form after her second conviction for miscegenation, Malinda is listed as follows: "Malinda Galloway, alias Vines." 1882 *Convict Records*, *supra* note 325. In the records of her first miscegenation trial, Malinda is variously referred to as "Malinda Brandon, alias, Malinda Vines." Transcript at 4, *Galloway v. State* (Tenn. 1872), *reprinted in* APPENDIX OF PRIMARY SOURCES, *supra* note 36.

478. When the Sisters of Charity first came to Nashville, they settled at the top of Campbell's Hill, which was considered "the best residential district." GILMORE, *supra* note 35, at 49.

479. *Id.* Campbell's Hill was sold to the city of Nashville in 1843 and then transferred to the State of Tennessee as the permanent site for the state's capitol. See Louis Littleton Veazey, *George Washington Campbell*, TENN. ENCYC., <https://tennesseeencyclopedia.net/entries/george-washington-campbell> [<https://perma.cc/WS3E-WYWU>] (last visited Sept. 1, 2022).

480. GILMORE, *supra* note 35, at 56.

481. Between 1842 and approximately 1851, the Sisters of Charity's Nashville location for their school and orphanage was on Vine Street in Campbell's Hill. See *id.* at 33–34, 48–49. In newspaper reports, court proceedings, and prison documents, Malinda's professional alias is variously written as "Vine" or "Vines." See, e.g., 1882 *Convict Records*, *supra* note 325.

482. See *Names of Prisoners Discharged Under the Acts of 1836 and 1870, from December 1, 1883, to December 1, 1884*, Tennessee Journal Appendix to the 44th General Assembly, House of Representatives 96–97. Malinda was freed early pursuant to a Tennessee statute enacted in 1836, providing for the commutation of a prisoner's term for good behavior. For the statute, see Act of Feb. 20, 1836, ch. 64, 1836 Tenn. Pub. Acts 171, 171–72.

483. 1882 *Convict Records*, *supra* note 325.

484. *Id.* The Tennessee Coal, Iron, and Railroad Company operated coal mines in Tracy City, located in Grundy County, Tennessee, approximately 100 miles from Nashville. See Gossett, *supra* note 298, at 112. Once processed in the main penitentiary facility in Nashville, inmates consigned to forced labor were shipped off to various work camps around the state. David was initially processed in the Nashville

penitentiary but was shipped off to Tracy City after he and Malinda arrived in the penitentiary on June 6, 1882. See *1882 Convict Records*, *supra* note 325

485. The poet and visual artist John Berger once wrote an anticipatory eulogy that ended this way:

What reconciles me to my own death more than anything else is the image of a place: a place where your bones and mine are buried, thrown, uncovered, together. They are strewn there pell-mell. One of your ribs leans against my skull. A metacarpal of my left hand lies inside your pelvis. (Against my broken ribs your breast like a flower.) The hundred bones of our feet are scattered like gravel. It is strange that this image of our proximity, concerning at it does mere phosphate of calcium, should bestow a sense of peace. Yet it does. With you I can imagine a place where to be phosphate of calcium is enough.

JOHN BERGER, *AND OUR FACES, MY HEART, BRIEF AS PHOTOS* 101 (First Vintage International ed. 1991) (1984). When she died, Malinda's bones were not buried and strewn together with David's; she probably never got his body back. David did not make it out of Tracy City; those who died in the camps were "buried without a single religious rite more than would be given a dead animal." *Imprisonment in Tennessee and Alabama*, *supra* note 340, at 111–12.