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Resistance Proceduralism: A Prologue to Theorizing Procedural Subordination

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Abstract

Several legal scholars have discussed the role of slavery within their own family histories and a growing number of scholars are exploring the successes and strategies of lawyers and Black litigants in freedom suits and other litigation in the United States antebellum South. I build on these literatures with a focus on procedure. In this Article, I analyze procedures involved in a few of my ancestral and personal experiences. Some of the

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experiences with process involved litigation to be free from slavery while other experiences did not explicitly involve any law. But they all involved process.

Engaging in this practice—marshaling procedure to increase justice for marginalized groups and to decrease procedural subordination and white supremacy—is a form of what I am calling resistance proceduralism. I draw from engagement with procedures, such as requirements to file a lawsuit or for bonds and securities, in my ancestors' freedom suits—lawsuits fighting for their freedom from slavery—to query whether some marginalized litigants, and even people who were enslaved at the time, may have engaged in resistance proceduralism.

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I am a free person and if I had had my rights, I would have been free from the beginning.

Rose Ana Porter[1]

INTRODUCTION

When I was a junior high student, the administration of the school that I attended imposed a process to thwart student attempts to change the school's racist mascot. Since then, the ways that people design and deploy procedure have continued to intrigue me. So much so that, decades later, as a law professor, I found myself writing an article developing a theoretical framework for understanding what I am calling procedural subordination—how racial subordination, and the subordination of other marginalized groups, may be facilitated by civil procedure.[2] While writing that article, I vaguely recalled

1. Rosana Porter Deposition at 25, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. July 27, 1854), https://perma.cc/QGC9-YSRM. In this case, my great-great-great-grandmother (Mary "Milly" Vance Porter) claimed that her enslaver, Nathaniel Porter, was unjustly enslaving her and her toddler (Dock Jones, my great-great grandfather). *Id.* The person quoted here, Rose Ana Porter, was Mary Vance's mother who, as a Black freed person, was deposed in the litigation, and had her deposition read into the court record. *Id.*

My ancestors lost this lawsuit, but litigating was one part of a multipronged winning strategy for keeping the family as safe as possible and together geographically or physically until they could earn and borrow enough money to purchase their freedom. This quotation is the first sentence that Rose Ana Porter spoke when being deposed and these are the earliest known recorded words spoken by any of my ancestors. I cannot think of better or truer words with which to begin this Article.

2. *See generally* Portia Pedro, Theorizing Procedural Subordination: A Critical Race Theoretical Account of Civil Procedure (2024) (unpublished manuscript) (on file with author) [hereinafter Pedro, Theorizing Procedural Subordination]. This Article fits within a series of my work on the topic of race and subordination within procedure. In an essay, *A Prelude to a Critical Race Perspective on Civil Procedure*, 107 VA. L. REV. ONLINE 143 (2021), I first examine the lack of scholarly attention given to the role of civil procedure in racial subordination, and then I posit reasons for this dearth of critical thought by interrogating the connections between procedure and the subjugation of marginalized peoples. *See id.* at 154–62. I also emphasize the importance of a critical race analysis of civil procedure and call for the expansion to civil procedure of the racial reckoning that reemerged in the summer of 2020 in response to police officers killing George Floyd, Breonna Taylor, and a number of other (predominantly) Black people. *Id.* at 157–58.

In my book chapter, *Forging Fortuity Against Procedural Retrenchment: Developing a Critical Race Theoretical Account of Civil*

family stories of structures, perhaps including legal structures, reinforcing racism in the lives of some of my enslaved[3] ancestors

Procedure, that appears in a book that I coedited, A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 23 (Brooke Coleman, Suzette Malveaux, Portia Pedro, & Elizabeth Porter eds., 2022), I argue that race and racial subordination matter within civil procedure much more than current scholarship has revealed. *See id.* at 23–24. I explain the significance of bringing critical race theory—which reveals the ways in which racial subordination is embedded in social structures and bureaucracies—to bear on civil procedure, the structure of civil litigation, which many marginalized communities have historically used to redress injustices. *See id.* at 26. I suggest that scholars pursuing a critical race theoretical perspective of civil procedure should also consider implications of procedural mechanisms across different types of claims and different marginalized groups, in addition to people of color. *See id.*

In my next manuscript in this area, *Theorizing Procedural Subordination: A Critical Race Theoretical Account of Civil Procedure*, I hypothesize the mechanisms of subordination within procedure. The project explores where, and how, white supremacy and other axes of subordination have done (or may do) the most harm in civil procedure in order to identify what areas of civil procedure may need to be completely rethought anew, and in order to identify earlier, and mount stronger defenses within areas susceptible to, retrenchment of rights for people of color and other marginalized groups. I introduce several concepts that explain many of the ways in which white supremacy and the subjugation of other groups along axes of identity and group membership are reinforced and produced within civil procedure.

3. In an earlier version of this Article, I used the terms "slave" and "master" because I thought something in the use of those terms gave voice to the inhumanity with which so many (mostly white) people treated and regarded so many of my ancestors and others who were African, Black, or people of African descent in the era of slavery before the U.S. Civil War. To my ear, "people who had been enslaved" and "enslavers," almost sounded more clinical, less emotional. But it wrenched my heart to type that someone (in fact, many someones) regarded my ancestors and others as property. I still have many of these sentiments, but I now find it most convincing that those status labels ("slave" and "master" or "owner") do far too little to continuously reveal the endless choices and actions that so many (predominantly white) people made and took—in their daily lives and as institutional actors—day after day, to actively dehumanize and imprison my ancestors and others. So, for similar reasons to those which Professor Adrienne Davis has given, "I adopt the term 'enslaved' rather than 'slave' to describe persons" whom other people brutally held in bondage. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223 n.4 (1999). "I do so in order to highlight the fact that people are not born into servitude. Others force such conditions onto them, with the assistance of state-sanctioned, and often state-sponsored, violence and coercion. Enslavement is not a one-time determination of status; rather, it must be enforced and maintained on an ongoing basis." *Id.*

in the U.S. pre-Civil War era. I searched for and eventually received what my relatives had assembled and collected of some parts of our family history. As I read through those binders of documents about my family and the related documents and court records that I found, the use, or attempted use, of process to impose—or to overcome—subordination based on race, sex/gender, and other aspects of identity stood out as a through-line, running from the earliest (currently) known experiences of my ancestors through to my own experiences.

In this Article, I share a few personal and ancestral narratives to explain my motivation for better theorizing the ways that procedure, both in civil litigation and in the broader world outside of the courtroom, furthers white supremacy and the subordination of people of color and other marginalized

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The brutality of people holding Mary Vance King, my great-great-great-great-grandmother, captive in a jail, month after month, based on a legal writ too eerily similar to the writ of replevin that I teach my students allowed the sheriff to seize Margarita Fuentes's stove in *Fuentes v. Shevin*—it makes me sick to my stomach and gives me chills. 407 U.S. 67, 70–71 (1972). And those chills deepen with the realization that those (white) people were subjecting or threatening Mary Vance King to treatment, or a certain future, so bleak and harsh that, in her court filings, she essentially asked to be treated like that stove for a period of time. Just to be safe. She pleaded to be as safe as a stove. Technically, she probably begged to be safe as a stove. While the court graciously entertained her attempt to litigate and prove her humanity. So, I now refer to my enslaved ancestors and others, not as "slaves" with "owners," but as people who others were enslaving. While we may have begged and pleaded to be treated as a stove, legally, because available procedures would protect a stove or property better than human life and freedom—we always knew that we were not stoves. We always knew and maintained that we were humans. Not "slaves." In a context that makes it difficult, if not impossible, to know how someone personally identified or to know the wishes of my ancestors and other enslaved people, in this Article, I want to at least honor their patent recognition of their own humanity.

For explanations of conflicting views about this terminology, compare Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1878–79 n.1 (2019) (explaining that he uses "slavery" to refer to the system and institution, "slaves" to refer to the general class of people who were enslaved, and "people who were enslaved" when talking about specific people in a more particularized way), with Carlton Waterhouse, *Total Recall: Restoring the Public Memory of Enslaved African-Americans and the American System of Slavery Through Rectificatory Justice and Reparations*, 14 J. GENDER RACE & JUST. 703, 726 (2011) (stating that the term "slave" fails to recognize enslaved Black people's "identities, hopes, dreams, pain, anguish, capacities, and contributions," and continues their objectification, whereas the term "enslaved blacks," recognizes "an identity that transcends the person's condition").

communities along axes of group identity. I also begin to outline the strategies that enslaved people, including some of my ancestors, employed when litigating freedom suits,[4] procedural unfairness notwithstanding. While Black legal scholars have discussed the role of slavery within their own family narratives[5] and a growing number of historians, legal historians, and law scholars are exploring the successes and strategies of lawyers and Black litigants in freedom suits and other litigation in the United States antebellum South,[6] this Article adds a focus on

4. Freedom suits were civil lawsuits brought on behalf of enslaved people claiming that their enslavement was unlawful. *See Freedom Suits*, NAT'L PARK SERV., https://perma.cc/H9CD-4S9V (last updated Apr. 10, 2015). These lawsuits were often founded on various procedural, substantive, and contractual bases that were unique to the specific circumstances of the enslavers and the enslaved people involved in the litigation.

5. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 216 (1991) (discussing the author's family history and experiences with slavery, starting with her great-great-grandmother's story).

6. *See generally* Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674 (2022); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH (2018); LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014). *See, e.g.*, Gloria Whittico, *The Rule of Law and the Genesis of Freedom: A Survey of Selected Virginia County Court Freedom Suits (1723–1800)*, 9 ALA. C.R. & C.L. L. REV. 407, 414–17 nn.28–36 (2018) (discussing scholars who have documented freedom suits). Whittico references the following works: MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); David Thomas Konig, *The Long Road to* Dred Scott*: Personhood and the Rule of Law in the Trial Court Records of St. Louis Freedom Suits*, 75 UMKC L. REV. 53 (2006); Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799 (2008); Michael L. Nicholls, *'The Squint of Freedom': African-American Freedom Suits in Post-Revolutionary Virginia*, 20 SLAVERY & ABOLITION 47 (1999), and see also, e.g., Alfred L. Brophy, *Slaves as Plaintiffs*, 115 MICH. L. REV. 895, 897–98 nn.16–27 (2017) (discussing works where scholars have documented freedom suits). Brophy references the following works: EMILY BLANCK, TYRANNICIDE: FORGING AN AMERICAN LAW OF SLAVERY IN REVOLUTIONARY SOUTH CAROLINA AND MASSACHUSETTS (Paul Finkelman & Timothy S. Huebner eds., 2014); Martha S. Jones, *Leave of Court: African American Claims-Making in the Era of* Dred Scott v. Sandford, *in* CONTESTED DEMOCRACY: FREEDOM, RACE, AND POWER IN AMERICAN HISTORY 54 (Manisha Sinha & Penny Von Eschen eds., 2007); Martha S. Jones, *The Case of* Jean Baptiste, Un Créole de Saint-Domingue*: Narrating Slavery, Freedom, and the Haitian Revolution in Baltimore City*, *in* THE AMERICAN SOUTH AND THE ATLANTIC WORLD 104 (Brian Ward, Martyn Bone, & William A. Link eds., 2013); KENNETH R. ASLAKSON,

procedure to the conversation. This is part of a larger project to explicate the ways in which members of marginalized communities can resist, and have resisted, from within procedural regimes that, in some ways, reinforce subordination. I look to the ways that my enslaved and freed ancestors, in civil litigation, deployed a procedural regime that was unjust and illegitimate[7] in a way that would shield them from harm and either provide or allow for their eventual freedom.

Professor Daniel Farbman sets forth the concept of resistance lawyers—lawyers who used strategies of delay, procedural entanglement, confusion, and obstruction within litigation, even though they viewed the procedural and legal regime as unjust and illegitimate.[8] These lawyers employed such strategies in order to give their alleged fugitive enslaved clients opportunities to make plans for escape, raise money to purchase their freedom, be away from their enslavers and the harsh conditions to which their enslavers subjected them, or potentially win in court and be free through litigation, with the end goal of resisting and eventually dismantling the unjust regime.[9] Analogizing to this concept of resistance lawyers, I propose that we can, and should, understand some of my ancestors, and perhaps some of yours, as engaged in resistance proceduralism—strategically using civil litigation and

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MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THE THREE RACES IN EARLY NEW ORLEANS (2014); Farbman, *supra* note 3.

7. *See* CALEB PERRY PATTERSON, THE NEGRO IN TENNESSEE, 1790–1865 32, 174 (Negro Univs. Press 1968) (1922) (noting that neither an enslaved nor free Black person could ever be "a witness against a white man" and that enslaved people could not be party to a lawsuit except one regarding freedom). It would baffle the mind to view any civil litigation's procedural system that, on the basis of race, ethnicity, gender/sex, or enslavement, limits a person's ability to file a lawsuit, testify, be deposed, or have their deposition considered by the decisionmaker—not to even mention a procedural system where the clerk auctions off an enslaved person for hire from the courthouse while litigation is pending—as anything but unjust and illegitimate.

8. *See* Farbman, *supra* note 3, at 1880 ("A resistance lawyer engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.").

9. *See id.* at 1898 ("Both delay and custody disputes created time and space for political organizing to take place—organizing that sometimes manifested as plans for escape, and sometimes allowed for the collection of funds to purchase the alleged fugitive's freedom.").

procedure, even at times within an unjust procedural regime, to keep families together, avoid enslavers' harsh conditions, or delay sales of themselves until they could save and borrow the money to buy their freedom, or even until the Civil War ended, resulting in their eventual emancipation.[10] I also explore whether, and how, present-day scholars and litigators can be resistance proceduralists by (1) mitigating the effects of the structural inequities of civil procedure on members of marginalized groups, and (2) developing strategies to resist and dismantle the procedural mechanisms that further subordinate marginalized groups.[11]

I describe lived experiences that involve civil procedure and that involve procedures in the world beyond civil litigation because the structural subjugation infused by civil procedure probably has much in common with the structural subjugation reinforced by procedures in many other contexts. As illustrated by my own lived experiences and those of my ancestors, if we do not intentionally develop and deploy procedure for the purpose of liberation, and if we do not develop an understanding of the subordinating characteristics and effects of various procedures for the purpose of criticizing and then dismantling those procedures, then, time and again, we may find that mere forms and technicalities thwart the substantive, sought-after ends.[12]

This Article is a personal and ancestral narrative prologue to my project of developing a theoretical framework for understanding how racial subordination and the subordination of other marginalized groups is facilitated by civil procedure. By

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10. *See infra* Part II. I do not contend that my ancestors, who may have been unable to read or write, engaged in resistance proceduralism entirely on their own. Several white lawyers and benefactors engaged in these lawsuits and likely had significant roles in devising procedural strategies. But my enslaved and freed ancestors were unquestionably significantly involved in the litigation, from having their concerns throughout litigation brought before the court to, essentially, providing testimony.

11. *See infra* Part III.

12. *See* Porter *ex rel.* Porter v. Blakemore, 42 Tenn. (2 Cold.) 556, 564–65 (1865) (freedom suit)

> [A] court of chancery will make every presumption in favor of human freedom, and look at the real substance of things—at the very purpose and intention of the parties—and will not suffer mere legal forms and technicalities, or the dress and drapery of transactions, to baffle the ends aimed at.

sharing some ancestral and autobiographical lived experiences with procedure, both within and outside of courts, I attempt to illuminate some of the underlying motivations for hypothesizing a critical race theoretical account of white supremacy, misogyny, homophobia, xenophobia, ableism, and more within procedure. Developing a richer understanding of the structural subjugation that sometimes infuses civil procedure may help resistance proceduralists dismantle, or navigate around, more of the structural subjugation infusing process in many other contexts.

In Part I, I introduce some of the context of my junior high school's mascot, to give some of the present-day background of why talking about race and slavery can be relevant in everyday life.

Then, as a partial explanation of why recent Confederacy celebrations are particularly repugnant and personal to me, in Part II, I move on to use some of my ancestors' freedom suits as entry points, to see the ways in which they arguably engaged in resistance proceduralism—utilizing procedure to increase justice for marginalized people and groups and to decrease procedural subordination and white supremacy. I look at civil procedure, in that litigation, with a specific eye to race, gender, and sex to see which procedures presented roadblocks that my ancestors attempted to navigate around and to identify which aspects they used as stepping stones to justice.

In Part III, I return to the story I started with by discussing the process involved in trying to change my junior high school's racist mascot as a way to look at procedure that is more present-day and outside the context of civil litigation. This is an attempt to build an understanding of how, in the past, marginalized peoples have engaged in resistance proceduralism and how we can continue to marshal today's procedures, or dismantle subordinating procedures and create new procedures in their place, to increase justice for marginalized groups, both inside and outside of the courtroom.

I. A CONFEDERATE SOLDIER MASCOT

My high school's[13] mascot was a Confederate soldier. It might not have been immediately clear to everyone who knew of the school mascot that our mascot was a Confederate soldier. But we were called "the Rebels." To some, that still might not have been an explicit reference to soldiers of the Confederacy. But for those who remained unsure, a huge mural of Yosemite Sam[14] dressed, and armed, in a Confederate Army uniform—as made clear by the colors, grey and blue, which are Confederate Army uniform colors (and also, probably intentionally, our "school colors")—covered the side of the school gym.

That the school's mascot was a Confederate soldier should not have surprised me. One of my junior high history teachers even referred to the Civil War as "the war of Northern Aggression."[15] But I went to the school in the 1990s and the

13. I attended junior high and high school at the same school, so the Confederate soldier was my school's mascot from eighth grade through twelfth grade.

14. Although Yosemite Sam is not always a Confederate soldier—he is, at times, a cowboy, a prison guard, a pilot, a Viking, a chief of a Native American tribe—he was decidedly a Confederate soldier in a 1953 Looney Tunes short. *Looney Tunes: Southern Fried Rabbit* (Warner Bros. 1953). In the 6.5-minute cartoon, "the North" is a barren desert wasteland, while "the South" is green, plush, and has carrots aplenty. Yosemite Sam, a Confederate soldier, tries to prevent Bugs Bunny from crossing the Mason-Dixon line even though, as Bugs Bunny explains to Yosemite Sam, "the war between the states" ended almost ninety years prior. Bugs Bunny sings, "I wish I was in Dixie, hooray, hooray!" on his way to the South. *Id.* In one of his attempts to trick Yosemite Sam to let him enter the South, Bugs Bunny engages in cartoon character "Blackface" while Yosemite Sam repeatedly calls him "boy," encourages him to sing an upbeat song, and then holds a whip as Blackface Bugs Bunny scrambles around while begging "please don't beat me, massa" (until Bugs appears disguised as Abraham Lincoln to inquire about word of Yosemite Sam "trying to whip a slave"). *Id.*

15. That same teacher also hosted a multi-night event for eighth-grade students to watch *Gone with the Wind* in the school auditorium at the end of the term. *Gone with the Wind* is a 1939 movie based on a 1936 fictional book of the same title. The movie, a romanticized portrayal of white enslavers on Southern plantations from the brink of the Civil War through early Reconstruction, was immensely popular and set a record for number of Academy Award wins. *See Gone with the Wind Wins 8 Oscars*, TODAY GA. HIST., https://perma.cc/78G9-UUPK (last visited Nov. 9, 2023). After the first night, when a few of my friends and I told our parents about what was going on, our parents contacted the school to let the school know that they thought that the history teacher's planned "stars and bars"-decorated cake was inappropriate.

From the best my parents, friends, and I can remember, the school let the students suggest how to move forward. We decided that we would finish watching the movie as planned the next night (because we did not want to face the ire of our classmates by canceling the movie night), but that we would have pizza instead of the Confederate flag-decorated cake that the teacher had ordered. The teacher was extremely unhappy with us, and it seemed as though that might have been the first time that anyone had prevented this teacher's annual celebration and memorial of the Confederacy and slavery.

I was, perhaps, faster to speak out about not wanting to have my classmates and I subjected to celebration of the Confederacy, under the guise of watching the movie, and having a cake decorated with the Confederate flag "for historical purposes" because my mom had rid me of any nostalgia for Southern plantations back when I was in elementary school. One year, when my mom asked me what I wanted to dress up as for Halloween, I thought about some of the most beautiful costumes that I had seen around the school in previous years, and I replied that I wanted to be a Southern belle. My mom explained to me—as I will probably need to explain to my own child someday—that, if I had been alive during those times, I would not have been a Southern belle. I would have been enslaved. So, no, I could not dress as a Southern belle for Halloween. Instead, I worked with her to match costumes with their eras in order to understand their cultural context, and she helped me to put together another costume. Inspired by the movie *Hairspray*, which has its own flaws, but is about racially integrating a teenage dance show in the 1960s, I dressed in a poodle skirt like I was going to a sock hop.

What I did not think of back then was what it means in our society that so many children (and their parents) were, and are, still holding on to their Confederate slavery nostalgia, costumes and all. Recently, some scholars have even problematized works, such as the *Bridgerton* television show or Lin-Manuel Miranda's *Hamilton*, in which people of color portray white characters, saying that the characters of color are leading lives that only white people could have led at the time such that the portrayals may disregard or trivialize some of the racist and white supremacist contexts. *See generally* Gary Younge, *Black Like Me? Bridgerton and the Fantasy of a Non-Racist Past*, NATION (Apr. 4, 2022), https://perma.cc/488X-24AH; Aja Romano, *The Debate over Bridgerton and Race*, VOX (Jan. 7, 2021), https://perma.cc/6HUA-PD6M; Salamishah Tillet, *'Bridgerton' Takes on Race. But Its Core Is Escapism*, N.Y. TIMES (Apr. 2, 2021), https://perma.cc/45VZ-2KPX; Lyra D. Monteiro, *Race-Conscious Casting and the Erasure of the Black Past in Lin-Manuel Miranda's Hamilton*, 38 PUB. HISTORIAN 89 (2016); Ishmael Reed, *"Hamilton: The Musical:" Black Actors Dress Up Like Slave Traders . . . and It's Not Halloween*, COUNTERPUNCH (Aug. 21, 2015), https://perma.cc/N6NV-T6U2; Annette Gordon-Reed, *Hamilton: The Musical: Blacks and the Founding Fathers*, NAT'L COUNCIL ON PUB. HIST. (Apr. 6, 2016), https://perma.cc/JHK7-K6D5.

It does not seem that my eighth-grade teacher learned much, if anything, of what the students and parents in my class, who were organizing against her Confederacy celebration movie nights, had hoped to impart. Instead, she shifted her frustrations in other directions that were similarly harmful for students, if not worse. A few years later, that teacher assigned my younger godsister E.'s class to present their family history. The teacher

school was in Southern California. My parents and I (all of us Black), perhaps naively,[16] did not expect to need to fight the Civil War and Reconstruction all over again with my teachers and classmates.[17]

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seemed to assume that students should be able to track back and discuss several generations of ancestors, perhaps even as far back as a family crest or some feudal European ancestors. My godsister E. had inordinate difficulties, both practically and emotionally, completing the assignment. Her difficulty tracing her ancestors back to some imagined European family crest as a Black descendant of people enslaved in the United States was complicated further by the lack of information due to frayed family relationships as her parents and relatives were in the throes of the complexities of divorce in addition to her facing the typical problems, both serious and petty, of a teenager coming of age. During her presentation to the history class, E. broke down in tears because she was not even able to trace and present a full two generations of her family. The history teacher had E. step out of the classroom, and they stood next to the room's floor-to-ceiling windowed-wall. And then that vile person who was supposed to be providing education grabbed E.'s shoulders and forcefully shook the crying thirteen-year-old child. For all of E.'s classmates to see.

The rage I feel as I write this is so multi-focused. That *that* "teacher" laid hands on E. That she humiliated and physically attacked E. in front of her mostly white classmates. That the teacher did not even have the shame to attempt to hide physical abuse of a Black student from anyone who happened to be in the school courtyard or looking out on it from a classroom. That the teacher had zero recognition of the ways in which the assigned project was both practically, emotionally, and racially problematic. That the teacher had no empathy for a teenage student who was obviously struggling through a difficult situation and tremendously trying issues within her family. That I had not protected my younger charge and, perversely, perhaps that my successful efforts to prevent the Confederate cake and, in future years, to prevent the teacher from continuing to hold the *Gone with the Wind* movie-watching sessions might have had some type of galvanizing, hydraulic effect on the teacher's need to convert her white supremacist views into physical violence that she imposed upon a Black child.

16. Segregation and racism have long had a support base where I grew up in Southern California. *See* Rosina A. Lozano, *Brown's Legacy in the West: Pasadena Unified School District's Federally Mandated Desegregation*, 36 SW. U. L. REV. 257, 257–58 (2007) (discussing segregation and racism in Pasadena). The area where my middle school and high school is located, La Cañada Flintridge, withdrew from the Pasadena Unified School District in an attempt to maintain separate public schools for white students, in contrast to the "increasingly mixed-race public school population in Pasadena—particularly at [John] Muir High School," my father's alma mater. *Id.* at 261–62.

17. This romanticization of the enslaving South was not limited to the mascot and the teachers. A student in one of the years senior to mine drove a replica of "the General Lee" car, a 1969 Dodge Charger, from Warner Brothers' *The Dukes of Hazzard* television show. Every day, he parked that car, with the Confederate flag on its roof, "GENERAL LEE" painted over each door (in honor

I am not sure why my parents and I, perhaps along with some reading this Article, were shocked that a high school in Southern California in the 1990s had a mascot that celebrated the Confederacy. Although many of the more prolific and state-sponsored displays of Confederacy celebration are in the South, there is a well-documented history of people outside of the Reconstruction South commemorating the Confederacy, its soldiers, and its leaders. This is especially true of areas in the West and of time periods long after the Civil War and Reconstruction, particularly the 1940s and 1950s.[18] Interestingly, the university where I work, also not in the South, has had its own not-so-ancient history of entanglement with Confederacy celebration through mascots.[19] And it is not lost on

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of the Confederate General Robert E. Lee), and sometimes rang out its horn that played the first several notes of *Dixie*, in the school parking lot. *The Dukes of Hazzard* was an immensely popular television show of almost 150 episodes aired from 1979 through 1985. *TV Land Pulls 'Dukes of Hazzard' Reruns Amid Confederate Flag Debate*, COLUMBUS DISPATCH (July 2, 2015), https://perma.cc/88RZ-7Q7K. Reruns and spinoffs of the show largely aired from the 1980s through 2015. *See id.*

18. The school I went to for middle school and high school was founded in the 1930s as an all-boys school and the first girls graduated from the school in the 1980s. The school changed their mascot from the Highlanders to the Rebels.

19. Since the 1920s, Boston University's mascot has been a Boston terrier. People referred to the terrier by many different names (including Pep, Kappa, Danny, Gulliver, Fumbles, and Touchdown) until the 1980s, when the terrier began being referred to as Rhett, after Rhett Butler, a main character in *Gone with the Wind*. In the summer of 2020, the BU president appointed students, alumni, and faculty to a mascot committee to consider feedback from the BU community and to make recommendations regarding whether the mascot's name should change. *See* Memorandum from Robert A. Brown, Boston University President, Appointment of a Committee to Consider the Name of Our Mascot 2 (July 1, 2020), https://perma.cc/CZ95-P27H (PDF) (notifying the Boston University community that a committee would be formed "to consider the question of whether the 'Rhett' nickname should be retired"); Elizabeth Joseph & Alicia Lee, *Boston University Looking into Retiring Mascot's Nickname Because of Its Reference to 'Gone With the Wind'*, CNN (July 1, 2020), https://perma.cc/WDD4-BG4V (reporting that the president of BU plans to look into whether to retire the "Rhett" nickname); Nina Silber, *Don't Think Racism Is Baked into Our Culture? Just Look at BU's Beloved Mascot, Rhett the Terrier*, WBUR COGNOSCENTI (July 7, 2020), https://perma.cc/W27Q-E5WR ("Instead of asking 'do we keep the name or change it?' we ought to ask 'how did we get here?'"); Sarah Readdean, *BU Community Responds to Potential Renaming of Mascot Rhett the Terrier*, DAILY FREE PRESS (July 1, 2020), https://perma.cc/24CX-9CJM (presenting comments from Arcangelo Cella, a 2014 BU Law graduate, who petitioned the school to change the

mascot's name); Joel Brown, *Time to Retire the Rhett Name? You Can Weigh In*, BU TODAY (Sept. 23, 2020), https://perma.cc/UWY2-948X (reporting on virtual forums for members of the BU community to give input on whether to retire the mascot's name); Megan Woolhouse, *Is It Time to Rename Rhett, BU's Mascot?*, BU TODAY (July 1, 2020), https://perma.cc/CW7U-TTVH (reporting that the president of BU formed a committee to consider changing the mascot's name); *Mascot Committee*, BOS. UNIV. ALUMNI & FRIENDS, https://perma.cc/VU4R-47KZ (last visited Sept. 25, 2023) (inviting alumni participation in renaming discussion forums); *BU Mascot: A Brief History*, BOS. UNIV. MASCOT COMM., https://perma.cc/53RK-FH3W (last visited Sept. 25, 2023) (offering a presentation about the history of the BU Mascot from the alumni file folder); Cameron Morsberger, *There's a New Rhett in Town*, DAILY FREE PRESS (Aug. 29, 2020), https://perma.cc/9ZZM-HVT3 (reporting that after the twelve-year-old campus terrier died, a new three-month-old puppy had taken its place as the unofficial campus mascot).

Before the summer of 2020 mobilizations for Black lives brought a focus to corporations' and universities' entanglements with racial subordination, and, I am assuming, before they or I knew that the terrier mascot's namesake was Rhett Butler, a wonderful colleague gave me (then pregnant) a stuffed animal of the terrier mascot for my then-unborn child. Once my daughter was able to communicate, we needed to think of a new name for the stuffed animal. It was pretty easy and none of us called the stuffed animal "Rhett." We said so many different names that I cannot remember them all—Red, Boston, Terry. The one we settled on, I think because this is the name my daughter seemed to use most, was Terry. Terry the terrier. It did not take us forming a committee or holding several town hall meetings or months of time or reports. But I do not run a university. I just refuse to knowingly celebrate the Confederacy, or racial subordination, in my household. Even if that means never patronizing an ice cream truck that is playing the instrumental version of "N*gger Love a Watermelon Ha! Ha! Ha!," which was a popular minstrel song played in ice cream parlors in the latter half of the 1800s; never again singing "Zip-A-Dee-Doo-Dah," which won an Academy Award and was based on a song by "Zip Coon," a blackface character; and informing my elders that the "this little piggy," "eenie meenie miny mo," and "five little monkeys" nursery rhymes were originally (or at their height of use) not about piggies, tigers, or monkeys at all, but used the word "n*gger," and asking them not to teach my child those racist rhymes that attempted to reinforce slavery and normalize subjecting Black people and our bodies to violence. *See* Elad Simchayoff, *The Racist Origin of 'Eeny, Meeny, Miny, Moe'*, AN INJUSTICE! (Jan. 25, 2021), https://perma.cc/WNV8-FM54 (presenting the background behind the children's rhyme); Scott Wartman, *Eenie Meenie Miny Moe . . . Republican Mailer Slammed as Racist. 'Ridiculous' Says GOP*, CINCINNATI ENQUIRER (Oct. 4, 2020), https://perma.cc/3ZJP-9DR2 (last updated Oct. 5, 2020) (showing a Republican campaign postcard criticizing a Black Democratic candidate next to the words "Eenie, Meenie, Miny, Moe . . . Where Will Your Tax Dollars Go?"); Eisa Nefertari Ulen, *8 Children's Nursery Rhymes That Are Actually Racist*, READER'S DIG. (Sept. 23, 2020), https://perma.cc/BEX8-4NZ2 (last updated Dec. 2, 2022); Debi Simons, *What's the Historical Background of "Zip-A-Dee-Doo-Dah"?*, BEHIND THE MUSIC (Sept. 10, 2018), https://perma.cc/3VNP-PFM2 (acknowledging the problematic

me that this Article is being published by the flagship law review at a university that has recently decided to keep Confederate General Robert E. Lee both as part of the university name and listed on every printed degree.[20]

But in Southern California, in the 1990s, my family, friends, and I were unaware that trying to rid my school of confederacy commemoration might be a losing battle. At the time, Robert E. Lee had surrendered, and the Civil War had ended almost 130 years prior. For the most part, from what we

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background of "this supposedly simple song" that takes influences from minstrel songs); Husain Sumra, *SONG OF THE SOUTH's 'Zip-a-Dee-Doo-Dah' Claws Its Way Out of a Controversial Movie*, MEDIUM (Oct. 7, 2015), https://perma.cc/AMJ6-LTYV (pointing out that, although the movie that featured the song is not for sale or viewable in the United States anymore, the song itself remains one of the more popular Disney songs, covered by many famous artists); Alex Abad-Santos, *The Racist Children's Songs You Might Not Have Known Were Racist*, VOX (May 21, 2014), https://perma.cc/DT2D-ACH8; Azizi Powell, *The Racist Roots of the "Five Little Monkeys Jumping on the Bed" Chant*, PANCOCOJAMS (July 22, 2014), https://perma.cc/4ES7-QGLX (last updated Apr. 15, 2022) (quoting a chat comment on another website as saying that "Five little monkeys" "derives from the original first verse of 'Shortenin' Bread': Two little (insert N-word here) Lyin' in bed One of 'em sick An' de odder mos' dead. Call for de doctor An' de doctor said, 'Feed dem darkies on shortenin' bread'"); Theodore R. Johnson, III, *Recall That Ice Cream Truck Song? We Have Unpleasant News For You*, NPR (May 11, 2014), https://perma.cc/ZH8Y-6JQB (explaining that the song plays on familiar negative depictions and tropes of Black people); Tiffany M.B. Anderson, *"Ten Little Niggers": The Making of a Black Man's Consciousness*, FOLKLORE F. (May 1, 2009), https://perma.cc/2GQM-8ZEL (noting that the origin of the rhyme is likely from a song titled "Ten Little N*ggers" that joked about ten Black men or boys dying).

20. *See* Johnny Diaz, *Board of Washington and Lee University Votes to Keep Lee's Name*, N.Y. TIMES (June 4, 2021), https://perma.cc/4LN5-CKHG (reporting that after hearing from over 15,000 students, alumni, and faculty, the university would not change the name of the school); Lilah Burke, *Retaining Its Name*, INSIDE HIGHER ED (June 6, 2021), https://perma.cc/FD3M-55D4 ("After much conversation, pushback and debate, the Board of Trustees at Washington and Lee University has voted not to change the institution's name. . . . Faculty overwhelmingly voted to support a change, and students organized two protests this year around the name and campus climate."); *see also* Brandon Hasbrouck, *White Saviors*, 77 WASH. & LEE L. REV. ONLINE 47, 47–48 (2020) ("It is worth exploring *why* the faculty has decided to make a collective statement on Lee *now* and *why* the [predominantly white] faculty has not included a demand to drop Washington in *their* petition. The answer is simple—it is no longer acceptable, profitable, or convenient to be associated with Lee but it is for Washington.").

know,[21] both sides of my family are descendants of enslaved people, with my most recent known enslaved ancestors being five generations prior to mine.

II. MY ANCESTORS

A. *Freedom Suits Brought by My Ancestors*

One such enslaved ancestor was named Mary Vance Porter—my great-great-great-grandmother. She was born around 1834 in Tennessee and was the second-eldest of six children born into slavery to my great-great-great-great-grandparents[22] before her father was able to purchase her mother's freedom. Mary Porter had filed her own lawsuit against the white Porter enslaving family years before her father would eventually earn the money to purchase her freedom. Looking at her case may offer some tentative insights into the subordinating or liberating role of civil procedure in civil litigation long before civil rights lawsuits.

21. Most of what I know about my ancestors and my family history is due to the research efforts of my paternal grandfather, Donald M. Pedro, Sr. He left us with several binders of information on our relatives and many of my other relatives have added to the binders. I am a bit ashamed that I did not appreciate these binders of documents, the information, and suppositions more or thank my grandfather for them when he was alive. I take pride in adding documents, including case files and court records, to the family history binders. But, in undertaking this project, I have neglected my entire maternal ancestral history and much of my paternal grandmother's family history. While I grew up knowing my relatives on my mother's side, including her mother, I only understood just how little we know about my ancestors on her side when I needed to provide detailed information to my doctors to figure out some genetic and medical conditions. And, when my grandfather did research, his primary interest was in his own ancestors, not those of my grandmother.

22. I have included a partial family tree in the Appendix to assist with clarifying the relationships presented in this Part.

1. *Vance v. Porter*

In 1853, Mary Porter was known as Mary Vance[23] and some people called her "Milly."[24] She filed a freedom suit (technically,

23. I am not sure why her last name is listed as "Vance" before it became "Porter." This may be because she did not take on or have her father's last name until after her father purchased his own freedom, her mother's freedom, and/or her own freedom. In ways similar to what some others have pointed out, it seems likely that my ancestor's name might have been Mary Vance because that was the same first and middle name of many women before and after her in the first white family, of whom we know, that enslaved her grandmother (Mary King). *See The Greer Family*, ROOTSWEB, https://perma.cc/5RDR-LTEJ (last visited Oct. 8, 2023) (mentioning five different women in the Greer family who each were named Mary Vance); *see also* Omi Leissner, *Naming the Unheard Of*, 15 NAT'L BLACK L.J. 109, 121–30 (1997) (discussing enslaved people's first names and surnames); Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1044–47, 1044 n.36 (1997) (noting customary naming practices for enslaved people and potential connections to how a particular enslaver, Major Talliaferro, came to enslave or "inherit" an enslaved person, specifically Harriet Robinson Scott, who is most known for her role in freedom suit litigation she brought alongside her spouse, Dred Scott).

It seems most likely that her first name was Mary Vance, or that her first name was Mary and her middle name was Vance, and that she did not have a last name until sometime after she was recognized as a free person. *See* J. N. HOOK, FAMILY NAMES: HOW OUR SURNAMES CAME TO AMERICA 286, 289 (1982) (noting that, before the Civil War, Black enslaved people did not "ordinarily have surnames" because "[o]ne name was usually regarded as enough for a slave"). Once a formerly enslaved Black person's freedom was recognized, they tended to adopt more formal first names (as opposed to the nicknames with which their enslavers tended to refer to them) and "probably every freed person was eager to adopt a second name as one of the symbols of his or her new status." *Id.* at 294. In the court record, it seems that Mary Vance tends to refer to herself primarily in that way (as "Mary Vance") while her enslaver, Nathaniel Porter, tends to refer to her more as "'Milly,' a slave" or as "'Milly,' one of his slaves." *Compare* Mary Vance & Samuel Jones Bill of Complaint at 1, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. July 14, 1853) [hereinafter Mary Vance Bill of Complaint], https://perma.cc/QGC9-YSRM, 2 THE SOUTHERN DEBATE OVER SLAVERY: PETITIONS TO SOUTHERN COUNTY COURTS 1775–1867 295 (Loren Schweninger ed., 2008) [hereinafter 2 THE SOUTHERN DEBATE OVER SLAVERY], *and* Petition of Mary Vance & Samuel Jones at 17, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Oct. 12, 1854) [hereinafter Mary Vance Supplemental Petition], https://perma.cc/QGC9-YSRM, *with* Nathaniel Porter Answer at 8, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Aug. 27, 1853), https://perma.cc/QGC9-YSRM, *and* Nathaniel Porter Petition at 13, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Oct. 5, 1854), https://perma.cc/QGC9-YSRM. To try to respect what seems to be her wishes, I will refer to her as "Mary Vance" or "Mary Vance Porter." Some Black people

chose their former enslavers' last name as their own, but many preferred other last names that were common for white people other than their own former enslaver. *See* HOOK, *supra*, at 294–96.

Andrew Greer, Sr., born in 1730 in Ireland, married Mary Vance, who was born in 1750 and was the daughter of David Vance and Sarah Colville. *See The Greer Family*, *supra*. Andrew Greer, Sr. named one of his children Vance Greer. *Id.* One of the other children of Andrew Greer, Sr., Alexander Greer, enslaver of Mary King, named one of his daughters Mary Vance Greer. *Id.* Alexander Greer's brother Joseph gave one of his children Vance as a middle name. *Id.* Alexander Greer's brothers Andrew Greer, Jr. and Thomas Greer, along with his half-brother John Greer, each named one of their daughters Mary Vance Greer. *Id.* There is also a potential that having Vance as a surname, ostensibly after the white Mary Vance in an older generation within the Greer family, might have indicated that an enslaved person was to be passed down through the women in the family, instead of through the white male enslaving descendants.

I have relatives in my own generation who have the last name of our ancestors' former enslavers and who are passing that last name on to the next generation. I admit that I draw a not small, but probably still petty, sense of satisfaction that, from what I know, my last name is not the name of anyone who enslaved my ancestors. I do not have to face the dilemma that pushed Malik el-Shabazz in his earlier life to choose to go by "Malcolm X" and pushed Sojourner Truth to choose her new name instead of using their respective "slave names" ("Malcolm Little" and "Isabella von Wagenen"). *See* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 360 (1996); WALTER DEAN MYERS, MALCOLM X: BY ANY MEANS NECESSARY 82, 85 (1993); MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 201 (1965). I do not have this problem because one of my ancestors began going by the last name Pedro, instead of his actual own last name, Goncalves, when he immigrated to the United States in the 1830s. Pedro was a decently common last name in Cape Verde, where he came from, and, as family lore goes, Pedro was also easier for people in the U.S. to pronounce than Goncalves.

I remember the exact moment when I learned that my last name was a Cape Verdean last name. I was in my early twenties, picking up prints of pictures from film that I had dropped off at a photo processing store in Washington, D.C. to develop for me. Upon hearing my last name to look up the prints, the person working in the store asked if my family had been from Cape Verde. Growing up in Southern California, where people regularly call my name out by pronouncing it as "Pay-dro Por-tee-yaa" because they assume that I am a man of Latino/Latinx ancestry, my name is a Spanish name, and Pedro is my first name, I had always thought that my ancestor just made up the last name. I excitedly told my whole family about the realization that our last name was indeed Cape Verdean.

There is still some confusion that arises from my family having a Cape Verdean, Portuguese last name in cities where there tend to be many more people of Latino/Latinx ancestry than Cape Verdean ancestry and because my family is primarily Black, descendants of enslaved Africans, with no Latino/Latinx ancestry and with English being our family's dominant, if not

by filing a Bill of Complaint) against Nathaniel Porter for unjustly holding her and her baby, Dock Jones (my great-great-grandfather), in slavery. Technically, Mary "Milly" Vance Porter could not file a Bill of Complaint or a petition with a court because she was considered an enslaved person at the time, so she filed "by her next friend Sam Jones," her husband who was a freed Black person. Mary Vance Porter's mother, Rose Anna (or Rosanna/Rosana) Porter,[25] as a freed person (because her husband,[26] George Porter, Sr., had bought her

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only, language at home for approximately eight generations. Nearly all members of my family pronounce our last name as "Pedro" rhymes with "Negro." Family lore has it that credit for the handy rhyme, which clarifies not only how the last name is pronounced, but also our family's Blackness, goes to my great-grandfather, George F. Pedro. Although I've taken several Spanish classes, I tend to pronounce my name as "Pedro" rhymes with "rainbow." By doing so, I choose not to say it as "Pee-dro" because I don't know of any language where it would be pronounced that way (except how non-Spanish speaking Southern Californians refer to San Pedro, the city) and I choose not to pronounce it as I would if speaking Spanish because I do not want to give the false impression that we are a Spanish-speaking family or as though that is my ancestry. However, when elders from my family are around, I pronounce it "Pee-dro," rhymes with "Negro," as they do, out of respect, and that is how I asked to have my last name pronounced at my own graduations. Because my Cape Verdean ancestor was Black, and likely also had African ancestors, there is a likelihood that his original last name from his ancestors was different from both his given and chosen last names (Goncalves and Pedro).

24. Mary Vance Bill of Complaint, *supra* note 23, at 1 (indicating that the lawsuit was filed on behalf of "Mary Vance"); 2 THE SOUTHERN DEBATE OVER SLAVERY, *supra* note 23, at 295 (indicating that the lawsuit was filed on behalf of "Mary Vance" and noting that she was "[s]ometimes called "Milly"). I remain unsure if she ever took on Jones as any part of her last name after marrying her spouse, Samuel Jones. She is listed in our family records as Mary Porter.

25. Like many others in these narratives, Rose Porter's name is listed several different ways in various documents—Rose, Rose Ana, Rosana, etc. I try to refer to her by the various names in ways to honor the name that she might have preferred herself (although I do not know her preferences), to achieve clarity about to whom I am referring, and to avoid being overly redundant by using two or three of her alternative names or spellings every time I mention her.

26. Because Rosana Porter describes George Porter as her husband, I refer to this relationship, and other similar relationships of my ancestors, as a marriage and refer to the involved individuals as spouses, husbands, and wives even though marriages between enslaved people were not legally recognized and whether freedom or emancipation changed that for freed Black people depended on state law, practice, and specific circumstances. *See* Rosana Porter Deposition, *supra* note 1, at 25, 29 ("George Porter a free person of color is my husband" and "George Porter my husband"); *see also* Aderson Bellegarde

freedom), was deposed in that case. Rosana Porter began her deposition by stating, "I am a free person and if I had had my rights, I would have been free from the beginning."[27]

Rose Anna Porter then spoke about her mother (Mary "Milly" King[28]), including saying that her own mother often said to the various white women who enslaved her, or whose husbands enslaved her, that she (my great-great-great-great-great-grandmother, Mary King) was a free woman who had been stolen into slavery under the guise of being taken to school.[29] Rosana Porter also stated that, to her knowledge, Alexander

François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. GENDER RACE & JUST. 105, 111 (2009) ("No Southern state granted legal recognition of marriage between two slaves."); Harris, *supra* note 23, at 332 (discussing "the legal non-recognition of marriages between Black men and women" under slavery); Laura F. Edwards, *"The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*, 14 L. & HIST. REV. 81, 90 (1996) (noting in discussion of North Carolina, "[t]he law had not recognized slave marriages, and emancipation did not make them legal"); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 409 (2011) (noting that, historically, even free Black people did not necessarily have the right to marry).

27. Rosana Porter Deposition, *supra* note 1, at 25.

28. Although the court and Nathaniel Porter (the defendant and enslaver of Mary Vance) often refer to Mary Vance's grandmother, Rosana Porter's mother, as "Mary 'Milly' King" or as "Milly," I will primarily refer to her as "Mary King" because her daughter, Rosana Porter indicated that her mother's name is "Mary King," not "Milly." *Id.* at 26 ("My mothers [sic] name was Mary King. They called her Milly but that was not her name, she always told me that her name was Mary King.").

29. *See id.* at 26–27. Rosana Porter specifically stated that her mother, Mary King, "said she belonged to the Portuguese nation, and that she had no African blood in her." *Id.* at 26.

Greer[30] was her mom's, Mary King's, first enslaver.[31] After Alexander Greer's death, it seems that Mary King and Rosana Porter first continued to be enslaved by his surviving widow, and then Mary King was enslaved by Jane Greer, Alexander Greer's daughter, who married Joseph McKisick[32] and eventually moved to Arkansas, presumably taking Mary King with them.[33] Rosana Porter continued to be enslaved by

30. Alexander Greer seems to be brother to Joseph Greer, and husband to Jane "Jenny" Bingham Greer. *See id.* at 26 (noting that Alexander Greer's wife's name was Jenny); *The Greer Family*, *supra* note 23 (listing Alexander Greer, born in 1752, and Joseph Greer, born in 1754, as brothers and both the children of Andrew Greer, Sr. and Ruth Kinkaid Greer, and listing Jane Bingham Greer as Alexander Greer's first wife); *Alexander Greer*, WE RELATE, https://perma.cc/A6Z9-6352 (last visited Sept. 25, 2023) (listing Alexander Greer, born in 1752 and died in 1810, as a child of Andrew Greer and Ruth Kincaid, a brother to Joseph Greer, who was born in 1754, and as married to Jane "Jenny" Bingham).

During the Revolutionary War, Joseph Greer (brother to Alexander Greer, who enslaved Mary King) traveled from Tennessee to Philadelphia with the important news for those at the Continental Congress that the patriots had won the battle of King's Mountain. *See generally* Maggie H. Stone, *Joseph Greer, "King's Mountain Messenger:" A Tradition of the Greer Family*, 2 TENN. HIST. MAG. 40 (1916) (describing Greer family tales and relics regarding Joseph Greer delivering the message of the patriot force victory over the loyalists at the battle of King's Mountain to the Continental Congress).

At some point during Rosana Porter's deposition, the questioner (presumably Nathaniel Porter or his lawyer) and Rosana Porter switch from referring to Alexander Greer as Mary King's enslaver and, instead, say that Joseph Greer (Alexander Greer's brother) enslaved Mary King or that she was in his possession. *See* Rosana Porter Deposition, *supra* note 1, at 29.

31. *See* Rosana Porter Deposition, *supra* note 1, at 26.

32. This family's Irish last name has several spellings (e.g., McKisick, McKisock, McKisack, McKissick, McKissock, McKissack) and older writings included a hyphen in between the "c" and the "k."

33. *See* Rosana Porter Deposition, *supra* note 1, at 26–27; *The Greer Family*, *supra* note 23 (listing Jane Greer as a child of Alexander Greer and Ruth Talbott Greer and listing Jane Greer as having married Joseph McKissick); *Alexander Greer*, *supra* note 30 (listing Alexander Greer as married to Jane "Jenny" Bingham, who lived from 1753–1803, with children of their marriage including Elizabeth Greer, 1791–1831, and Jane Bell Greer, 1793–1874; then listing Alexander Greer as marrying Ruth Talbot); *Jane Bell Greer*, WE RELATE, https://perma.cc/6M4L-XBLJ (last visited Sept. 25, 2023) (listing Jane Bell Greer, born in 1793 and died in 1874, as married to Robert S. Moore); *Robert S. Moore*, WE RELATE, https://perma.cc/869M-6LKE (last visited Sept. 25, 2023) (listing Robert S. Moore, who lived from 1786–1848, as having been married to Jane Bell Greer, who died in 1874). It seems that Jane

Elizabeth "Betsy" Greer, Jane Greer's sister, who married Samuel Porter and stayed in Tennessee.[34] When Rosana Porter was approximately sixteen years old, John N. Porter (presumably John Nathaniel Porter, Nathaniel Porter's father) was her enslaver.[35] At the time that Rosana Porter was deposed, she had not seen her mother in nearly two decades and did not even know whether she was alive or still enslaved.[36]

Nathaniel Porter's attorney objected to the reading of Rosana Porter's deposition into the record, in part, because (1) Rosana Porter was "incompetent, being of mixed blood," and (2) Rosana Porter described "statements of another [her mother, Mary King] who was incompetent for the same reason."[37] That Rosana Porter's deposition was read into the record was of significant import because, at the time, even freed Black people could not testify against white people in court.[38]

Mary Vance Porter filed this lawsuit when she was nineteen or twenty years old[39] and her son (Dock Jones) with her husband, Samuel Jones, was approximately three years old.[40] Nathaniel Porter claimed that he put Mary Vance in the Bedford

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Bell Greer might have married Joseph McKisick at some point after Robert S. Moore's death. *Id.*

34. *See* Rosana Porter Deposition, *supra* note 1, at 28; *The Greer Family*, *supra* note 23 (listing Elizabeth Greer and Jane Greer as sisters, both children to Alexander Greer and Ruth Talbott Greer); *Alexander Greer*, *supra* note 30 (listing Elizabeth Greer, 1791–1831, and Jane Bell Greer, 1793–1874 as sisters, both children of Alexander Greer and Jane "Jenny" Bingham, who lived from 1753–1803, then listing Alexander Greer as marrying Ruth Talbot); *Elizabeth Greer*, WE RELATE, https://perma.cc/4WPX-KANL (last visited Sept. 25, 2023) (listing Elizabeth Greer, born in 1791 and died in 1831 in Tennessee, as married to Samuel Porter).

35. *See* Rosana Porter Deposition, *supra* note 1, at 28–29.

36. *Id.* at 30.

37. *Id.* at 27.

38. *See* LOREN SCHWENINGER, APPEALING FOR LIBERTY: FREEDOM SUITS IN THE SOUTH 257 (2018) (explaining that "testimony by free blacks in freedom suits occurred only infrequently" and describing how, when Mary Vance's lawyer "called her free black mother, Rosana Porter, to testify, [and] the defendant objected on grounds that it was contrary to law," the court still "allowed the mother's deposition").

39. Mary Vance Bill of Complaint, *supra* note 23, at 2; 2 THE SOUTHERN DEBATE OVER SLAVERY, *supra* note 23, at 295. Our family records indicate that she was born sometime around 1834.

40. Mary Vance Bill of Complaint, *supra* note 23, at 2.

County jail "for safe keeping" while the litigation was pending because she was the property that was the subject of the dispute and he had possession of her child.[41] But Mary Vance contended that she was held in the Davidson County jail due to the attachment that she requested in order "to prevent [Nathaniel] Porter from running her off" until she had a receiver appointed.[42] Mary Vance alleged that she was in the Bedford County jail when she filed her Bill of Complaint and that, after she filed the Bill, Nathaniel Porter took her out of that jail to Nashville to sell her and that he would sell her beyond the limits of Tennessee courts unless enjoined from doing so.[43]

Nathaniel Porter alleged that he put Mary Vance in the Bedford County jail because of an issue that he was having with his wife, "which he [was] advised that it is not necessary for him to give the particulars in relation thereto."[44] Nathaniel Porter also alleged that he had taken Mary Vance out of the Bedford County jail, to Nashville to try to sell her, "so as to remove as far as possible, all cause of difficulty between [him] and his wife."[45] If these responses were true and not just a cover for trying to sell an enslaved person who might ultimately be determined to be free by a court, some might wonder if Nathaniel Porter's wife might have taken issue with Mary Vance, her husband's treatment of Mary Vance, and/or who the biological father of Mary Vance's child (Dock Jones) might be.[46]

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41. *Id.*; Nathaniel Porter Answer, *supra* note 23, at 8.

42. Upon Mary Vance's petition, George W. Ruth, a justice of the peace, was appointed as her receiver. Mary Vance & Samuel Jones Petition for Receiver at 10, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Aug. 13, 1853), https://perma.cc/QGC9-YSRM; *see also* Mary Vance Bill of Complaint, *supra* note 23, at 3 ("G.W. Ruth, a justice of the peace in & for Bedford County . . . .").

43. Mary Vance & Samuel Jones Petition at 11–12, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Aug. 6, 1853) [hereinafter Mary Vance Petition], https://perma.cc/QGC9-YSRM.

44. Nathaniel Porter Answer, *supra* note 23, at 8.

45. *Id.* at 9.

46. By writing about and publishing so many details about my family, my ancestors, and their freedom suits, I am laying bare things that might have been lost to everyone outside of our family and even many within. I acknowledge that my ancestors and the others involved in their lives and freedom suits do not have the opportunity to decline this information being shared. Much of what I am sharing about my long-deceased ancestors is from public records, but these records have not necessarily been easy to find. To not

Nathaniel Porter contended that "during the whole period, ['Milly' or 'Mary Jones'[47]] had the appearance of a 'negro,' nothing to indicate that she was of the pure white race."[48] But

provide names, identifiable details, or even share the stories at all would be to "essentially erase[]" them and their experiences "from the historical record." SUSAN C. LAWRENCE, PRIVACY AND THE PAST: RESEARCH, LAW, ARCHIVES, ETHICS 15 (2016). This Article "might be the only tangible evidence that they ever lived" or at least might be the only way for more than a few scholars researching freedom suits in Tennessee to learn of these liberation efforts in which my ancestors invested so much time, money, and life. *Id.* at 15–16 ("[T]he past belongs to all of us, warts and all. . . . The past is fragile. In an age awash in information, it is easy to forget that so much of the past is forever inaccessible because documents, images, and things were lost, destroyed, forgotten, or just left to decay away."). It seems safe to presume that I am likely one of very few legal procedural scholars with an interest in race and critical race theory who has multiple ancestors who were involved in multiple freedom suits that are well documented, and whose relatives have also been able to build a decently robust family history that they are willing to share with the general public, and who has an administration, mentors, and colleagues supportive of developing this scholarly project. If my deceased ancestors would have wished that these details I provide had died with them and the lawyers, enslavers, judges, and others involved at the time in their lives and litigation, I hope that the "value of truth-telling" and "the demands of social justice" redeem this project. *Id.* at 121.

Despite the proclamations of some scholars, historians, and philosophers that the dead deserve only truth-telling while the living also deserve respect, I attempt to treat the lives, experiences, and wishes of my ancestors (and others involved in their lives) with dignity. *See id.* at 122–23 ("'On doit des égards aux vivants; on ne doit aux morts que la vérité.' The living deserve our respect; the dead deserve only the truth." (quoting Voltaire, *Lettres à M. De Genonville. Lettre Premiere* (1719), *in* 1 ŒUVRES COMPLETE DE VOLTAIRE 28 (De L'Imprimerie de la Société Littéraire-Typographique ed., 1785))). I have attempted to make decisions about what to share and in what detail in a way that is respectful, but that also does not hide the truth or engage in self- or ancestral-censorship or erasure. *See* LAWRENCE, *supra*, at 120 (suggesting that even "the most extremely sensitive of records" about identifiable individuals can be shared 115 years from the date of the record's creation). Much of what I am sharing is contained in public records that are over 160 years old. In deciding what to tell of these stories and histories, I have received encouragement from my relatives to share what I can learn of our family members' experiences, and I have also received permission and support even from anonymized people such as E. to share these experiences and stories that we have discussed over the years.

47. It is not readily clear whether Nathaniel Porter is referring to Mary Vance, the plaintiff, or Mary King, her grandmother.

48. Nathaniel Porter Answer, *supra* note 23, at 6.

the court clerk indicated that Mary Vance "is nearly white."[49] Nathaniel Porter argued that neither of Mary Vance's parents (George Porter, Sr., and Rosanna Porter) could have believed what Mary alleged (that she and her mother, Rosanna, should be considered free due to Mary Vance being a white and free before being kidnapped into slavery), in part because George Porter, Sr. "has time and again, purchased in the freedom of his children, at heavy prices," which he would not have done if they should have already been free. [50]

Mary Vance requested that the court continue the case for one or two terms of the court after Nathaniel Porter had answered her petition.[51] In August 1853, the court referred the matter by interlocutory order to the Clerk and Master of the Chancery Court for Bedford County so that said clerk could hire Mary Vance out as enslaved labor, upon receipt of bonds and securities for the hire and for her returning to the court proceedings, while the case was pending until the next court term.[52] On April 1, 1854, the clerk accepted from Samuel Jones (Mary Vance's spouse) a bond from Mary Vance for twelve hundred dollars payable to Nathaniel Porter, for Samuel Jones to "hire" Mary Vance and her infant and to guarantee their presence at the termination of the lawsuit.[53]

In September 1853, the clerk "advertised" Mary Vance "at the court-house door" and "she was publicly cryed for a reasonable time" by an auctioneer and "was bid off" by a white

49. Report of Clerk & Master at 23, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Feb. 13, 1854), https://perma.cc/QGC9-YSRM.

50. Nathaniel Porter Answer, *supra* note 23, at 7.

51. *See* Petition of Nathaniel Porter at 13, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Oct. 5, 1854), https://perma.cc/QGC9-YSRM (alleging that Mary Vance requested two continuances); Mary Vance Supplemental Petition, *supra* note 23, at 17 (alleging that Mary Vance requested one continuance); *see also* Petition of Nathaniel Porter, *supra*, at 14–15 (showing the time elapsed to be approximately fifteen months).

52. *See* Report of Clerk & Master, *supra* note 49, at 22.

53. *See id.* at 24–25. The bond was signed by George Porter, Sr. (Mary Vance's father), Thomas H. Coldwell or Caldwell, and Dr. John A. Blakemore. It seems that this creditor is probably the same Dr. J.A. Blakemore who is a defendant creditor in *Porter ex rel. Porter v. Blakemore*, 42 Tenn. (2 Cold.) 556, 559 (1865) (freedom suit), where Blakemore was trying to collect my ancestors as enslaved people, the monetary value of whom would go toward payment of George Porter, Sr.'s outstanding debts to Blakemore after George Porter, Sr.'s death.

man, James Wood, for twenty-five dollars "payable on the 1st day of March 1854."[54] James Wood, however, refused to give a bond and security for Mary Vance's enslaved labor, it seems, because she was pregnant.[55] Because Mary Vance was pregnant, no one would pay to enslave her, so the clerk sent her back to jail and Samuel Jones, her spouse, gave the receiver a security for the payment of twenty-five dollars for Mary Vance to remain in jail until the next term.[56] The clerk also noted that, because Mary Vance "is nearly white, it will be difficult to get any person to give bond and good security for her forthcoming," so she remained in jail.[57]

During all of the fifteen months when she was not in jail, Mary Vance and her son lived with their family members, most of whom were free by that time.[58] Nathaniel Porter contended that continuing to live with her family would "render her of but little value."[59] Despite the security and receiver, the court granted Nathaniel Porter's request for an order that Mary Vance and her child, Dock, be delivered to him after he entered upon bond and security payable to Samuel Jones.[60] Mary Vance argued that, after she had a second child named George, Nathaniel Porter took that child away from her when she was in the jail and while the child was still breastfeeding, and that Nathaniel Porter intended to move away out of the jurisdiction

54. Report of Clerk & Master, *supra* note 49, at 22–23. Although the clerk's report indicated that he put Mary Vance up for auction in September of 1854, that seems to be an error, with the correct date of him auctioning her actually being in September of 1853. *Id.* The report notes that the bid was supposed to be paid in March of 1854 and the clerk's report was submitted on February 15, 1854. *Id.* The report also noted that, in August 1853, the chancellor had issued an interlocutory order to take Mary Vance "into his possession, and to hire her out until the next-term" of the court. *Id.*

55. *See id.* at 23 (describing Mary Vance as "being enceinte, or about having a child").

56. *See id.* ("[H]er husband . . . proposed to pay twenty five dollars for her services [sic] and let her remain in jail until the next term . . . .").

57. *Id.*

58. *See* Petition of Nathaniel Porter, *supra* note 51, at 15.

59. *Id.*

60. *See* Order of Chancery Ct. of Bedford Cnty., Tenn. at 16, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. Oct. 5, 1854), https://perma.cc/QGC9-YSRM (ordering Mary Vance and her child "to be attached and delivered to said Nathaniel Porter").

of the court, taking her and her two children.[61] Because enslaved babies were seen as less valuable than adults, it did not seem to be common practice that an enslaver would take a baby from its enslaved mother unless the white enslaver thought that he was the biological father of the child.[62] Mary Vance stated that someone would pay a bond with security worth twenty thousand dollars to guarantee that she would be present for the lawsuit's end, subject to court order and decree.[63] The equivalent sum of $20,000 in 1854 would be over $700,000 today.[64]

2. *Porter v. Blakemore*

Returning to Rosana Porter—my great-great-great-great-grandmother, who was Mary Vance Porter's mother and who was also married to George Porter, Sr.—as noted in the court opinion recognizing the freedom of her youngest three children born into slavery, Rosana's spouse, George, Sr., "by his industry and fidelity . . . , so won the affections of his master [John N. Porter, a white man],[65] that he granted him the privilege of purchasing his own freedom, at a price greatly below his actual value."[66] My great-great-great-great-grandfather, George

61. *See* Mary Vance Supplemental Petition, *supra* note 23, at 18–19.

62. *See, e.g.*, WILLIAMS, *supra* note 5, at 18 (noting that the white man who enslaved, raped, and impregnated her great-great-grandmother took those children from her to grow up in his house, "raised playing with, caring for, and envying" his "legitimate children, their half brothers and sister"); *see also* Vandervelde & Subramanian, *supra* note 23, at 1046 (noting that enslaved children were not usually taken away from their mothers or enslaved caregivers until they were at least seven years old).

63. *See* Mary Vance Supplemental Petition, *supra* note 23, at 20 ("She states that a bond with security worth twenty thousand dollars can be given on her behalf, for her forthcoming at the termination of this suit, subject to the order and decree of the court . . . .").

64. Two online calculators provided this sum. *See Purchasing Power Today—US $*, MEASURINGWORTH, https://perma.cc/4XZT-KQ88 (last visited Sept. 16, 2023); *U.S. Economic Data Inflation Calculator*, OFFICIALDATA, https://perma.cc/HR8G-QLYL (last visited Sept. 17, 2023).

65. I often write middle names or initials to lessen confusion about which person I am referring to when so many of the people involved share the same last name and may have similar or the same first names or initials. I occasionally specify someone's race or ethnicity to decrease potential confusion about which people are part of the white Porter family who enslaved the Black Porter family.

66. Porter *ex rel.* Porter v. Blakemore, 42 Tenn. (2 Cold.) 556, 557 (1865) (freedom suit). Personally, it is difficult to try to consider it a privilege for an

Porter, Sr., then, purchased the freedom of Rosana Porter, his wife, (Mary Vance's mother and the mother of their then five other children), and "purchased and set free" his older children (including Mary Vance).[67] But, before George Sr. could free all of his enslaved children, John Porter (their enslaver) gave the remaining enslaved children (George, Jr., Martha, and Jane Bell) as enslaved people to Thomas N. Porter, a white man.[68]

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enslaved person that they are allowed to "purchase" their own freedom if they are somehow able to save or borrow even an amount of money that is far below their "market price."

67. *Porter*, 42 Tenn. at 558.

68. John Nathaniel Porter (born in 1795) and Katherine (or Catherine) Rucker had married, and they had two children, Thomas Nathaniel Porter and, to make matters confusing, John N. Porter. *See John Nathaniel Porter (1795–1875)*, WIKITREE, https://perma.cc/N65S-HZJC (last updated Jan. 4, 2021); *John Nathaniel Porter*, FIND A GRAVE, https://perma.cc/FVH5-H553 (last visited Sept. 25, 2023); *Katherine (Rucker) Porter (1797–1838)*, WIKITREE, https://perma.cc/3X7M-NSGJ (last updated Sept. 21, 2019); *Thomas Nathaniel Porter (1822–abt. 1855)*, WIKITREE, https://perma.cc/URD8-Y3FC (last updated Oct. 11, 2019); *Thomas N. Porter*, FIND A GRAVE, https://perma.cc/4FF8-ATKA (last visited Sept. 25, 2023); *John Nathaniel Porter (1847–1927)*, WIKITREE, https://perma.cc/Z45D-4JX2 (last updated Apr. 25, 2021); *Pvt John N. Porter*, FIND A GRAVE, https://perma.cc/9EFS-9WXT (last visited Sept. 25, 2023). It seems that the elder John Nathaniel Porter did not go by "senior," and the younger John Nathaniel Porter did not go by "junior or II." Thomas N. Porter and Mary Frances "Fannie" Hardin married, and they had seven children. *See* 2 HISTORY OF TENNESSEE: FROM THE EARLIEST TIME TO THE PRESENT 1224 (1886) [hereinafter HISTORY OF TENNESSEE] (noting that Thomas N. Porter and Mary F. (Hardin) Porter were married); *Thomas Nathaniel Porter (1822–abt. 1855)*, *supra*; *Thomas N. Porter*, *supra*; *Thomas Melville Porter*, FIND A GRAVE, https://perma.cc/PF8R-K7KQ (last visited Sept. 25, 2023) (listing Thomas N. Porter and Mary Frances Hardin as Thomas Melville Porter's parents).

John Nathaniel Porter (born in 1795) was the son of Nathaniel Porter (born in 1760) and Nancy Emmit Porter. *See John Nathaniel Porter (1795–1875)*, *supra*; *Nathaniel Porter*, FIND A GRAVE, https://perma.cc/68V3-V4C4 (last visited Sept. 25, 2023); *Nancy* Emmitt *Porter*, FIND A GRAVE, https://perma.cc/EVV6-TMMQ (last visited Sept. 25, 2023). Nancy Emmit's father, Samuel Emmit, founded the town of Emmitsburg, Maryland. *See Samuel Emmit*, FIND A GRAVE, https://perma.cc/7LSJ-LYG5 (last visited Sept. 25, 2023); *Mary* Shields *Emmit*, FIND A GRAVE, https://perma.cc/7VDQ-QMPW (last visited Sept. 25, 2023) (listing Samuel Emmitt as Mary *Shields* Emmit's spouse and Nancy *Emmit* Porter as her child); Michael Hillman, *Setting the Record Straight: The Real History of Emmitsburg's Founding*, EMMITSBURG AREA HIST. SOC'Y, https://perma.cc/6KVG-XTXR (last visited Sept. 25, 2023); *A Short History of the Greater Emmitsburg Area*, EMMITSBURG.NET, https://perma.cc/6Y97-ZX35 (last visited Sept. 25, 2023). *See generally* JAMES A. HELMAN, HISTORY OF EMMITSBURG, MARYLAND (1906).

Thomas Porter died, with outstanding debts and without a will, before my great-great-great-great-grandfather had earned enough money to purchase the freedom of the last three of his own enslaved children.[69] Thomas Porter's widow and mother of their seven children, Mary Frances "Fannie" Porter, wanted to sell George Porter, Sr.'s enslaved children at auction to the highest bidder.[70] After some negotiation, George Porter, Sr. was able to purchase the freedom of his three children at a public auction for a reduced price by providing part of the sale cost in cash up front along with a promise to pay the outstanding balance.[71] When George Porter, Sr. was unable to save up the money to cover that outstanding balance, a number of people, including Blakemore,[72] lent funds and credit to pay that debt.[73] George Porter, Sr. was then unable to pay Blakemore back and, when those creditors seemed to consider the children collateral to secure the debt, George, Sr. felt forced to consider letting his creditors take and re-enslave those three children that he had freed. After George Porter, Sr. fell ill and died, two of his

69. *See Porter*, 42 Tenn. at 558.

70. *See id.*

71. *See id.* at 599.

72. *See id.* (describing this person only as "Blakemore," one of George Porter, Sr.'s "friends [who] sympathized with him"). That court opinion does not even give Blakemore's first name but goes to lengths to discuss George "Dock" Porter, Jr.'s disposition. The opinion mentions that George "Dock" Porter, Jr., one of the ten children of George Porter, Sr. and Rose Porter, "became dissipated and worthless, and added greatly to the old man's [George Porter, Sr.] difficulties." *Id.*

Upon further research, it seems that Blakemore was J.A. Blakemore or Jehu Anderson Blakemore (in some places, J.A. Blakemore's first name is listed as John instead of Jehu). He was a doctor born in 1811 in Virginia, and he and Gartha Anne Barringer, the only child of the wealthiest person in the county, had married. *See* JAY BERRY PRICE, THE PRICE, BLAKEMORE, HAMBLEN, SKIPWITH AND ALLIED LINES 81, 177 (Harry Hollingsworth ed., 1992); HISTORY OF TENNESSEE, *supra* note 68, at 876, 880. Gartha Anne Barringer's father had been a twelve-year member of Congress from North Carolina and then was Speaker of the House in the Tennessee State Legislature. PRICE, *supra*, at 201–02. Their descendants are listed as national registrants in the Sons of the American Revolution and the Daughters of the American Revolution and some also served in the Confederate Army. *See* 19 LOUISE P. DOLLIVER, LINEAGE BOOK: NATIONAL SOCIETY OF THE DAUGHTERS OF THE AM. REVOLUTION 68–69 (Harrisburg Publ'g Co. 1905) (1896); LOUIS H. CORNISH, A NATIONAL REGISTER OF THE SOCIETY: SONS OF THE AMERICAN REVOLUTION 952 (A. Howard Clark ed., 1902).

73. *See Porter*, 42 Tenn. at 559.

children were jailed awaiting their sale to pay the debt that their father had incurred to buy their freedom.[74]

At that point, Rosana Porter, George, Sr.'s widow and the mother of the three children whose freedom was at stake, filed a lawsuit[75] asking the Tennessee court to recognize that the three children under dispute had been emancipated and were free, not property or enslaved. The creditors were arguing that George Porter, Sr. bought and paid in full for these three children of his, but that he never promised them their freedom or agreed to freeing them.[76] In the midst of these creditors alleging that my great-great-great-great-grandfather worked his entire life to free himself and several of his family members, but claiming that George, Sr. then decided to become an enslaver by enslaving three of his ten children as chattel with his mind open to using them as collateral, the Emancipation Proclamation and the resolution of the Civil War intervened. To the credit of the Tennessee Supreme Court, it seems that they would have recognized the freedom of my ancestors regardless. The opinion noted that freeing these children was "the cherished purpose of [George Porter, Sr.'s] life."[77]

> The whole record is so pregnant with facts and circumstances, going to establish the settled purpose of the father to emancipate complainants, and that they so understood it, that it is impossible to resist the conclusion, that there was, to this effect, a distinct understanding, if not an agreement in terms, between the parties.[78]

In a portion of the opinion that serves as something of an inspiration for this Article, when the Tennessee Supreme Court reversed the chancellor's dismissal of my ancestors' freedom suit, the court noted that "legal forms and technicalities" should not obscure "the real substance of things" and the "presumption

74. *Id.*

75. *Cf.* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 961 (2002) (noting Justice Brennan's opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which he observed that neither enslaved people nor women could file lawsuits in their own names).

76. *See* Porter *ex rel.* Porter v. Blakemore, 42 Tenn. (2 Cold.) 556, 560 (1865) (freedom suit).

77. *Id.* at 561.

78. *Id.* at 564.

in favor of human freedom."[79] This gives the hope that it was not a mere fortune of timing with the Emancipation Proclamation and the end of the Civil War that decided that George, Jr., Martha, and Jane Bell were free, but that the court would not have allowed technicalities as an excuse to reach any other conclusion even if the court was deciding the issue ten years prior.

Handwritten next to the name of George Porter, Sr. on a page in one of our notebooks on our family history is that he was "a former slave who owned slaves." After I read about George Porter's family's circumstances, I took offense at that notation and told my relatives that we had had it all wrong. But, after he was too ill to try to make the money to pay back the creditors who had paid off the promissory note that George, Sr. couldn't afford to pay himself, my great-great-great-great-grandfather felt that he had no choice but to resort to what seems to me (and likely also to the Tennessee Supreme Court) to be a procedural technicality. Knowing that the full understanding of the contract and his own intention was to free all of his children, George Porter, Sr. thought that he might be forced to exploit a technicality to give his final three freed children back to be enslaved again in order to repay his debt.[80]

B. *Places of Resistance Proceduralism in My Ancestors' Freedom Suits*

In thinking about these lawsuits, numerous aspects of procedure stand out as mechanisms that were imposed to subordinate, based on race or gender, and that my ancestors (or their lawyers) needed to overcome or to think of ways to use to their own advantage. Areas for resistance proceduralism included:

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79. *Id.*

80. This is an illustration of why I will leave it to others to encourage putting more people from marginalized groups into positions of power as a solution to various injustices—in essence, using representation to counter subordination. I do not fight against attempts to increase the representation of marginalized peoples in decisionmaking roles, but changing the person implementing the procedure will not necessarily undo or correct any unjust part of that procedure if our society ascribes (or the people who succeed in some way despite structural subordination ascribe) more importance to the rules or technicalities than to humanity and justice.

- The types of lawsuits that were possible;[81]
- The courts that my ancestors could file these suits in;
- Restrictions on who could file a lawsuit;
- Restrictions on who could testify or properly be deposed;
- The concept and mechanism of attachment;
- The concept and mechanism of a receiver;
- Continuances;
- The practice of the court clerk "hiring out" enslaved people who were jailed while litigating their freedom; and
- Bonds and securities.

I do not know whether Mary Vance Porter actually believed that she, her mother, and her grandmother had all been free for the reasons that she alleged in her complaint or if she, like her mom, simply believed the statement, "I am a free person and if I had had my rights, I would have been free from the beginning."[82] If Mary Vance filed the lawsuit as some sort of a

81. Because much of my family was enslaved in Tennessee, which based its laws regarding enslaved people on the "liberal policy" of North Carolina, we were afforded privileges denied to enslaved people in most other states that allowed us to engage in procedural resistance. *See* PATTERSON, *supra* note 7, at 25, 30 (noting that enslaved people in Tennessee could make legal contracts for their freedom). I will admit that I started tearing up when I realized that one of my ancestors' freedom suits is described in the definitive tome on pre-Civil War Tennessee law for Black people as *the case* where the state supreme court demonstrated that it would enforce contracts that enslaved people made with their enslavers. *See id.* at 30–31 ("In the case of Porter v. Blackmore[sic], the supreme court of the state held that such a contract established a vested right to freedom and that 'no one but the State can take advantage of it, not even the owner or master, after the right is once vested. A court of chancery, if the right is once vested, will interpose to prevent its defeat.'" (quoting Porter *ex rel.* Porter v. Blakemore, 42 Tenn. (2 Cold.) 556, 563 (1865) (freedom suit))). This means that Rosana Porter's and George Porter, Sr.'s efforts to ensure the freedom of all of their children are documented in the U.S. Library of Congress. So, I lied to you. I did not tear up; I cried. And I was so excited at my discovery that I told my family through my tears. At the same time, I recognize that it is pitiful both to be grateful that we were allowed to enter into contracts for our freedom and to be thankful that courts were supposed to recognize and enforce our contracts for freedom. But I will not have shame about the pride that I feel that my ancestors' struggles seemed to mean something. In addition to keeping family members and loved ones together much more than they would have been otherwise, these freedom suits pushed for our liberation.

82. Rosana Porter Deposition, *supra* note 1, at 25. I also do not know whether Mary Vance or her mother, Rosana Porter, believed that Mary King was white and with no African blood as they both had alleged. *See* Mary Vance Bill of Complaint, *supra* note 23, at 1 ("[H]er grandmother aforesaid was white,

multipurpose litigation stunt to prevent Nathaniel Porter from selling her far away (as he had tried to do), to keep her babies with her instead of with her white enslaver, and to stay in the area close to her relatives and husband long enough for her father to save up the money to purchase her freedom, then she was brilliant—along with her legal team and any of my other enslaved or formerly enslaved relatives who helped to develop, carry out, and modify this strategy as needed.

It seems that my ancestors (both enslaved and freed) might have been engaged in resistance proceduralism that was something akin to Professor Daniel Farbman's concept of the resistance lawyer.[83] Farbman describes how those engaged in resistance lawyering for alleged "fugitive slaves" in the North used litigation and strategies of delay, procedural entanglement, confusion, and obstruction within litigation in order to give the alleged fugitive enslaved clients the opportunity to make plans for escape, raise money to purchase their freedom, be away from their enslavers and the conditions with their enslavers, and potentially win in court and become free through litigation.[84]

The timing of Mary Vance's lawsuit might have been strategic, whether to allow more time to save and borrow the funds necessary to ensure that the case would be stronger, to get her out of a situation that may have become especially violent, or to prevent her sale to a distant enslaver along with the resulting separation from her parents, siblings, spouse, and children. It might be that my ancestors waited to file Mary Vance's complaint until George Porter, Sr. was able to buy Rosana Porter's freedom so that she might be able to be deposed. Rosana Porter's statements during her deposition were lauded by the court and probably went a long way toward having the court entertain and consider Mary Vance Porter's claims.[85]

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not having any blood of the Affrican[sic] race . . . ."); 2 THE SOUTHERN DEBATE OVER SLAVERY, *supra* note 23, at 295 (same).

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

84. *See* Farbman, *supra* note 3, at 1905–24 (offering examples of ways lawyers successfully employed strategies of delay, procedural entanglement, and confusion, particularly when fugitives escaped).

85. *See* RACE & SLAVERY PETITIONS PROJECT, U.N.C. GREENSBORO, PETITION ANALYSIS RECORD #21485301 (2008), https://perma.cc/QGC9-YSRM (PDF) (noting in the abstract that the deposition "is particularly rich in

Depending on the veracity of Nathaniel Porter's representations to the court, if Mary Vance was the source of some sort of dispute between Nathaniel Porter and his wife, it could be that Mary Vance and her babies might have been subject to particularly awful treatment—whether rape or beatings. In terms of using the litigation and procedure to delay, the continuations that Mary Vance requested, and that the court granted, seemed to get her more time away from her enslaver, as she seemed to remain either in jail or with her family for much of the litigation.

The court record includes allegations that Nathaniel Porter tried once (or maybe twice) to take Mary Vance out of the jurisdiction of the court in order to sell her somewhere far away. My ancestors had likely learned from their experience, when Mary King's enslavers took her to Arkansas, about the seeming impossibility of remaining in touch after someone had been sold away, not to mention the impossibility of procuring their freedom.

Based on the deposition of Lewis Cotner, my ancestors might also have learned about the likely futility of an enslaved person in their area of the South escaping to freedom while members of the white enslaving community were on high alert because it was known that their enslavers intended to sell or move the enslaved person far away. In his deposition, Lewis Cotner stated that, when Joseph McKissick enslaved Mary King (Mary Vance's grandmother) and before he moved her out of the state, Mary King had tried to escape.[86] Cotner said that Mary King had come to Captain Blackwell's house to tell the house "negroes," or "house slaves," that the next morning she was going into town and two (presumably) white men, Bob Cannon and Whiteside, were going to "set her free and see her out."[87] But after Mary King stayed with the enslaved people at Blackwell's house all night, Joseph McKissick arrived the next

information about family births, marriages, and legal statuses"); *see also* Rosana Porter Deposition, *supra* note 1, at 25–31.

86. *See* Cotner Deposition at 31, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. July 27, 1854), https://perma.cc/QGC9-YSRM.

87. *Id.*

morning "in hunt of her."[88] When Lewis Cotner told McKissick what he heard Mary King say, McKissick headed to town.[89]

As we know from Rosana Porter's deposition, Mary King did not escape. Instead, Joseph McKissick and his wife took her with them when they moved to Arkansas, and Mary King's family never saw her or even heard anything about her again.[90] Perhaps this failed escape attempt and resulting permanent separation from family is a reason that my ancestors filed Mary Vance's lawsuit when they did, even if they might have known that they would lose in court. It could be that having Mary Vance as the subject of litigation, in addition to her living for a while in a household of Black former enslaved people who had bought their freedom, might have ruined Nathaniel Porter's attempts to sell her.[91]

Some of these considerations could make one wonder whether families of enslaved people, depending on their physical appearances, the experiences of their elders, and their resources, might have developed a multitiered strategy using freedom suits and even maneuvering procedure to secure their physical wellbeing, physical unity, proximity to one another, and, eventually, their freedom. It seems that some members of the family had been light-skinned enough to pass as white for several generations,[92] and even though Mary King told people that she was not a "slave" and that she had been wrongfully kidnapped and sold into slavery, nobody in the family filed a lawsuit claiming such until at least three members of the family had purchased their freedom, could participate in court, and probably had made good headway toward being able to purchase Mary Vance's freedom.

At least four generations of my family have been involved in suing or filing lawsuits involving four generations of the

88. *Id.*

89. *Id.*

90. *See* Rosana Porter Deposition, *supra* note 1, at 28–29.

91. *See* Petition of Nathaniel Porter, *supra* note 51, at 15 ("She is now residing with a family of free negroes, which will render her of but little value, if permitted to remain there . . . .").

92. *See* Cotner Deposition, *supra* note 86, at 32 (stating that Mary "Milly" King "was as white as the common race").

white, enslaving Porter family.[93] Sometimes we lost and had to pay the Porters at least $2,000. Other times we won, which allowed us to be free after paying the Porters at least $1,050 to $1,800 to purchase the said freedom of three ancestors born into slavery (in addition to the amount paid to free George Porter, Sr., Rose Porter, and three of their other children born into slavery, along with the untold years of unpaid labor for the Porters as enslaved laborers). The equivalent sum of $2,000 in 1854 would be at least $70,000 today.[94] The equivalent sums of $1,050 or $1,800 in 1855 (Thomas N. Porter's approximate year of death) would be over $35,000 or over $60,000, respectively, today.[95]

This means that my ancestors paid over $100,000 to the white Porter enslaving family in their efforts to try to purchase our freedom or to remain together with their spouses, relatives, and loved ones while still enslaved.[96] My relatives somehow earned or borrowed this money while enslaved or while several of their immediate family members were enslaved. I cannot fathom how difficult it must have been for a Black person, while enslaved or recently freed, to earn this money or to convince someone to lend them such an overwhelming amount of money. And perhaps nobody would loan them this money unless the

93. *See generally* Porter *ex rel.* Porter v. Blakemore, 42 Tenn. (2 Cold.) 556 (1865) (freedom suit); Mary Vance Bill of Complaint, *supra* note 23.

94. Two online calculators provided this sum. *See Purchasing Power Today—US $*, MEASURINGWORTH, https://perma.cc/AG65-Q9CA (last visited Sept. 19, 2023); *U.S. Economic Data Inflation Calculator*, OFFICIALDATA, https://perma.cc/SB7J-D9E4 (last visited Sept. 19, 2023).

95. Two online calculators provided these sums. *See Purchasing Power Today—US $*, MEASURINGWORTH, https://perma.cc/BU9Z-FHQ7 (last visited Sept. 19, 2023) ($1,050 in 2023 dollars); *U.S. Economic Data Inflation Calculator*, OFFICIALDATA, https://perma.cc/FJ8Y-Z23V (last visited Sept. 19, 2023) (same); *Purchasing Power Today—US $*, MEASURINGWORTH, https://perma.cc/HUH7-AAKE (last visited Sept. 19, 2023) ($1,800 in 2023 dollars); *U.S. Economic Data Inflation Calculator*, OFFICIALDATA, https://perma.cc/NWJ4-SW27 (last visited Sept. 19, 2023) (same).

96. Recent conversations with Professor Jeremy Bearer-Friend about a forthcoming article of his have prompted me to wonder if these types of litigation costs, court-ordered fines and fees, and even the large sums of money that people paid to purchase their own freedom might be missing from reparations calculations for Black descendants of enslaved people. *See generally* Jeremy Bearer-Friend, *Paying for Reparations: How to Capitalize a Multi-Trillion Reparations Fund*, 67 HOWARD L.J. (forthcoming 2024).

creditors assumed or believed that the formerly enslaved relatives would be "put up" as collateral.

Today, almost none of my relatives have this kind of money ($100,000). Who of us would creditors "seize" as collateral after our desperate attempts to secure freedom for the others? I wonder what my enslaved ancestors made of the role of courts in sometimes ordering that we pay these large sums of money to our enslavers. A court required Mary Vance to give a bond and security of $1,000 payable to Nathaniel Porter in order to litigate her case; a court issued a writ of attachment, attaching Mary Vance and her son; and a court enjoined Nathaniel Porter from using Mary Vance as an enslaved person or selling her during the litigation.[97] The court also noted that, if Mary Vance lost in litigation, she would need to pay damages to the defendant for his loss of her unpaid enslaved labor in the meanwhile.[98] Further, it can seem unthinkable that a judge (or chancellor) used civil procedural and remedial mechanisms to order a clerk of the court to auction off a human being until the next court term from the courthouse steps.

The court and civil procedure was such an integral part of actively maintaining enslavement. It could make someone wonder how entangled with white supremacy, misogyny, and subordination of marginalized groups civil procedure and procedure outside of courts might still be today.

III. BACK TO THE CONFEDERATE SOLDIER MASCOT

Briefly considering my ancestors' freedom suits reveals that there may be quite a bit that we can hypothesize and learn about how marginalized groups engaged in resistance proceduralism in litigation in the past. I anticipate that several of these lessons may have corollaries or translate to present-day situations and may include procedures outside of the litigation setting. I turn back to the vignette about my school's confederate soldier mascot with twin goals in mind—understanding how procedures

97. *See* Order of Clerk & Master at 3–4, Vance v. Porter, Tenn. State Libr. & Archives Box 116 (Tenn. July 14, 1853), https://perma.cc/QGC9-YSRM (explaining that Mary Vance was required to provide bond and security in the amount of $1,000).

98. *See id.* at 4 ("[I]n case of failure, [Complainant] will pay all costs incident to such failure . . . .").

might be set up to reinforce subordination and how people might, nevertheless, successfully use procedure to benefit marginalized groups.

At some point in high school, several of us students of color joined together in a multicultural student coalition to push the school to change its mascot. Some of my objections to the mascot were due to the circumstance it created for students of choosing between being complicit in Confederacy celebration or boycotting many school activities. But, during my efforts, I did not realize that the head of the school was, in some ways, the sole decision-maker regarding the mascot, like a judge is the decision-maker for a lawsuit. I objected to the Confederate soldier mascot (as did my parents), and I strongly believed that the mascot should be changed. I use passive voice intentionally here because it seems that the school administration deliberately obfuscated who had the power to change the mascot and I did not notice that unclarity at the time. At one point, I thought that, as students, we had the power to change the mascot. But it was the school administration, namely the headmaster, who set the terms by which students could theoretically change the mascot. Thus, the headmaster actually had the power to change the mascot (or to decide when he would let other people think that they themselves had changed the mascot). The procedure surrounding how we were supposed to go about attempting to change the mascot obscured the power dynamics such that none of the students realized that the head of the school was the sole decision-maker and that, in order to change the mascot, we would probably at least have needed to launch a campaign to put pressure on the headmaster.

Another reason that I wanted to change the mascot is because I chose this school. I wanted to be there. I wanted to thrive there. I thought it was the best school for me. In turn, I had been somewhat complicit in promoting and upholding the normalcy of a Confederate soldier as a mascot. As a student who thought I mostly "fit in," had friends on sports teams, enjoyed playing sports myself, loved dancing, and was also highly motivated to participate in activities that would exempt me from taking a physical education class every academic quarter, I wore the rebel uniform, and I shouted out "Let's go, Rebels" more times than I can count at games. The school did not force me to do any of that. I was also a teenager who wanted a middle school

and high school experience. I did not think of my other options. Until they changed the mascot, I could have chosen not to play any sports or at least not to wear the uniform, or anything with "Rebels" printed on it, and I could have chosen to never reference the mascot when shouting out support to friends playing sports.[99]

When we announced that we wanted the mascot to change, the school administration responded that it would be fine for us to change the school mascot. All we needed to do was wait for the next student elections and put at least four mascot options on the ballot (including "the Rebels," or Confederate soldiers). If one of the other mascots won a plurality[100] of the votes, then that other mascot could replace the Confederate soldier. Perhaps not surprisingly, though, no alternative mascot got enough votes to displace the Confederate soldier. Process matters.

After the failed attempt, I realized that the administration had designed a process that set us up to fail.[101] There were likely

99. What you just read is the part of this story that I chose to write last. I did not know how to write this admission of my complicity fairly and, frankly, I feel like a completely different person than that eleven- to seventeen-year-old me. Perhaps the role that I played in that school then, or the universities I work at now or in the future, might not be meaningfully different from George Porter, Sr. thinking that he may have to let creditors re-enslave three of his children. It is much easier to admit my naïveté in not realizing that the school administration had sent us on a wild goose chase than to admit that I am sure I also mindlessly or unintentionally promoted the confederate mascot at times. But this is, in part, a self-reflective exercise, as I ask us all (myself included) to think about how the processes that we are involved in might be reinforcing marginalization (even if that marginalization is also of ourselves).

100. I do not remember specifically if the school required the other mascot to win a majority—more than 50% of the total—of the votes or a plurality of the votes— more than any other mascot option. I am pretty sure I remember the requirement being a majority of the votes, especially because, as teenage students, we were not as familiar with the concept of a plurality. But I will refer to the requirement as a plurality in this Article in order to present the school administration in a more generous light because I am not certain. Regardless of what the voting requirement was for the confederate soldier mascot to be displaced, I distinctly remember that the school administration did not tell us how many votes (or what percentage of votes) a mascot alternative would need to get until after the votes were counted and until after they knew what would be needed to keep the Confederate soldier mascot. These types of shifting procedures that also lack transparency should be red flags for potential abuse.

101. At this point, it likely will not surprise you that the school did not replace the mascot in any way until years and years later. It was not until

a range of factors at play in the administration's refusal to change the mascot and one administration (or, perhaps, one administrator) who might intentionally strategize to achieve certain outcomes is not equivalent to a judicial system.[102] But procedures that are neutral on their face and that may sound of technicalities can achieve certain substantive goals or reinforce existing structures of subordination regardless of whether they are instrumental in an elite college prep school or haphazardly sedimentary in civil litigation.

CONCLUSION

As I embark on this endeavor to identify the potential imposition of different procedural baselines for litigation brought to benefit members of marginalized groups as compared to other litigation, I hope that others will also push this conversation forward, both within and outside of civil litigation.

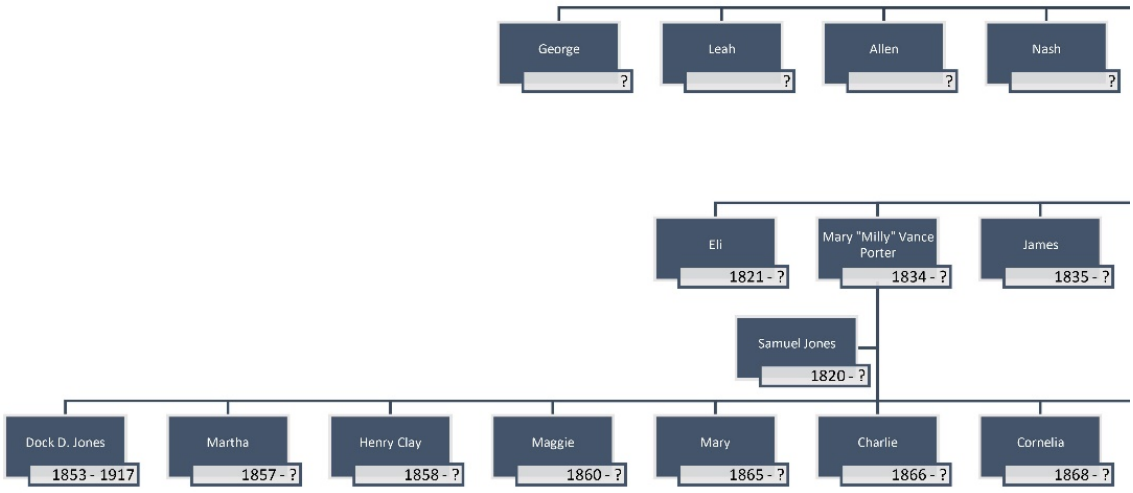
2015 (nearly twenty years later) that they first made any change. A convened committee issued a report about the mascot and logo. Even then, the only change was to replace Confederate Yosemite Sam with images of a pioneer man and a pioneer woman (so I guess white settlers). It was not visually clear that the new mascot image was of white people, but I am not sure who else would have been the eighteenth-century, pioneer settlers of the Western foothills. Particularly when the United States (including Southern California) was far from uninhabited in the eighteenth century.

After another committee was convened, a survey was held to see if the school's community thought that the mascot should change, and another survey was planned to determine what the mascot would change to. Only in January of 2020 (nearly twenty-five years later) did the school's director (called headmaster) announce that the school mascot would officially change from the rebels to another mascot on July 1, 2020. It did not seem coincidental that the school headmaster announced that he would retire on June 30, 2020—one day prior to the mascot finally changing from the rebels.

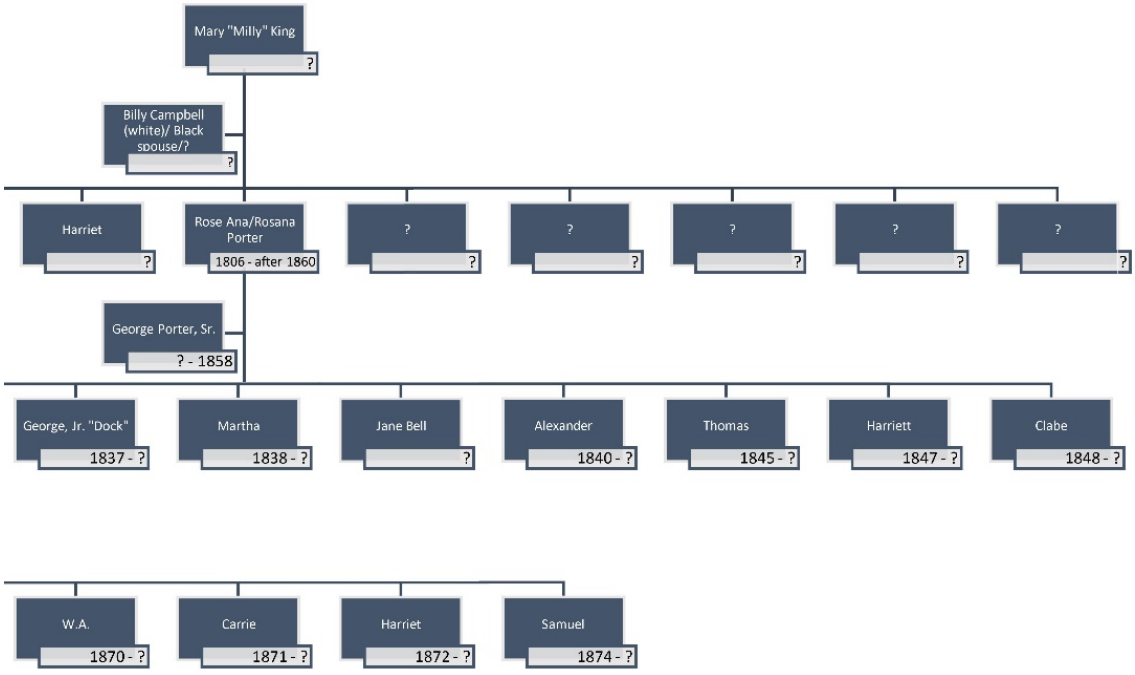
102. In writing a piece like this, questions inevitably arise about whether potential procedural subordination is intentional, due to some ____-ism or a ____-ist person, a bad actor, or a grouping of them. I do not know, that is not my expertise, and I make no claims regarding the intentionality of anyone—any judge or justice, any rule-maker, any scholar, or even the headmaster of the school that I attended with the Confederate soldier mascot. I do not care if he maintained the Confederate soldier mascot because he promised a donor on their deathbed that he would keep the mascot, if he thought continuity would keep students happy, or if he was a white supremacist and bigot. I will not say that knowing or understanding the motivations behind upholding marginalizing procedure is futile, worthless, or irrelevant, but it is not what I have intended to explore in this project.

We may begin to identify, and then work to undo, the facilitation of white supremacy, racism, and the subjugation of people of color and other marginalized groups within all sorts of procedural systems.

APPENDIX: PARTIAL FAMILY TREE[103]



103. This partial family tree is based on my family records and information in Rosana Porter's deposition. *See* Rosana Porter Deposition, *supra* note 1, at 25, 27–28, 30; Family Tree from Aunt Laura (on file with author). All of George, Sr.'s and Rose Ana Porter's children born 1840 and after (Alexander, Thomas, Harriett, and Clabe) were born after George purchased Rose Ana's freedom, so these four children were born emancipated. Dock D. Jones is my paternal great-great grandfather.


Mary "Milly" King
?
Billy Campbell (white)/ Black spouse/?
?
Harriet
?
Rose Ana/Rosana Porter
1806 - after 1860
?
?
?
?
?
?
?
?
George Porter, Sr.
? - 1858
George, Jr. "Dock"
1837 - ?
Martha
1838 - ?
Jane Bell
?
Alexander
1840 - ?
Thomas
1845 - ?
Harriett
1847 - ?
Clabe
1848 - ?
W.A.
1870 - ?
Carrie
1871 - ?
Harriet
1872 - ?
Samuel
1874 - ?