

SPEAK TO YOUR DEAD, WRITE FOR YOUR DEAD:
DAVID GALLOWAY, MALINDA BRANDON,
AND A STORY OF AMERICAN RECONSTRUCTION¹

By Aderson Bellegarde Francois

Speak to your dead. Write for your dead. Tell them a story. What are you doing with this life? Let them hold you accountable. Let them make you bolder or more modest or louder or more loving, whatever it is, but ask them in and listen, and then write.²

*The butcher, the banker, the drummer and then
Makes no difference what group I'm in
I am everyday people.³*

Prologue

This is a story about twelve French catholic nuns who sailed across the Atlantic in search of paradise in New Orleans, Louisiana; about a white banker who once owned every black inmate in the Tennessee's prison system; about a riverboat captain who sailed the Ohio in search of a port that would take in the hundreds of female sex workers the Union Army had conscripted to his care; about a Black prophet named Pap who led an exodus of his people out of the cotton plantations of the South in search of a new Canaan in the Great Plains of Kansas; about a former confederate soldier who single-handedly tried to block Tennessee's ratification of the Fourteenth

¹ I am thankful to Georgetown University Law Center alum Agnes Williams and her family for supporting the Williams Research Professorship that made this article possible; to the librarians of Georgetown University Law Center for never telling me "no" even when – especially when – I was asking for the impossible; to my students Alexander Afnan and Olivia Grob-Lipkis for helping bring this article into being over the months they talked me through my unfocused ideas; and, as always, to Parisa, Kian, and Shahrzad for making time for me to write.

² Alexander Chee, *How to Write an Autobiographical Novel*, 277 (2018).

³ *Everyday People* by Sly and the Family Stone.

Amendment and whose grandson would in time sign the Southern Manifesto to block implementation of *Brown v. Board of Education*; about a former governor of Mississippi who opposed secession while serving in the Confederate Congress and spent the last decades of his life challenging Jefferson Davis to a duel and calling for an end to white supremacy; and about a civil rights lawyer who spent his dying days in an Alabama commune mourning the death of his daughter and spinning dreams of black liberation out of the cocoons of silkworms.

These characters – the nuns, the banker, the riverboat captain, the prophet, the confederate general, his grandson, the Mississippi governor, the sericulturist – are not principal players; they are supporting actors orbiting the story’s main characters: Daniel Galloway, a biracial Union veteran who was returned to slavery after the Civil War, and Malinda Brandon, a white girl made orphan in the time of cholera in Nashville, Tennessee, who, when of age, chose for a while to pass for Black. Here and there, the story turns to these secondary players because it is a story about race and slavery and, like black holes that cannot be seen but only sensed in the gravitational pull and superheated reflection they cast on nearby stellar matter, so too the central characters in race and slavery stories can often be seen only in the shadow they throw on those around them and the echo they leave behind.

Like all race and slavery stories, the story of David Galloway and Malinda Brandon cannot be told in a linear fashion; it toggles between past and present; time moves forwards so swiftly that small settlements become large cities overnight; it moves backwards so relentlessly that, like “boats against the current,” we are “borne back ceaselessly into the past.”⁴ And, again like most race and slave stories, the story of David and Malinda has gaps in it; people are born, live, and die barely leaving behind a public trace that they were here. But these leaps in time and these lapses in chronology are to be expected because “every historian of the multitude, the dispossessed, the subaltern, and the enslaved is forced to grapple with the power and authority of the archive and the limits it sets on what can be known, whose perspectives matters, and who is endowed with the gravity and authority of historical actor.”⁵

This “story takes place mostly during Reconstruction and to write about Reconstruction is to constantly imagine a series of counter-factual narratives and counter-constitutional doctrines: what the American

⁴ F. Scott Fitzgerald, *The Great Gatsby*

⁵ Saidiya Hartman, *Wayward Lives, Beautiful Experiments: Intimate Histories of Social Upheaval* xiii (2019).

constitutional experiment would have amounted to had Reconstruction been made to work, and the second founding not been killed off in its infancy: What would have been our modern conception of substantive rights had the Supreme Court not hollowed out the privileges and immunities clause in *Slaughterhouse*? Would *Plessy v. Ferguson*'s American apartheid have come to pass if the majority in the *Civil Rights Cases* had gone the way of Justice Harlan's dissent that the Reconstruction Amendments "established and decreed universal civil freedom throughout the United States"? Would Black political power have survived the racial terror campaign in former confederate states had the Court used *Cruikshank* to back federal prosecution of white violence?

These parallel universes, in which racial lynching is a crime serious enough to merit federal attention and the bare minimum of personhood is a black person eating unmolested at a lunch counter, often turn upon wayward opinions of federal judges, or the public pronouncements and private thoughts of those whose power and position guaranteed their words would be preserved and remembered.⁶ But, far from a mere theoretical alternative reality, that lost world was actually made real by the generation born in slavery, raised in the War, and formed in Reconstruction. These ordinary people - many were former enslaved persons and children of former enslaved persons - by the very example of their lives, by the very fact of their daily existence, sought to redefine the Constitution. They did not always succeed; indeed, more often than not, they were victims of, and witness to, the birth of

⁶ One of my favorite works in this "what-might-have-been" genre is *A Rift in the Clouds*, which examines the career of three white southern federal judges – Jacob Trieber of Arkansas, Emory Speer of Georgia, and Thomas Goode Jones of Alabama – and what the author characterizes as "their forgotten struggle for racial justice and civil right." Brent J. Aucoin, *A Right in the Clouds 2* (2007). Aucoin shows that, unlike their Reconstruction-era contemporaries, Trieber, Speer, and Jones tried to read the Reconstruction Amendments broadly. In *U.S. v. Morris*, 125, Fed. 322 (1933), Trieber ruled that the Thirteenth Amendment empowered Congress to protect black people from racial violence. In *U.S. v. McClellan*, Speer ruled that peonage was a form of slavery outlawed under the Thirteenth Amendment. *A Rift in the Clouds* at 45. And, in *Ex Parte Riggins*, 134 Fed. 304 (1907), Jones held that the Thirteenth and Fourteenth Amendments imposed an affirmative obligation on the federal government to protect black people from being lynched by whites. *A Rift in the Clouds* at 64. Aucoin does not sentimentalize them; he readily concedes that, as proponents of the New South Creed, the three advocated for the fair treatment of African-Americans but not for true equality. *A Rift in the Clouds* at 14. Rather, Trieber, Speer, and Jones were racial paternalists who believed that "the solution to the South's 'race problem' was for whites to treat blacks as parents treat their children, and for blacks to relate to whites as a child does a father." But, in the end, Aucoin's thesis is to imagine what might have been had the Supreme Court not "aided and abetted the southern counterrevolution." *A Right in the Clouds* at 90.

American Apartheid. And yet, they used their very bodies to enact citizenship⁷ and, in the process, they made real, even if only for a short while, and even if only at a terrible price, the lost world of Reconstruction we so often so fitfully try to reanimate using dissenting opinions by Justices who could not command a majority to their views, and the radical teachings of men and women who conceived of a second founding but upon whom the country has never seen fit to confer the title of founder.

Nearly three quarters of a century after the end of the Civil War, W.E.B. Dubois eulogized Reconstruction as a “splendid failure”⁸ – a failure because, with the North’s acquiescence, the South replaced “equality with caste”⁹; splendid because, in spite of it all, “back to the wall, outnumbered ten to one,” black people had fought “the battle of all the oppressed and all the despised humanity of every race and color, against the massed hirelings of Religion, Science, Education, Law, and brute force.”¹⁰ Perhaps with the benefit of hindsight, Dubois could clearly see then that which we can clearly see now: that from the start Reconstruction was fated to end in failure. And no doubt, Dubois was right that “if the Reconstruction of the Southern States, from slavery to free labor, from aristocracy to industrial democracy, had been conceived as a major national program of America, whose accomplishment at any price was well worth the effort, we should be living today in a different world.”¹¹ But the Reconstruction generation did not know - and could not have possibly known - that the odds had always been too decidedly against Reconstruction succeeding. Nor did they did know – nor could they have known – the different world DuBois imagined would remain beyond their reach. If Reconstruction is a story of splendid failure, so too it is a story of everyday people, by the simple ordinary acts of daily life, trying to build the “different world” Dubois would in time come to mourn.

David Galloway and Malinda Brandon were two ordinary everyday people during Reconstruction and this is one version of their story.

⁷ I take credit neither for the idea nor the phrase that the history of America is the story of black people using their bodies to enact citizenship; both the idea and the phrase belong to Peggy Cooper Davis, though she has yet to state as such in writing. Over the years, I’ve co-taught a seminar with Peggy at New York University School of Law, titled Critical Narratives in Civil Rights, in which her central message to students has always been the ways in which, from slavery to the modern civil rights movement, the lived experiences of Black people have been nothing less than a demonstration of the promises of the Constitution.

⁸ W.E.B. Dubois, *Black Reconstruction* 708 (1935)

⁹ *Id.* at 707.

¹⁰ *Id.* at 708

¹¹ W.E.B. Dubois, *Black Reconstruction* 798 (1935).

I

The Orphan and the Sisters of Charity of Nazareth

On February 22, 1727, twelve Catholic nuns from the Order of St. Ursula, accompanied by a delegation of Jesuits, left the port of L’Orient, France aboard the ship *La Gironde* bound for New Orleans, Louisiana on a mission to establish a convent and school in the French territory.¹² The youngest of the party, twenty-year old Marie Madeleine Hachard,¹³ wrote a farewell letter to her father, a bourgeois bureaucrat in nearby Rouen, describing the lower Mississippi Valley - a place to which she’d never been - as “the blessed country for which I long as if it were the Promised Land.”¹⁴

The crossing took five months. On July 23, the nuns landed at La Balize, a French fort and settlement at the mouth of the Mississippi River that would later become the site of Plaquemines Parish, Louisiana, home to Fort Jackson, the last confederate redoubt before the fall of New Orleans to the Union in the Civil War.¹⁵ At La Balize, they transferred to small boats for the final leg of their voyage up river to New Orleans, where they arrived the morning of August 6.¹⁶ Looking back over their nearly six-months journey from L’Orient to New Orleans, twelve nuns berthed together in a single small compartment, beset by storms, stalked by pirates, and nearly drowned by drunken sailors, Mother Superior Marie Tranchepain de St. Augustin, the leader of the expedition, who would pass away barely six years after arriving in New Orleans, ascribed their safe arrival to nothing less than divine providence.

Founded in 1535 in Brescia, Italy, and named for their patron Saint Ursula, the Ursulines took as their mission the education of girls and the care

¹² Maria Viatoria Schuller, *A History of Catholic Orphan Homes in the United States, 1727-1884* at 6 (1954), Dissertations. Paper 467. http://ecommons.luc.edu/luc_diss/467; Marion Ware, *An Adventurous Voyage to French Colonial Louisiana: The Narrative of Mother Tranchepain 1727*, *The Journal of the Louisiana Historical Society*, Vol. 1 No 3, 212, 214 (1960).

¹³ Emily Clark, *Voices from an Early American Convent: Marie Madeleine Hachard and the New Orleans Ursulines 1727-1760* at 22 (2007).

¹⁴ Emily Clark, *Voices from an Early American Convent: Marie Madeleine Hachard and the New Orleans Ursulines 1727-1760* at 22 (2007).

¹⁵ Schuller, *History of Catholic Orphan Homes* at 6.

¹⁶ Schuller, *History of Catholic Orphan Homes* at 6.

of the sick and needy.¹⁷ From Italy, the Order first spread to France and Belgium, then to Austria, Germany, Holland, Poland, and Great Britain, before establishing its first outpost in North America in 1639, where, for almost a century prior to their 1727 arrival in New Orleans, the Ursulines educated Native and French colonial girls in Quebec, Canada.¹⁸ New Orleans became the second outpost of the Ursulines in North America when the Company of the Indies, which had been granted monopoly over the Louisiana Territory by the French crown, entered into a contract for the nuns to take charge of the local hospital and open up a school.¹⁹ For their first two years in New Orleans, the Ursulines ran the first free day school in America and a boarding school for young women,²⁰ until 1729 when they accepted into their charge a large group of young girls made orphans after members of the Natchez native American nation on the night of November 28, 1729 attacked and killed nearly the entire French settlement at nearby Fort Rosalie.²¹

From their humble beginning, the Ursulines grew into a potent social and economic political force in New Orleans,²² and, like their neighbors, became slaveholders. They did so early and with little seeming compunction.²³ So, while the Jesuits accompanying Sister Tranchepain's nuns brought white skilled tradesmen to help them settle in New Orleans, Marie Madeleine Hachard, the young novice who'd so excitedly described Louisiana as the Promised Land, wrote in that very same letter to her father

¹⁷ Ettie Madeline Vogel, *The Ursuline Nun in America*, Records of the American Catholic Historical Society of Philadelphia, Volume 1 1884-81, page 214

¹⁸ Ettie Madeline Vogel, *The Ursuline Nun in America*, Records of the American Catholic Historical Society of Philadelphia, Volume 1 1884-81, page 214; Carol Mattingly, *Black Robes/Good Habits: Jesuits and Early Women's Education in North America* 116-118, collected in Gannet and Brereton, *Traditions of Eloquence: The Jesuits and Modern Rhetorical Studies* (2016).

¹⁹ Henry Churchill Semple, *The Ursulines of New Orleans and Our Lady of Prompt Succor: A Record of Two Centuries, 1725-1925* 69 (New York, 1925).

²⁰ Marion Ware, *An Adventurous Voyage to French Colonial Louisiana: The Narrative of Mother Tranchepain 1727*, *The Journal of the Louisiana Historical Society*, Vol. 1 No 3, 212, 214 (1960).

²¹ Sophie White, *Massacre, Mardi Gras, and Torture in Early New Orleans*, Vol. 70. No. 3 *The William and Mary Quarterly* 497, 501-02 (July 2013); Maria Viator Schuller, *A History of Catholic Orphan Homes in the United States, 1727-1884* at 11 (1954), Dissertations. Paper 467. http://ecommons.luc.edu/luc_diss/467

²² Emilie Clark, *Masterless Mistresses: The New Orleans Ursulines and the Development of a New World Society, 1727-1834* 208-09 (2007).

²³ Emilie Clark, *Masterless Mistresses: The New Orleans Ursulines and the Development of a New World Society, 1727-1834* 161-62 (2007).

that the nuns chose to bring their own black servant.²⁴ “Please do not be scandalized,” she wrote her father, “it is the custom of the country: we are taking a Moor to wait on us.”²⁵ By 1770, a little over forty years after their arrival in New Orleans, the Ursulines were in the top 6% of plantation slaveholders in the lower Mississippi valley.²⁶

For nearly a century, the Ursulines served as the only Catholic order in the Mississippi valley until 1829 when the Sisters of Charity, an American Order founded on the East Coast in 1809, arrived in New Orleans and, for a time, took over running the orphanage from the Ursulines. From New Orleans, the Sisters of Charity would go on to establish Catholic orphanages across the United States, including one in 1842 in Nashville, Tennessee.²⁷ There, they set up St. Vincent’s Orphan Asylum, an orphanage for young girls, where in 1850 lived seven nuns and seventeen orphans, including a 7-year old girl by the name of Malinda Brandon.²⁸

²⁴ Emily Clark, *Voices from an Early American Convent: Marie Madeleine Hachard and the New Orleans Ursulines 1727-1760* at __ (2007).

²⁵ *Id.*

²⁶ Emilie Clark, *Masterless Mistresses* at 169.

²⁷ *Id.* at 34. *The Catholic Advocate* of Nashville wrote the following line on September 15, 1842: “The Sisters of Charity arrived in our city on Thursday, the 25th of last month. These were the Sisters from Nazareth.”

²⁸ Malinda Brandon and the nuns of the Sisters of Charity appear on pages 145 and 146 of Schedule I of the Free Inhabitants in the City of Nashville in the County of Davidson for the State of Tennessee in the 1850 Census. The entry shows 7 nuns and 18 orphan girls between the ages of 4 and 14 years old. For a discussion of the Sisters of Charity’s orphanage work in Nashville, see Julia Gilmore, *Come North: The Life of Mother Xavier Ross, Foundress of the Sisters of Charity of Leavenworth* 32-33 (Mc. Mullen Books 1951). Malinda was probably made orphan by cholera. During the nineteenth century Tennessee suffered Cholera epidemics in 1834, 1849, 1873, and 1892. The disease hit Nashville between 1849 and 1850 where, among others, it claimed the life of former President James K. Polk. See William K. Bowling, *Cholera as It Appeared in Nashville in 1849, 1850, 1854, and 1866* 3-4 (1866) at <https://collections.nlm.nih.gov/ext/cholera/PDF/34720190R.pdf>

The image shows two pages of a historical document titled "SCHEDULE I - Free Inhabitants in the City of Nashville in the County of Davidson, State of Tennessee, enumerated by me, on the 1st day of October 1868." The document is a detailed tax assessment schedule. Each page contains a table with multiple columns, including names of property owners, their addresses, and assessed values for different categories of property. The tables are organized in a grid format with numbered rows and columns. The handwriting is in ink, and the paper shows signs of age.

II Malinda Brandon

The City the Sisters found when they arrived in Nashville in 1842 was still, in their own words, “a backwoods town.”²⁹ They had come to Nashville at the behest of Bishop Richard Pius Miles, whom Pope Gregory XVI assigned to minister the “spiritual desert” of Tennessee. At the time, there were no more than a hundred Catholic families scattered across the State³⁰ and Bishop Miles hoped the Sisters would help expand the diocese of Nashville.³¹ Over the next few years, the Sisters opened St. Mary’s Female Academy, a boarding and day school, St. Vincent’s Orphan Asylum for girls,³² an orphanage for young girls, and St. John’s Hospital, where Catholic orphan girls learned how to help the Sisters care for the sick according to the Sisters’ pedagogical philosophy of teaching discipline of mind and

²⁹ Come North at 34.

³⁰ Schuller, Mary Viatora, "A History of Catholic Orphan Homes in the United States, 1727 to 1884", (1954). Dissertations. Paper 467, p. 239, www.ecommons.luc.edu/luc_diss/467

³¹ Daniel, V.F., *The Father of the Church in Tennessee*, p. 26 (Cincinnati Pustet, 1926)

³² Schuller, Mary Viatora, "A History of Catholic Orphan Homes in the United States, 1727 to 1884", (1954). Dissertations. Paper 467, p. 239, www.ecommons.luc.edu/luc_diss/467

character.³³ To that end, the Sisters implemented strict rules, including the prohibition of reading fiction, which they believed to be damaging to a “vigorous mental culture” and led to “intellectual imbecility.”³⁴ In 1852, when a smallpox epidemic came to the City, the Sisters enlarged the orphanage in order to take in “children left parentless by the pestilence.”³⁵

Like the Ursulines of New Orleans, the Sisters of Charity kept Black people as slaves to perform menial tasks but, unlike the Ursulines, they did not derive an income from slavery.³⁶ Indeed, because the Sisters had virtually no independent income of their own, they and their orphan charges lived off the generosity of Nashville’s merchants: “Six mornings in the week two little girls went from the orphanage to the marketplace with a basket swinging between them. They made the rounds of the meat counters without a word spoken. Each meat vendor understood their errand and put a contribution into their basket.”³⁷ By the summer of 1858, the Sisters had fallen so deeply into debt that they had no choice but to sell the Academy and close the orphanage in order to repay their creditors.³⁸ Boarders with families were returned to their parents or guardians;³⁹ young orphan girls were placed with families, while others accompanied the Sisters to their new home in Kansas;⁴⁰ the rest, with no family and past the age to be taken in, went out on their own.⁴¹ So, at the close of 1858, Malinda Brandon, sixteen, still an orphan, no longer under the Sisters’ tutelage, was now on her own in Nashville.

³³ *Id.* at 35.

³⁴ *Id.*

³⁵ *Come North* at 63.

³⁶ Though incomplete, some of the records from the Sisters of Charity’s time in Nashville remain with the archives of the Catholic Diocese of Nashville. In those records, there is a letter from Sister Xavier Ross to a Sister Claudia on or about 1850-1851. The letter ends with “Best love to all the Sisters, Mother first, though she never thinks of me now. I wonder what I have done to her – remember me to Bell, Puss, and Lou.” An undated footnoted annotation to the letter states: “Bell, Puss, and Lou were slaves who had been sent from Nazareth to Nashville to assist the Sisters.”

³⁷ *Come North* at 56.

³⁸ *Id.*

³⁹ Schuller, *supra* at 245.

⁴⁰ *Id.* at 245.

⁴¹ *Id.*

Ellitt, Nashville, Tenn.
OLB-I, p. 126

1850 or 51? (Not dated but probably
Dec. 1850 or Jan. 1851)

40: Dear Sister Claudia,

If I had no more letters to write than you have, I would certainly write to you. Have you forgotten me so soon? I hear you have been (I mean the Sisters) sitting up with the dear Bishop. How pained I was to hear of his illness. He wrote me on my feast day telling me how unwell he had been ever since he returned home, but I thought it was only one of his bad colds. Since I hear that he has been dangerously ill. Do write to me and let me know how he is. How are you and all? I do not forget any of you. You, my dear Sister, do I remember every day with gratitude. You were always so kind to me when I was sick, I shall never have it in my power to repay you, but God will reward you for it was a real charity to be so kind and patient to one so weak and fretful.

I am strong now, still I have worn the handkerchief on my face nearly all winter. I am not as deaf as I was, but my miserable ears are ever aching if exposed to the least cold. How is Nannie and Kate and all? Give every one of the dear girls my best love and say "New Years Gift" to all for me. Best love to all the Sisters, Mother first, though she never thinks of me now. I wonder what I have done to her—remember me to Bell, Puss and Lou.

Pray for me every day,

Ever yours in Christ

Xavier (Ross)

I'll write to Sister Baptista in the course of a week.

Identifications

Sister Xavier Ross was writing from St. Vincent Orphan Asylum in Louisville. She had been SS. at Nashville from 1847-8/1850 when she was sent to Louisville and Mother Frances, who completed her 10th term of three years in 8/1850 was sent to Nashville as SS. The separation from Nazareth and the formation of a Diocesan Congregation was in the process. It was so far developed that Mother F. could do nothing to prevent it and she asked to be changed. Sister Xavier returned to Nashville in July 1851 and with five Sisters who chose to remain, formed the separate Congregation which eventually became the Sisters of Charity of Leavenworth (Kansas).

Bishop R.P. Viles was the 1st Bishop of Nashville. Sister Baptista Crancy was missioned in Nashville 1847-1851 and she joined the group which separated but returned to Nazareth 1/1853 after which she was known as Sister M. Julian or Julianna.

Nannie and Kate were probably orphans under the care of the Sisters in Nashville.

Bell, Puss, and Lou were slaves who had been sent from Nazareth to Nashville to assist the Sisters there.

Orphans
Nash
Slaves

III

The Invalid Soldiers of the 64th United States Colored Infantry

Nashville may have been in 1842, as the Sisters of Charity considered it, a backwoods town but it was then, and had been since its founding a half century prior, a multiracial community. In 1787, 105 black enslaved persons joined whites to form the settlement that would in time become Fort Nashborough on a western bluff overlooking the Cumberland River.⁴² From the start, along with enslaved people, who cleared trees, removed stones and boulders, and dug wells to raise Fort Nashborough, there also lived among white settlers free Black people.⁴³ By 1804, when the area surrounding Fort Nashborough became Davidson County, Blacks comprised 22 percent of the

⁴² Bobby L. Lovett, *The African-American History of Nashville, Tennessee, 1780-1930* 3 (1999).

⁴³ Lovett at 3-4

477 settlers.⁴⁴ Three years later the county had 677 of the 3,778 blacks living in the Tennessee territory, and by 1820 the county had 20,154 inhabitants, including 7,088 Black people, representing 35 percent of the population.⁴⁵ As the black population grew, so did the free Black middle class: “There were 18 free Negroes in Davidson County in 1791, 14 in 1800, and 130 by 1810. By 1820, some 70 free Negroes (nearly 40 percent of the county's total) lived in Nashville proper. Free Negroes represented 9 percent of Nashville's black population by 1830,” and 23 percent by the 1850s.⁴⁶ And, “[e]ven though they were merely persons who struggled to make a living in frontier Fort Nashborough, the early free blacks formed the foundation for an elite group of Negroes in the midst of an urban slave society.”⁴⁷ Nashville and surrounding Davidson County remained slave communities in the antebellum period. And, while unlike the Deep South “the separation of the races seemed more invisible than visible, more metaphysical than physical, and more psychological than social,”⁴⁸ prior to the war to be free and Black was to live under a constant cloud of suspicion such that two years before the war, a local newspaper maintained that “The free Negro population of this county, although it may contain worthy and meritorious individuals, is, as a class, corrupt, vicious, and degraded ” and “its evil influence upon the slave population is apparent to all who have given the subject any investigation.”⁴⁹

When War came, “Davidson County men voted 5,635 to 5,572 to separate but voted against representation in the Confederate States of America.”⁵⁰ The rest of the state broke along Union and Confederate lines with “Middle Tennessee white males vot[ing] by a 15,000-vote margin for separation from the United States,” and “east Tennesseans cast[ing] 70 percent of the state's 47,238 votes against secession” and later “conven[ing] the Greeneville Convention to denounce the illegal secession and propose a separate, loyal state.”⁵¹ As for Nashville, on June 18, 1861, “a large crowd witnessed the raising of the Confederate flag over the state capitol.”⁵² But the

⁴⁴ Lovett at 4.

⁴⁵ Lovett *The African-American History of Nashville* at 4.

⁴⁶ Lovett, *The African-American History of Nashville* at 4.

⁴⁷ Lovett, *The African-American History of Nashville* at 4.

⁴⁸ Lovett, *The African-American History of Nashville* at 7.

⁴⁹ Lovett, *The African-American History of Nashville* at 43

⁵⁰ Lovett, *The African-American History of Nashville* at 45

⁵¹ Lovett, *The African-American History of Nashville* at 45; see also Charles F. Bryan, Jr., *A Gathering of Tories: The East Tennessee Convention of 1861*, Volume 39, No. 1 *Tennessee Historical Quarterly* 27 (1980).

⁵² Lovett, *The African-American History of Nashville* at 45

confederacy did not hold the city for long. The Confederate Army of Tennessee had planned to supplement its ranks by having owners volunteer their slaves as support workers but few owners complied, even after the General Assembly authorized “a military labor draft for free Negro males between the ages of fifteen and forty-five.” As for Tennessee’s free blacks, most men of military age successfully escaped forced confederate military conscription.⁵³ Less than a year, after the confederate flag flew over the state capital, on February 25, 1862, “the 6th Ohio Volunteers' regimental band marched from the gunboat Diana and up Broad Street, playing a triumphant song, Hail Columbia” and replaced it with the Union Flag.⁵⁴

At first, the Union army that took over the city organized the city’s black population into military-like labor battalions, including black women “who washed clothes, cooked food, nursed the wounded, worked in officers' homes, and handled wagons and wheelbarrows on large construction projects.”⁵⁵ But, a year after union forces marched into Nashville, on May 22, 1863, the United States War Department issued General Order Number 143 establishing a specialized bureau to organize black enlisted troops⁵⁶ Infantrymen were accepted in companies, and then consolidated into battalions and regiments.⁵⁷ The Adjutant General numbered their unit by the order of their acceptance.⁵⁸ Their formal designation became the United States Colored Troops, or USCTs.⁵⁹ Altogether, close to 180,000 black soldiers served in the Union Army⁶⁰ and another 29,000 served in the Navy,⁶¹ including at least 80 commissioned officers.⁶² Black troops accounted for

⁵³ Lovett, *The African-American History of Nashville* at 45

⁵⁴ Lovett, *The African-American History of Nashville* at 49

⁵⁵ Lovett, *The African-American History of Nashville* at 51

⁵⁶ John David Smith, *Black Soldiers in Blue, African American Troops in the Civil War Era*, 259 (2002).

⁵⁷ *Id.*; National Archives, *Black Soldiers in the U.S. Military During the Civil War* at <https://www.archives.gov/education/lessons/blacks-civil-war>

⁵⁸ William A. Dobak, *Freedom by the Sword* 11

⁵⁹ John David Smith, *Black Soldiers in Blue, African American Troops in the Civil War Era*, 259 (2002).

⁶⁰ *Freedom Soldiers: The Black Military Experience in the Civil War 16-17* (1998) (edited by Ira Berlin, Joseph Reidy, Leslie Rowland)

⁶¹ National Archives, *Black Soldiers in the U.S. Military During the Civil War* at <https://www.archives.gov/education/lessons/blacks-civil-war>

⁶² National Archives, *Black Soldiers in the U.S. Military During the Civil War* at <https://www.archives.gov/education/lessons/blacks-civil-war>. See also John Blassingame, *The Selection of Officers and Non-Commissioned Officers of Negro Troops in the Union Army, 1863-1865*, Volume 30, No. 1, *Negro History Bulletin* 8, 10 (1967) (“[T]he seventy-

nearly 10 percent of all Union forces and 68,178 of the Union dead or missing.⁶³ They served in artillery and infantry and also performed noncombat roles, including carpenters, chaplains, cooks, guards, laborers, nurses, scouts, spies, steamboat pilots, and surgeons.⁶⁴ Black women could not formally join the Army but served as nurses, spies, and scouts, the most famous being Harriet Tubman three-fifths of all black troops were former slaves, who scouted for the 2d South Carolina Volunteers.⁶⁵ Three-fifths of all black troops were former slaves.⁶⁶

In Tennessee, between 1863 and 1865 the United States Colored Troops (U.S.C.T.) experienced every facet of war. In the spring of 1863, Brigadier General Lorenzo Thomas, appointed Commissioner for the Organization of Colored Troops in Tennessee, began raising black regiments in Memphis and had 3,000 troops by June.⁶⁷ At first, these regiments were designated by state and race, such as the First Tennessee Volunteers infantry regiment, A.D. (African Descent). But in the spring of 1864 the Union army began to group Tennessee black troops into numbered regiments; among them was the 64th United States Colored Infantry. First organized on December 1, 1863 under the designation of 7th Louisiana Infantry (AD) in Memphis Tennessee, and Hollis Springs Mississippi,⁶⁸ the 64th was classified as invalid as it was “composed of men unfit for field service but sufficiently healthy to stand guard over contraband camps, plantations, warehouses full of government supplies, and wood yards.”⁶⁹ While the Union Army designated white soldiers wounded in battle as “invalids” and organized them into a Veterans Reserve Corps, it deliberately signed up black men for duty who had been rejected by medical examiners; such was

four Negro officers of the First, Second, and Third Louisiana Native Guards,... actually led their men into combat. Furthermore, eight Negro surgeons and twelve Negro chaplains were commissioned during the War.”)

⁶³ National Archives, Black Soldiers in the U.S. Military During the Civil War at <https://www.archives.gov/education/lessons/blacks-civil-war>.

⁶⁴ National Archives, Black Soldiers in the U.S. Military During the Civil War at <https://www.archives.gov/education/lessons/blacks-civil-war>

⁶⁵ National Archives, Black Soldiers in the U.S. Military During the Civil War at <https://www.archives.gov/education/lessons>

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⁶⁷ Freedom by the Sword at 102; Noah Andre Trudeau, *Like Men of War: Black Troops in the Civil War 1862-1865* 47, 59 (1998);

⁶⁸ Freedom by the Sword at 179.

⁶⁹ Freedom by the Sword at 246, 385.

the case for the 64th.⁷⁰ Over the course of the war, the 64th served along the Mississippi River, from Memphis to Natchez, guarding forts and railroads from guerilla raids.⁷¹ They also protected and helped maintain freed people's settlements on former plantations, including a settlement at Davis Bend, Mississippi the site of two plantations – Hurricane Plantation and Brierfield Plantation – that belonged to Jefferson Davis and his brother Joseph.⁷² In Tennessee, Black fighting regiments mustered out of service as early as April 1865; black invalid regiments like the 64th continued for another year to perform police duties both on plantations, where, under the direction of the Freedmen's Bureau, former enslaved persons were now expected to work for wages for their old masters,⁷³ as well in cities where black people settled as they fled slavery on nearby plantations, including Memphis, Chattanooga, Knoxville, and Nashville.⁷⁴ On or about March 13, 1866, soldiers of the 64th mustered out in Nashville;⁷⁵ among them was a Private named David Galloway.⁷⁶

⁷⁰ Freedom by the Sword at 246

⁷¹ Freedom by the Sword at 385.

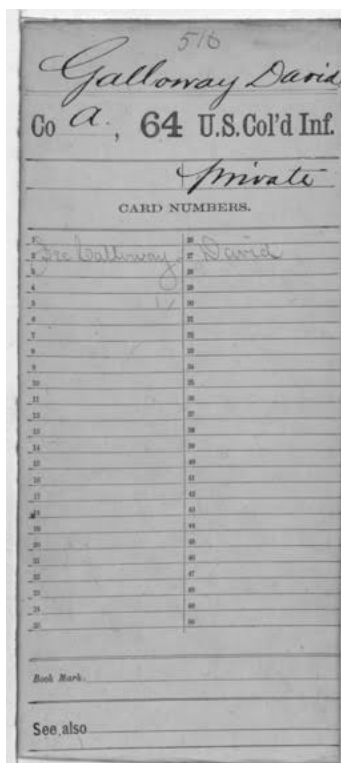
⁷² Joan E. Cashin, *First Lady of the Confederacy: Varina Davis's Civil War* 37 (2006).

⁷³ Freedom by the Sword at 465

⁷⁴ Freedom by the Sword at 499-500.

⁷⁵ Freedom by the Sword at 474.

⁷⁶ Army records show that David Galloway was a Private in Company A in the United States Colored Infantry, 64th Regiment. See <https://www.nps.gov/civilwar/search-soldiers-detail.htm?soldierId=F6F6DB9F-DC7A-DF11-BF36-B8AC6F5D926A>



IV

The Preacher and the Brothels of Smoky Row

David was about twenty-six years old when he settled in Nashville after his discharge from the army.⁷⁷ He'd been born into slavery between

⁷⁷ David was first incarcerated in the Tennessee Penitentiary in January 1872. In the archives of the Penitentiary Records, David's entry appears in Volume XX- Convict Records: State Penitentiary, Nashville, TN, Book XX 1877-882 Slide 1072, Roll Number RG25-25. The entry lists him as forty-years old in January 1872 and notes that he was born in Columbia, Tennessee. The Slave Schedule for the 1850 Census for Maury County, Tennessee shows the Galloway family as owning three enslaved persons: two females, age of twenty-two and fourteen respectively, and one male, age 14. That young enslaved boy was in all likelihood David; his age of 14 in 1850 and 42 in 1872 falls within the range of him having been born at some point between 1830 and 1835. Slave schedules at the time rarely included the names of enslaved persons but only their gender and age, though they were often imprecise about an exact age. David's 1872 penitentiary record also remarks that at the time of his imprisonment he had a scar on his forehead "from a fractured skull." That's consistent with him having been enlisted in the 64th United States Colored Infantry, which comprised of Black men who had been rejected by medical examiners but were recruited for garrison and other guard duties.

1830 and 1835 in Columbia, the county seat of Maury County, Tennessee.⁷⁸ His owners, from whom he inherited his last name, were the Galloways, a planter family with three hundred acres of land.⁷⁹

For a while after the army, David made a living as a laborer, working for local white landowners. During the war, Nashville's council had authorized local police to act as slave catchers to apprehend runaway slaves and hold them in jail and work crews until their masters could reclaim them.⁸⁰ When the Union army took over the city, it used runaway slaves as laborers to support union forces.⁸¹ Once the war ended, the black population in Nashville, as with many urban centers around the state, nearly tripled in size.⁸² The local Freedmen Bureau adopted a policy of forcibly relocating black people from the city to nearby farms and plantations, where they were now expected to work for wages. In October 1865, the Bureau relocated as many as four thousand blacks from Nashville;⁸³ the Bureau even permitted white farmers to pay off the fines of black people, who had been detained for one reason or another, and take them back to plantations where they worked off the amount that had been paid to free them. The Bureau's objective was less the welfare or political empowerment of newly freed people than reducing unemployment in urban areas and reviving the agricultural economy

⁷⁸ The Agricultural Census for Maury County, Tennessee shows Thomas Galloway as the owner of 80 acres of improved agricultural lands and 56 acres of unimproved land, and F[rancis]. M[arion]. Galloway as the owner of 60 acres of improved agricultural land and 106 acres unimproved. The 1850 Census shows Thomas Galloway, then sixty years old, as being married to Margaret Galloway, fifty-years old. Their son, Francis Galloway, twenty-seven years old, lived next door, and was himself married with two children of his own. 1850 Census, Schedule I, Free Inhabitants in District 9, in the County of Maury, State of Tennessee. On Page 8 of the 1850 slave schedule for Maury County, Tennessee, the Galloway family is listed as owning one male slave of approximately 13 years of age. The 1860 Slave Schedule for Maury County lists Thomas Galloway as owning 7 enslaved persons, ranging from ages 50 to as young as 4. Three other members of the Galloway family, including Francis and Marion, appeal to own 5 persons.

⁷⁹ The Agricultural Census for Maury County, Tennessee shows Thomas Galloway as the owner of 80 acres of improved agricultural lands and 56 acres of unimproved land, and F[rancis]. M[arion]. Galloway as the owner of 60 acres of improved agricultural land and 106 acres unimproved. The 1850 Census shows Thomas Galloway, then sixty years old, as being married to Margaret Galloway, fifty-years old. Their son, Francis Galloway, twenty-seven years old, lived next door, and was himself married with two children of his own. 1850 Census, Schedule I, Free Inhabitants in District 9, in the County of Maury, State of Tennessee

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⁸² Lovett, *The African-American History of Nashville* at 72.

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of nearby farms.⁸⁴ And indeed, the Bureau’s policy brought into conflict black people beginning to exercise full citizenship and white elites determined to keep them in as close to a state of slavery as possible. This conflict played out in the August 1867 election when black Nashville residents overwhelmingly voted for the radical republican ticket, while white Nashville supported conservative candidates.⁸⁵ While many conservatives initially denounced secession during the war, they did not necessarily approve of black emancipation and, in any event, certainly opposed Reconstruction.⁸⁶ Following the August 1867 election, white landowners retaliated against Black laborers for voting the radical ticket by firing them from their jobs; David was among those fired.⁸⁷

David and Malinda met in Nashville in or about 1868 and started living together soon after. In the 1870 census they reported themselves as part of the same household with Malinda listing herself as black and sharing David’s last name.⁸⁸ In June 1872, the two were arrested for violating an 1857 statute, outlawing interracial co-habitation, and an 1870 constitutional amendment banning interracial marriage. Three months later, on September 26, 1872, a Nashville grand jury indicted them for living together and being married. The indictment charged David, “a mulatto man,” and Malinda, a white woman, for “knowingly, willfully, unlawfully, and feloniously” marrying, and for “unlawfully and feloniously liv[ing] and cohabit[ing] together as man and wife, dividing and intruding the morals of the good citizens of the aforesaid county to debauch and corrupt contrary to the statute and against the peace and dignity of the State.”⁸⁹

⁸⁴ Lovett, *The African-American History of Nashville* at 72.

⁸⁵ Lovett at 210; Ben H. Severance, *Reconstruction Power Play: The 1867 Mayoral Election in Nashville Tennessee*, collected in *Sister States, Enemy States: The Civil War in Kentucky and Tennessee* 320 (2009).

⁸⁶ Ben H. Severance, *Reconstruction Power Play* at 321.

⁸⁷ White landowners firing black people for voting in Radical Republicans wasn’t limited to Nashville and Davidson county but was a fairly common occurrence nationwide. See, *New York Dispatches, Nashville Union and American*, November 3, 1867 (“Two hundred and thirty-seven negroes have reported to the Freedmen’s Bureau in Richmond [Virginia] as having been discharged by their employers for voting the Radical Ticket.”)

⁸⁸In the 1870 census, David and Malinda appear on lines 2 and 3. They are both listed as black. His age is listed as 34 or 39, which would place his date of birth at either 1836 or 1831. Her age is listed as 25, which would place her date of birth at 1845.

⁸⁹ Transcript

Page No. 38 } No. 17 is not to be asked in regard to infants. (Laplines numbered 11, 12, 13, 14, 15, 16, 17, 18, and 19 are to be answered if at all nearly by an affirmative mark, as /.)

SCHEDULE I.—Inhabitants in Madison, in the County of Madison, State of Tennessee, enumerated by me on the 25th day of June, 1870.

Post Office: Madison June 1870 Chas. S. Lamb Asst. Marshal.

1	2	3	4				7	8		10	11					18	19	20
			5	6	7	8		9	11		12	13	14	15	16			
Name, sex, age, color, and whether head of family			Profession, Occupation, or Trade of each person, male or female				Place of Birth, stating State or Territory of U. S., or the County, if of foreign birth	Color of eyes	Color of hair	Color of skin	Whether deaf and dumb, blind, insane, or idiotic	Whether pauper	Whether insane	Whether idiotic	Whether deaf and dumb	Whether blind	Whether insane	Whether idiotic
249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267
268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286
287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305
306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324
325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343
344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362
363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381
382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400
401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419
420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438
439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457
458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476
477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495
496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514
515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533
534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552
553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571
572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590
591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609
610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628
629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647
648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666
667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685
686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704
705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723
724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742
743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761
762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780
781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799
800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818
819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837
838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856
857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873	874	875
876	877	878	879	880	881	882	883	884	885	886	887	888	889	890	891	892	893	894
895	896	897	898	899	900	901	902	903	904	905	906	907	908	909	910	911	912	913
914	915	916	917	918	919	920	921	922	923	924	925	926	927	928	929	930	931	932
933	934	935	936	937	938	939	940	941	942	943	944	945	946	947	948	949	950	951
952	953	954	955	956	957	958	959	960	961	962	963	964	965	966	967	968	969	970
971	972	973	974	975	976	977	978	979	980	981	982	983	984	985	986	987	988	989
990	991	992	993	994	995	996	997	998	999	1000	1001	1002	1003	1004	1005	1006	1007	1008
1009	1010	1011	1012	1013	1014	1015	1016	1017	1018	1019	1020	1021	1022	1023	1024	1025	1026	1027
1028	1029	1030	1031	1032	1033	1034	1035	1036	1037	1038	1039	1040	1041	1042	1043	1044	1045	1046
1047	1048	1049	1050	1051	1052	1053	1054	1055	1056	1057	1058	1059	1060	1061	1062	1063	1064	1065
1066	1067	1068	1069	1070	1071	1072	1073	1074	1075	1076	1077	1078	1079	1080	1081	1082	1083	1084
1085	1086	1087	1088	1089	1090	1091	1092	1093	1094	1095	1096	1097	1098	1099	1100	1101	1102	1103
1104	1105	1106	1107	1108	1109	1110	1111	1112	1113	1114	1115	1116	1117	1118	1119	1120	1121	1122
1123	1124	1125	1126	1127	1128	1129	1130	1131	1132	1133	1134	1135	1136	1137	1138	1139	1140	1141
1142	1143	1144	1145	1146	1147	1148	1149	1150	1151	1152	1153	1154	1155	1156	1157	1158	1159	1160
1161	1162	1163	1164	1165	1166	1167	1168	1169	1170	1171	1172	1173	1174	1175	1176	1177	1178	1179
1180	1181	1182	1183	1184	1185	1186	1187	1188	1189	1190	1191	1192	1193	1194	1195	1196	1197	1198
1199	1200	1201	1202	1203	1204	1205	1206	1207	1208	1209	1210	1211	1212	1213	1214	1215	1216	1217
1218	1219	1220	1221	1222	1223	1224	1225	1226	1227	1228	1229	1230	1231	1232	1233	1234	1235	1236
1237	1238	1239	1240	1241	1242	1243	1244	1245	1246	1247	1248	1249	1250	1251	1252	1253	1254	1255
1256	1257	1258	1259	1260	1261	1262	1263	1264	1265	1266	1267	1268	1269	1270	1271	1272	1273	1274
1275	1276	1277	1278	1279	1280	1281	1282	1283	1284	1285	1286	1287	1288	1289	1290	1291	1292	1293
1294	1295	1296	1297	1298	1299	1300	1301	1302	1303	1304	1305	1306	1307	1308	1309	1310	1311	1312
1313	1314	1315	1316	1317	1318	1319	1320	1321	1322	1323	1324	1325	1326	1327	1328	1329	1330	1331
1332	1333	1334	1335	1336	1337	1338	1339	1340	1341	1342	1343	1344	1345	1346	1347	1348	1349	1350
1351	1352	1353	1354	1355	1356	1357	1358	1359	1360	1361	1362	1363	1364	1365	1366	1367	1368	1369
1370	1371	1372	1373	1374	1375	1376	1377	1378	1379	1380	1381	1382	1383	1384	1385	1386	1387	1388
1389	1390	1391	1392	1393	1394	1395	1396	1397	1398	1399	1400	1401	1402	1403	1404	1405	1406	1407
1408	1409	1410	1411	1412	1413	1414	1415	1416	1417	1418	1419	1420	1421	1422	1423	1424	1425	1426
1427	1428	1429	1430	1431	1432	1433	1434	1435	1436	1437	1438	1439	1440	1441	1442	1443	1444	1445
1446																		

1857, this time rendering it a criminal misdemeanor for such unions to take place,⁹² and finally in 1870, making these marriages a felony punishable by up to five years in the state penitentiary. The 1870 felony statute was enacted to enforce a provision of the 1870 Tennessee Constitution, stating that “the intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation, inclusive, or their living together as man and wife, in this State is prohibited.” That provision would not be repealed until 1977.

While awaiting trial, the two were incarcerated in Nashville’s workhouse, the local county jail.⁹³ Authorized by statute in 1855⁹⁴ and erected in 1858,⁹⁵ the Nashville work-house was a pauper’s prison where the city incarcerated people who could not afford or refused to pay fines associated with minor convictions.⁹⁶ Once incarcerated, prisoners were required to discharge their fines by working for seventy-five cents a day;⁹⁷ fifty-cents per day was added to the original fine for each day an inmate refused or was unable to work.⁹⁸ The work-house also housed slaves and mules and carts used by the City to clean mud, animal waste, and other refuse from the streets.⁹⁹ More than century after it first opened the work-house

⁹² Byron Curti Martin, *Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation* at 324-25 (1975)

⁹³ An article dating from October 15, 1874 in the *Nashville Union and American*, recounts the case by noting that David spent ten months in the workhouse for miscegenation before marrying Malinda and then married her after he was released. *See Miscegenation*, *Nashville Union and American* October 15, 1874, page 4. That’s most likely incorrect. David received a 10-month sentence in the workhouse beginning in November 1870 for assault, larceny, and lewdness. He was released on or about April 1871 and subsequently married Malinda approximately 4 months later on August 28, 1871. David’s ten-month sentence most likely involved Malinda, as she too was sentenced on the same day to twenty days in the workhouse for lewdness. David and Malinda lived together and, even though not yet married, listed themselves in the 1870 Census as one household and sharing the same last name of Galloway. So, it is likely that the circumstances of their November 1870 arrest and sentence to the workhouse grew out of their living together. That said, the 1870 prosecution wasn’t for miscegenation.

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⁹⁵ Charles Edwin Robert, *Nashville City Guide Book* (1880).

⁹⁶ James E. Rains, *A Compilation of the General Laws of the City of Nashville: Together with the Charters of the City, Granted by the States of North Carolina and Tennessee, and a List of the Chief Officers of the Municipal Government of Nashville, in Each Year from 1806 to 1860* (1860), p. 141.

⁹⁷ *Id.*

⁹⁸ *Id.* at 142.

⁹⁹ ⁹⁹ *Id.* at 143

was still in operation when, in 1960, the City arrested hundreds of young students staging sit-ins at Nashville lunch counters and department stores in protest against racial segregation.¹⁰⁰ The Nashville sit-ins, which protesters described as a new language aimed at expressing “the dissatisfaction and anger of the black community toward white indifference”¹⁰¹ helped to catalyze student protests throughout the South.¹⁰² Convicted of disorderly conduct and fined \$50, the students refused to pay; they were sentenced to 33 days in the work-house, where they were put on work detail shoveling snow from the streets.¹⁰³

David and Malinda married on August 28, 1871, after obtaining a valid marriage license two days prior on August 26, 1871. A preacher named Armstead Shelby, performed the ceremony late one evening in a house in west Nashville.¹⁰⁴ Years later, after David and Malinda had been convicted and David’s lawyers were litigating habeas petitions to obtain his release, Shelby, would claim in a newspaper interview that he had never met David or Malinda before marrying them that evening and had not seen them again since, that it was so dark in the room during the ceremony he could hardly see David and Malinda’s faces, and that for all he knew Malinda was just one of the many light-skinned black women walking around Nashville at the time:

“That man Galloway came to me after dark one night and said he wanted me to perform a marriage ceremony at a house in West Nashville. I went in to the room, which was so dark that I couldn't see the parties very well, but I saw the woman was a yaller woman, but then she mout a bin a white woman. I was there 'bout five minutes, I never saw the man or woman afore nor since... but the fact is I didn't pay much attenshun to either of 'em. You know there's some mighty white colored people in Nashville, and as to there bein' any trouble about it, thought the man what made out the licenses fixed them things.”¹⁰⁵

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¹⁰¹ Eduardo Moises Penalver & Sonia K. Katyal, *Property Outlaws, How Squatters, Pirates, and Protesters Improve the Law of Ownership* 65 (2010).

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¹⁰³ *Nashville Then: 1960 Civil Rights Movement in Nashville*, THE TENNESSEAN, <https://www.tennessean.com/picture-gallery/news/2017/02/06/nashville-then-1960-civil-rights-movement-in-nashville/97558166/>.

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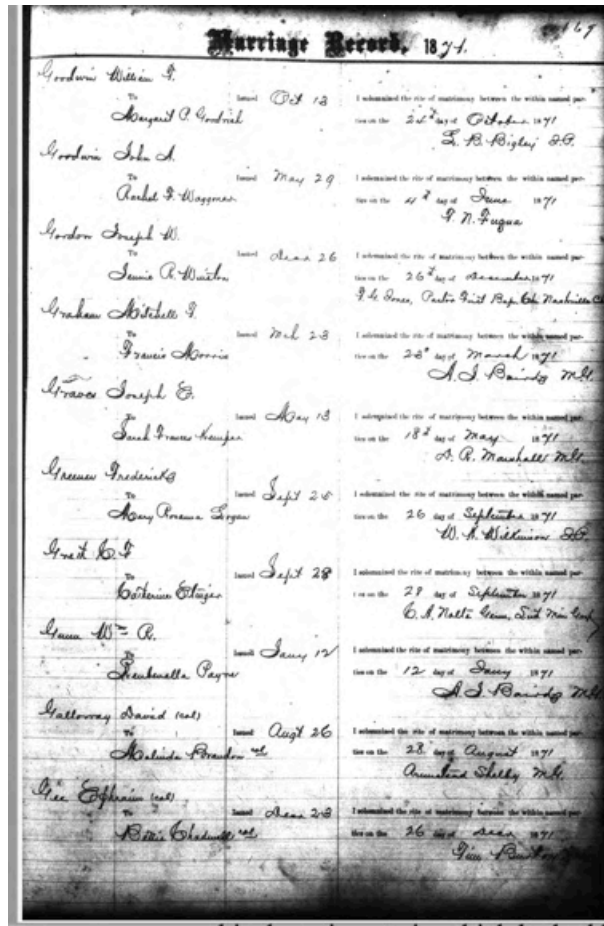
¹⁰⁵ *Galloway’s Bride: Nuptials that Sent a Man and Brother to the Penitentiary*, Nashville Union and American, Friday, may 1, 1874.

Shelby was a preacher, a cook and, a whitewasher.¹⁰⁶ He was also a civil rights activist, standing as one of twenty-five delegates who represented Davidson County in the 1871 Tennessee’s Colored State Convention that met over four days in Nashville between February 22 and 25, 1871, barely six months before Shelby would marry David and Malinda.¹⁰⁷ Among other things, the Convention reported on the poor funding for public schools, racial discrimination in public accommodation, the use of black codes to keep blacks in a state of near slavery, and violent campaigns by the Ku Klux Klan, the White Brotherhood and other terrorist organizations. The Convention resolved to demand from the state and federal government equal access to higher education for black people, the establishment of a national public school system, protection for organized labor, and federal leasing of land to black people to help them achieve economic independence.

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<https://omeka.coloredconventions.org/files/original/9bc74455b84cdc7fbbd6caaaa0872a65.pdf>



The evening he married David and Malinda, Shelby lived on Market Street (now First Avenue) near Nashville’s Cumberland River waterfront.¹⁰⁸ That area, known as Smoky Row, the site of city’s first settlements and now a wealthy tourist destination and luxury condominium developments,¹⁰⁹ was for a time Nashville’s Red Light District and came to operate legally during the Civil War, though it predated the war.¹¹⁰ For much of its history, the City barely regulated prostitution. In early November of 1854, Nashville’s Board of Aldermen passed an ordinance requiring two-weeks-notice be given "to occupants of houses of ill fame, or to owners of houses rented to occupants

¹⁰⁸ See 1870, 1873, 1879 Nashville Street Directory.

¹⁰⁹ The Nashville Downtown Partnership, a nonprofit corporation with the mission of promoting the riverfront neighborhood that used to include Smoky Row, describes the area as “the compelling urban center in the Southeast in which to live, work, play, and invest.” See Nashvilledowntown.com/about

¹¹⁰

of ill fame" prior to their removal. A few months later, in January 1855, the Board followed up with ordinance that made the advertisement of prostitution but not the act itself illegal. The ordinance made it “a penal offense for Lewd Women to expose their persons at their front doors or to use vulgar language to persons passing by.”¹¹¹

But, these laws notwithstanding, prostitution continued to thrive in the city such that by 1860, there lived in Nashville at least 207 sex workers who operated openly enough to be recorded as such in the federal census. When the War began and the Union captured Nashville, the city went from a population of around 17,000 in 1860 to nearly 26,000 by 1870.¹¹² The increased presence of Union troops also brought an increase in prostitution. In 1862 the number of female sex workers in Nashville was over 1,500. At least 8.2 percent of Union troops would be infected with syphilis or gonorrhea before war’s end—nearly half the battle-injury rate of 17.5 percent.¹¹³ In July 1863, Major General William Rosecrans, leader of the Union Army of the Cumberland ordered the Nashville Provost General, Lieutenant George Spalding, to “without loss of time seize and transport to Louisville all prostitutes found in the city or known to be here.”¹¹⁴ Spalding commandeered the *Idahoe*, a brand new luxury passenger riverboat, placed over approximately 111 sex workers women on board and directed its captain to take the women to Louisville, Kentucky.¹¹⁵ The *Idahoe* left Nashville on July 8, 1863,¹¹⁶ and arrived week later in Louisville, but city officials refused

¹¹¹

¹¹² Between 1860 and 1870, the population of Davidson county grew by ___ percent, from 47,055 to 62,897. The 1860 Census reported the White population of Davidson County at 31,056, the “free Colored” at 1,209, and the slave population at 14,790. By 1870, Whites numbered 37,468, and “Free Colored, 25412. In Nashville proper saw similar increases. See <https://www2.census.gov/library/publications/decennial/1940/population-volume-1/33973538v1ch09.pdf> There, the African American population nearly tripled between 1860 and 1870, representing nearly 40% of the city’s total population. See Gabriel A. Briggs, *The New Negro in the Old South* 36 (2015).

¹¹³ Angela Serratore, *The Curious Case of Nashville’s Frail Sisterhood*, *Smithsonian Magazine*, July 8, 2013 at <https://www.smithsonianmag.com/history/the-curious-case-of-nashvilles-frail-sisterhood-7766757/>

¹¹⁴ Mary Elizabeth Massey, *Women in the Civil War*, 77 (1966).

¹¹⁵ *Id.*

¹¹⁶ *Nashville Dispatch* July 9, 1863:

Yesterday [8th] a large number of women of ill-fame were embarked upon three or four steamers, and transported northward. The number has been estimated at from one thousand to fourteen hundred—probably five or six hundred would near the mark. Where they are consigned to, we are not advised, but suspect the authorities of the city in which they landed will

to let the women disembark and instead directed the Captain to take them to Cincinnati, Ohio.¹¹⁷ Cincinnati too refused to take them in, forcing the Captain to anchor the ship for two weeks at Newport, Kentucky across the river.¹¹⁸ Finally, unable to find a port that would take the women in, and running out of rations, the Captain sailed back to Nashville, where the women disembarked and presumably resumed their profession on Smoky Row.¹¹⁹

A year before the War began, of the 207 women who recorded their profession as “prostitute” in the 1860 Census, 205 were white; 2 were listed as “Mulatto”; none were recorded as “Black” or “Negro.”¹²⁰ When the *Idahoe* sailed away from Nashville, all 111 women on board were white. At least one Nashville newspaper soon complained that, far from eliminating

feel proud of such an acquisition to their population. We hope the commanding officer will issue an order as soon as possible, ordering off all contraband prostitutes -- they contribute considerably more toward the demoralization of the army than any equal number of white women, and certainly have no more claims upon our sympathy.

¹¹⁷ Angela Serratore, The Curious Case of Nashville’s Frail Sisterhood, *Smithsonian Magazine*, July 8, 2013 at <https://www.smithsonianmag.com/history/the-curious-case-of-nashvilles-frail-sisterhood-7766757/>

¹¹⁸ *Id.*

¹¹⁹ All in all, the *Idahoe* sailed for over thirty days on its maiden, and ultimately last, voyage as a luxury passenger riverboat. With his vessel berthed at various ports, the Captain, a skeleton crew of 4 and no soldiers at his disposal, was powerless to stop men from coming on board to patronize the prostitutes. On his return to Nashville, he submitted a bill to federal authorities for \$1,000 for damages to furniture caused by the women and their customers and \$4,300 for purchases of food “and medicines peculiar to the diseases of women in this class.” When army authorities balked at reimbursing him, the Captain, John Newcomb, wrote directly to the Secretary of War. Captain Newcomb, reminding Stanton he had not taken on the task willingly and the reputation of his boat a luxury passenger vessel had been irreparably ruined: “I protested against their putting these women on my boat. She being a new boat, only three months built, her furniture new, and a fine passenger boat. I told them it would forever ruin her reputation as a passenger boat if they were put upon her. (It has done so. She is not and has since been known as the floating whore house.” He noted that before leaving Nashville, he’d asked but been refused soldiers to help guard the women and as a result could not stop unruly customers at various ports from coming on board: “When leaving Nashville I applied for a guard to be put on board. Gen. Morgan told me I did not need any, but to take charge of them myself. Having no guard I could not keep men along the route from coming on board to these women, when at anchor, and being angered because I strove to drive them away both themselves and these bad women destroyed and damaged my boat and her furniture to a great extent.” Eventually, Secretary Stanton arranged to have Captain Newcomb’s \$6,000 bill paid.

¹²⁰ David Kaser, Nashville’s Women of Pleasure in 1860, Vol. 23 No. 4 *Tennessee Historical Quarterly* 379, 380 (December 1964).

prostitution in the City, authorities had merely created a market for black women to fill the absence of white women:

The sudden expatriation of hundreds of vicious white women will only make room for an equal number of negro strumpets. Unless the aggravated curse of lechery as it exists among the negresses of the town is destroyed by rigid military or civil mandates, or the indiscriminate expulsion of the guilty sex, the ejection of the white class will turn out to have been productive of the sin it was intended to eradicate.¹²¹

Once the Idahoe returned, Rosencrans and Spalding gave up any effort of exiling them; instead, they essentially legalized prostitution in Nashville. Female sex workers were required to submit to regular medical exams; they received a license or certificate of good health, and were provided access to a specialized hospital when they needed treatment.¹²² When the war ended and civilian authorities regained control of the city, Nashville abandoned the experiment but, while it lasted, legalization worked to reduce the incidence of venereal disease among union troops stationed in the city.¹²³

During and after the war, the dozens of brothels of Smoky Row were “located in a quarter only two blocks wide and four blocks long.”¹²⁴ That quarter consisted of “the first block north and the first block south of Spring (now Church) Street, on Front, Market, College, and Cherry (now First, Second, Third, and Fourth Avenues) Streets.”¹²⁵ Among the brothels of Smoky Row was one run by a man named Joseph Overby, who lived there

¹²¹ See Angela Serratore, *The Curious Case of Nashville’s Frail Sisterhood*, *Smithsonian Magazine*, July 8, 2013 at <https://www.smithsonianmag.com/history/the-curious-case-of-nashvilles-frail-sisterhood-7766757/>

¹²² Jeannine Cole, *Upon the Stage of Disorder: Legalized Prostitution in Memphis and Nashville, 1863-1865*, Volume 68, No 1. *Tennessee Historical Quarterly* 40, 47 (Spring 2009).

¹²³ Cole, *Upon the Stage of Disorder* at 61.

¹²⁴ David Kaser, *Nashville’s Women of Pleasure in 1860*, Vol. 23 No. 4 *Tennessee Historical Quarterly* 379, 380 (December 1964).

¹²⁵ Kaser at 382

with his wife and kids and eight female sex workers.¹²⁶ One of these women was Malinda Vines, aka Malinda Brandon.¹²⁷

¹²⁶ In the 1860 federal census, page 101 of Schedule 1 of the Free Inhabitants of the 4th Ward of the City of Nashville in the County of Davidson in the State of Tennessee, taken on January 20, 1860, shows Joseph Overby's household, which includes, in addition to his wife and six children, nine women listing their profession as prostitute. Among them is Malinda Vines.

¹²⁷ In none of the numerous newspaper articles about David and Malinda's case is she identified as a sex worker. Usually, she's referred to as Brandon; on at least one occasion she's referred to as Vine instead of Vines. Yet, a number of the articles adopt a barely suppressed mocking tone about David and Malinda's relationship, perhaps as if to insinuate that as a black man, David was so eager for an intimate relationship with a white woman that he was willing to go to prison over a sex worker. For example, here's how the Nashville Union and American described David's case upon his being rearrested for returning to Malinda after his release from the penitentiary:

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

Miscegenation: An Outrage for the Chattanooga Shriekers: Nashville Union and American, Thursday, October 5, 1874, page 1. For another example, here's how a newspaper described David and Malinda being denied their motion to be released from the workhouse after being rearrested:

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

The Tennessean, Tuesday, November 17, 1874.

Page No. 101

SCHEDULE 1—Free Inhabitants in 4th Ward City of Nashville in the County of Davidson State of Tennessee enumerated by me, on the 20th day of August 1860. Wm J. Hall Ass't Marshal.

Post Office _____ 370

1	2	3	4			7	8		10	11	12	13	14
			Age	Sex	Color		Value of Real Estate	Value of Personal Estate					
530	579	Leaac Taylor	37	m	V	Shipping Merchant	1	000	see Tennessee				
531	580	Joseph Carby	52	m	V	Carpenter	1		Georgia	x			
3		Lucina do	38	f	V				"	x			
4		John C do	22	m	V	Barber	1		"				
5		Whealy do	15	f	V				"			Blind	
6		Janis do	12	f	V				"				
7		William S do	11	m	V				"				
8		Louisa do	9	f	V				"				
9		James H do	7	m	V				"				
10		Louisa Edington	25	f	V	Prostitute	1		Tennessee				
11		Edwin Eiler	22	f	V	"	1		"				
12		Louisa Hulsey	17	f	V	"	1		Alabama				
13		Nashell Craig	22	f	V	"	1		Indiana				
14		Nancy Bailey	23	f	V	"	1		Tennessee				
15		Mary Bennett	22	f	V	"	1		"				
16		Elizabeth Johnson	7	f	V	"	1		"				
17		Malinda Vines	22	f	V	Prostitute	1		Tennessee				
18		Mary Sells	22	f	V	"	1		"				
19		Corbely Best	21	f	V	"	1		"				
20	581	Polley Owens	22	f	V	"	1		North Carolina				
21	582	Martha Harrison	47	f	V	"	1		Tennessee				
22		Eugene do	16	m	V	"	1		"				
23		James Haley	37	m	V	Ray Laborer	1		Kentucky				
24		Louisa Johnson	26	f	V	"	1		Tennessee				
25	583	Sarah Owens	19	f	V	Prostitute	1		North Carolina				
26		Elizabeth Owens	18	f	V	"	1		"				
27	584	Henry Lewis	26	m	V	Wagoner	1		Tennessee				
28		Sarah Richardson	32	f	V	Wagoner	1	200	see Alabama				
29	585	Sabitha Richardson	24	f	V	"	1		see North Carolina				
30		Edwin do	27	f	V	"	1		Tennessee				
31		Julia Ann do	11	f	V	"	1		"				
32		Calvin do	1	m	V	"	1		"				
33	586	Nancy Armstrong	32	f	V	Prostitute	1		South Carolina				
34		Nancy Howell	17	f	V	"	1		Tennessee				
35	587	Eliza Brown	47	f	V	"	1		South Carolina				
36		Sarah S do	4	f	V	"	1		Tennessee				
37		Abelia Annen	22	f	V	Prostitute	1		"				
38	588	Ben Squire	77	m	V	Ship Builder	1		Virginia				
39	589	Edwin Bass	27	f	V	Wagoner	1		Tennessee				
40	590	Estimate Smith	26	m	V	Wagoner	1		Tennessee				

No. white males, 11 No. colored males, _____ No. foreign born, _____ No. blind, _____
 No. white females, 29 No. colored females, _____ No. deaf and dumb, _____ No. insane, 3300/1100 No. idiotic, _____
 No. pauper, _____ No. convicts, _____

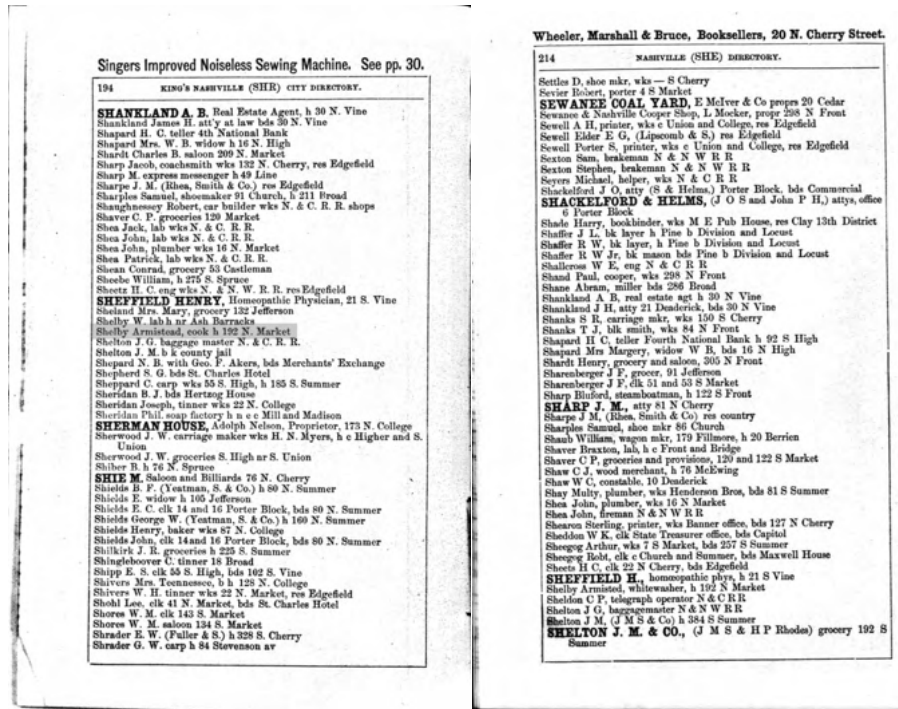
7/23

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

Malinda lived with them as a 7-year old orphan. Throughout her miscegenation trial, the court repeatedly and pointedly referred to her as “Malinda Brandon, aka Malinda Vines,” as though local authorities had reasons to know her by Vines as an alias. So, Armstead Shelby, delegate to the 1871 state colored convention, cook, whitewasher, preacher, and longtime resident of Market street on Smoky Row until he passed away,¹²⁸ had been, for a time, a neighbor of Malinda Brandon, aka Malinda Vines, when she lived and worked on Smoky Row in Overby’s brothel.¹²⁹

¹²⁸ The 1870 Directory for the City of Nashville shows lists “Shelby Armistead, cook,” residing at 192 Market Street; the 1873 Directory for the City of Nashville lists “Shelby Armistead, whitewasher,” residing at 192 Market Street; the 1879 Directory for the City of Nashville lists “Shelby Armistead, whitewasher,” residing at 212 N. Market Street; the Deaths Register for David County shows Armstead Shelby died February 21, 1879.

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



V

David and Malinda

David’s and Malinda’s cases were severed; David went to trial first on October 10, 1872, followed by Malinda on October 15. Presiding over both trials was Judge Thomas N. Frazier, who’d regained his seat on the bench after being impeached and removed by Tennessee’s Legislature for standing in the way of the state ratifying the Fourteenth Amendment.¹³⁰

Back in 1866, Tennessee Governor William “Parson” Brownlow, who had been elected by a collation of white supporters of the unions and newly enfranchised Black people, called a special session of the legislature to ratify the Fourteenth Amendment, making Tennessee the first southern state to do so. White unionists, who had up until then had supported Brownlow, balked interpreted what they imagined to be the Amendment’s promise of “social equality” for blacks as a bridge too far. After, two members denied the legislature the requisite quorum to ratify the Amendment by refusing to show up, the legislature directed the sergeant-at-arms to arrest them. Once arrested, the legislators were counted for purposes of a quorum in ratifying the Fourteenth Amendment, even though they were not actually

¹³⁰ See <https://babel.hathitrust.org/cgi/pt?id=yale.39002022162490&view=1up&seq=11>

present in the chamber. Meanwhile, one of the absentee legislators petitioned Judge Frazier for a writ of habeas corpus, who issued the writ, commanding the legislature's sergeant-at-arms to produce the legislator. This resulted in the legislature passing a resolution, denying Frazier's authority to issue the writ. Frazier in turn refused to recognize the validity of the resolution and instead ordered the Sheriff of Davidson County to arrest the legislature's sergeant-at-arms for contempt of court for refusing to release the absentee legislators. When the sergeant-at-arms showed no intention of releasing the legislators, the Sheriff deputized a local *posse comiatus* to go after the sergeant-at-arms. Matters came to a head when the legislature passed a second resolution demanding that the Sheriff, members of his *posse comiatus*, and Judge Frazier himself appear in person before the chamber to answer any charges that might be brought against them. Months later, even though Tennessee had already ratified the Amendment, the legislature impeached Judge Frazier, tried and convicted him, and, on June 3, 1867 removed him from the bench, until 1870, when the next legislation restored him as district judge of Davidson and Rutherford County where, two years later, he sat in judgment of David and Malinda. Years later, Frazier's son, James Frazier, would serve as Tennessee Governor and United States Senator;¹³¹ his grandson, James B. Frazier, Jr., representing Tennessee's Third Congressional District in the House of representatives, would sign the Southern Manifesto, opposing desegregation of public schools in the wake of *Brown v. Board of Education*.¹³²

After a two-day trial, David was convicted. As punishment, he was disqualified from serving as a witness or juror in court and from holding elected office, ordered to pay the costs of his prosecution, and sentenced to two years in the state penitentiary,¹³³ Malinda, for her part, went to trial on

¹³¹ James Beriah Frazier served as Governor of Tennessee from 1903 to 1905. See <https://www.nga.org/governor/james-beriah-frazier/>

¹³² James Beriah Frazier, Jr. represented Tennessee's 3rd Congressional District in the United States House of Representatives between from 1949 to 1962. On March 12, 1956, nineteen Senators and eighty-two members of the House of Representatives signed the so-called Southern Manifesto, a resolution calling the United States Supreme Court decision in *Brown v. Board of Education* "a clear abuse of judicial power" and encouraging states to resist its implementation. Frazier was one of three members of Tennessee's delegation in the House of Representatives to sign the Southern Manifesto. See *Congressional Record*, 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956); see also <https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/>.

¹³³ Transcript

October 15, and she too was convicted.¹³⁴ The jury sentenced her to one-year in the state penitentiary with a recommendation that she serve her time in the local jail but Judge Frazier commuted it to six-hours in jail and a \$25 fine.¹³⁵ She served her time on October 16, and was released the next day on October 17.¹³⁶

On January 2, 1873, Tennessee Supreme Court heard oral argument in David's appeal.¹³⁷ His lawyers before the Court were Henry S. Foote, the former ante-bellum Mississippi governor, who served in the confederate congress during the war, only to become a Republican in 1875, and John Alexander Campbell, a former Tennessee state judge who'd long harbored political ambitions of his own.¹³⁸ This was not Campbell's first miscegenation case before the Supreme Court. Prior to oral arguments in David's case, the Court had delivered an opinion in *State v. Bell*, in which Campbell represented a white man and black woman charged with violating Tennessee's 1870 anti-miscegenation law even though they'd legally married in Mississippi before moving to Tennessee.¹³⁹ After a grand jury returned an indictment against the Bells, Campbell moved to quash and Judge Frazier, who would later preside over David and Malinda's trial, granted the

¹³⁴ Galloway's Bride: Nuptials that Sent a Man and Brother to the Penitentiary, Nashville Union and American, Friday, may 1, 1874.

¹³⁵ Galloway's Bride: Nuptials that Sent a Man and Brother to the Penitentiary, Nashville Union and American, Friday, May 1, 1874. Malinda's commutation was grounded in the text of the 1870 statute, providing that "the Court may, in the event of a conviction, on the recommendation of the jury, substitute in lieu of punishment in the penitentiary, fine and imprisonment in the county jail. Sect 2. Presumably the jury made no such recommendation for David.

¹³⁶ On October 17, 1872, a local paper posted a list of individuals released from the local jail; among them was "Malinda Galloway." While court records listed Malinda as either Brandon or Vines and not Galloway, this was surely her as the paper noted that she'd been jailed after "being accused of intermarrying with a negro." See, *The Courts: At the Jail*, The Tennessean, Thursday, October 17, 1872, page 4.

¹³⁷ *The Courts*, Nashville Union and American, Saturday, January, 4 1873; *The Courts*, Nashville Union and American, Friday, January, 3 1873.

¹³⁸ *The Papers of Andrew Johnson: September 1867- March 1868* (358) (edited by Paul H. Bergeron 2000) (Letter to Andrew Johnson from Alexander Campbell); *The Papers of Andrew Johnson: May 1869—July 1875* 623 (edited by Paul H. Bergeron 2000) (Letter to Andrew Johnson from Alexander Campbell); see also *The Union National Convention*, Nashville Union and American, Friday, July 6, 1866; *Republican Convention in Maury*, Nashville Union and American, Tuesday, September 3, 1872.

¹³⁹ *State v. Bell*, 66 Tenn. 9 (1872).

motion.¹⁴⁰ Tennessee’s Attorney General appealed and the Supreme Court reversed, remanding the case back to Judge Frazier for trial.¹⁴¹

Before the *Bell* Supreme Court, Campbell previewed the principal argument he would ultimately use in David’s case, namely that the Bells’ marriage was a contract Tennessee was obligated to recognize.¹⁴² In rejecting the argument, the Court reasoned that the general rule that “a marriage good in the place where made after the forms and usages of that place shall be good everywhere” does not apply to instances where the marriage in question is against the “good morals” of a community.¹⁴³ Otherwise, were Tennessee to recognize the Bells’ marriage just because it was legal in Mississippi, it would be similarly forced to accept “the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited.”¹⁴⁴ Rather, the Court concluded, “the Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.”¹⁴⁵

So, in David’s brief to Tennessee’s Supreme Court, Foote and Campbell conceded at the outset that “[the] case presents a question for decision, which is not altogether a stranger in this court,¹⁴⁶” and that they now proposed “to discuss a question which has been already adjudicated before the very judges themselves from whom that decision has emanated.”¹⁴⁷ Nonetheless, Campbell and Foote, insisted, even though the two cases both raised the question of the validity of a marriage contract, David’s case differed from that of the Bells in one key respect: unlike *Bell*, which concerned the respect Tennessee owed to Mississippi to give full faith and credit to a marriage made valid under Mississippi law, David’s case was “emphatically one of constitutional liberty and equality; involving not only the safety and welfare of that numerous class of our population who have recently emerged from a long, continued, and debasing condition of

¹⁴⁰

¹⁴¹ Bell, 66 Tenn. at 11.

¹⁴² Bell, 66 Tenn. at 9-10

¹⁴³ Bell, 66 Tenn. at 11.

¹⁴⁴ Bell, 66 Tenn. at 11.

¹⁴⁵ Bell, 66 Tenn. at 11.

¹⁴⁶ Brief at 1

¹⁴⁷ Brief at 6-7

servitude, but also as I conceive, the permanent quietude and prosperity of our whole forty-millions of free people.”¹⁴⁸

Much of the Foote-Campbell brief, consisting of sixty-six handwritten pages, is dedicated to defending the proposition that marriage is a contract and Tennessee violated the 14th Amendment, the Civil Rights Act of 1866, and the Civil Rights Act of 1870 in seeking to punish “for marrying a woman, for the marrying of a whom by a white man no punishment would be inflicted.”¹⁴⁹ As the brief explained, “by the Civil Rights Law our colored citizens are authorized to make all contracts that white citizens may make. It is not disputed that a white citizen may make a contract of marriage with a white woman. Then, a colored citizen may make the same.”¹⁵⁰

But, in the closing few pages, both the tone and the handwriting of the brief abruptly changes. Whereas the first forty-eight pages studiously avoided the topic of interracial sex by putting forward a fairly conventional defense of marriage as a matter of contract law, the remaining eighteen pages are nothing less than an unabashed rejection of white supremacy and an unembarrassed declaration that there was nothing so unique about white blood that mixture with black blood would somehow taint it. The war was over, the brief declared, and “it is high time we should realize the radical changes in the framework of our civil polity, which great and memorable causes have been bringing about the last 12 years.” Black people had a constitutional right to be free from the “oppressive tyranny” of white people. As for the so-called taboo of interracial sex,

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

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

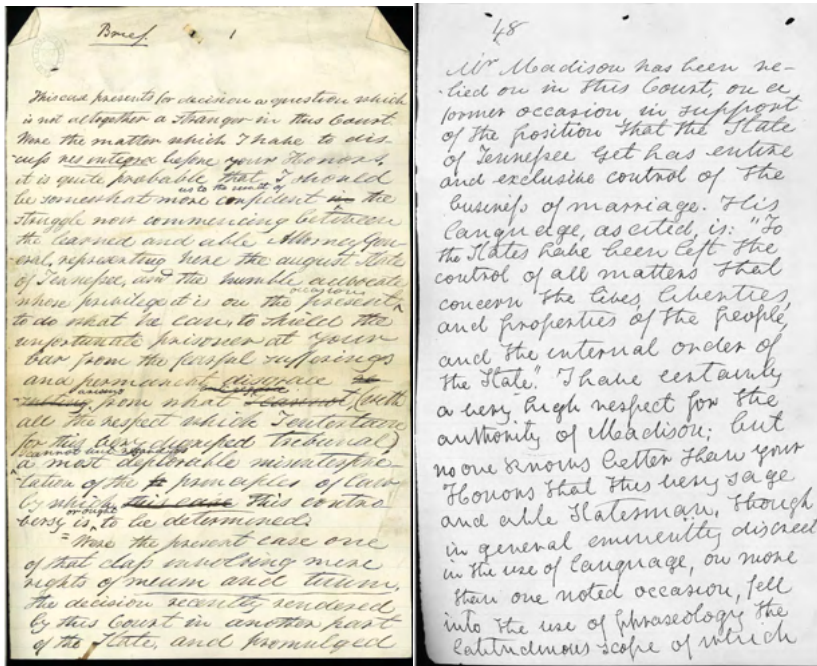
There was a time in England, when neither our Celtic nor our Anglo-Saxon ancestors were recognized as British citizens, nor were they allowed by law to intermarry with the proud

¹⁴⁸ Brief at 4-5.

¹⁴⁹ Brief at 13-14.

¹⁵⁰ Brief at 16-17

Norman. ...This monstrous deprivation of civil rights our ancestors endured for centuries; but as Christianity and civilization advanced this dishonoring and unwise discrimination was gotten rid of. ... In regard to the African race, we have only followed in the wake of these well-known historical examples; and, for one, I rejoice in the belief that unnumbered blessings are yet to flow from the complete emancipation of children of a long-suffering and singularly amiable and unoffending segment of our people from all the impediments to happiness and moral advance, with which the oppressive tyranny of former ages have on all sides surrounded them.



VI

Black Moses and the Exodus to the New Canaan of Kansas

It is unlikely Campbell wrote to the justices of the Tennessee Supreme Court that it was high time Black people were freed from the tyranny of White people. For a while in Nashville, his representation of Bell and Galloway had earned him the reputation of a “favorite lawyer with the

miscegenationists.”¹⁵¹ He no doubt found this an impediment to his political ambitions because, even in the midst of working on Galloway’s habeas appeal, he made it a point to explain that he wasn’t in favor of full social equality for black people. The bill that would eventually become the Civil Rights Act of 1875, banning racial discrimination in places of public accommodation, was the subject of intense debate in Nashville during the 1874 election season; support of or opposition to the bill came to serve as a litmus test for a candidate’s position on civil rights. Campbell, notwithstanding his representation of interracial couples, publicly opposed the bill.¹⁵²

More likely, Foote wrote the closing pages of the brief. A native Virginian, Foote moved to Mississippi in his twenties, becoming the governor of the state in 1851 by defeating the future President of the Confederacy, Jefferson Davis.¹⁵³ For much of his life and prior to the War, Foote was an ardent defender of slavery; during an 1848 congressional debate, he threatened anti-slavery Senator John Hale of New Hampshire to visit the good state of Mississippi” so that he could “grace one of the tallest trees in the forest with a rope around his neck...[I]f necessary, I should myself assist in the operation.”¹⁵⁴ But Foote was also a unionist who opposed secession,¹⁵⁵ and resolutely turned Republican once the War ended.¹⁵⁶

Throughout Reconstruction and for the remainder of his life, Foote held constant two beliefs: first, that Jefferson Davis was a traitor who deserved public scorn for “his indecent and seditious attempts to keep alive in the bosoms of his countrymen feelings of irritation and alienation, which ought never to have been brought into existence.”¹⁵⁷ In letters to the editors, Foote delighted in reminding readers that he once slapped Davis in the face and took equal delight in challenging Davis to a duel if he wished to redeem his honor.¹⁵⁸ Foote’s second belief flowed from the first: he was convinced

¹⁵¹ The Election Next Tuesday, Nashville Union and American, Sunday, November 1, 1874.

¹⁵² The Election Next Tuesday, Nashville Union and American, Sunday, November 1, 1874.

¹⁵³ Michael Woods, *Arguing Until Doomsday: Stephen Douglas, Jefferson Davis, and the Struggle for American Democracy*, 108-09 (2020).

¹⁵⁴ Daniel J. Sharfstein, *The Invisible Line: The Secret History of Race in America* (2011).

¹⁵⁵ Joseph A. Rainey, *A Legal History of Mississippi: Race, Class, and the Struggle for Opportunity* 51 (1919).

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¹⁵⁷ *Fighting Words: The Jefferson Davis and Henry Foote Letter in Full*, *Republican Banner*, page 3, January 29, 1874.

¹⁵⁸ *Id.*

and said so publicly that the future of the South laid in repudiating and abandoning all vestiges of white supremacy.

These two beliefs were most evident in two of his public speeches: one to students at Fisk University in December 1870; the other during a memorial service at the death of Robert E. Lee in October 1874. Founded in 1865 by abolitionists barely six months after the end of the War, Fisk University, which would in time become the alma mater of W.E.B. Dubois, was named after General Clinton Fisk, the director of the Freedmen’s Bureau in Kentucky and Tennessee.¹⁵⁹ Foote told the assembled students how moved he was to see them “in the heart of this metropolitan city, in sight of the noble Capitol of a great and wealthy state.” He called them “part of a gigantic and glorious movement,” and described their education as “our sacred duty to forward the educational welfare of that class of our young people, whose ancestors participated so efficiently in clearing our forests, in tilling our lands, in building up our villages and cities, and who administered in former years in a thousand interesting modes, to our domestic comfort and to our social happiness.”¹⁶⁰

Four years later, on October 14, 1874, three days after Robert E. Lee’s death, Foote gathered with other Nashville politicians and prominent citizens in the city’s main courthouse to mourn Lee’s passing with speeches, praising him for having been blessed with “some of the noblest qualities, which now and then fortunately graced humanity,” and remembering him as “dignified, just, generous, magnanimous, patriotic, philanthropic.”¹⁶¹ Foote too joined in praising Lee as “a great and good man,”¹⁶² but, while perhaps giving Lee far more credit than he deserved for always having been opposed to secession, Foote also took the occasion to mock those who would “whine[] dolorously over ‘the Lost Cause.’”¹⁶³ He reminded his audience that secession was always and remained “a deadly and dangerous,” and an “absurd and perilous” dogma.¹⁶⁴ And he ended by declaring that he “rejoice[d] in believing also that secession is dead, dead, dead, and I trust it will never be resuscitated in all time to come.”¹⁶⁵

¹⁵⁹ Lecture of Hon. H. S. Foote to the Students of Fisk University, *Republican Banner*, page 3, Wednesday, December 14, 1870.

¹⁶⁰ *Id.*

¹⁶¹ Meeting of Citizens: Action in Regard to the Death of General Robert E. Lee, *The Tennessean*, page 4, Saturday, October 15, 1870.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

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

The end of the war may have heralded for formerly enslaved people, as DuBois put it, “a new birth of freedom” but, except for a brief period near the Sea Islands,¹⁶⁶ federal and state governments rejected demands by Black people for land reform which, combined with so-called Black Codes enacted in former confederate states, consigned Black people to wage workers.¹⁶⁷ As a result, from the very start of Reconstruction Black people were forced into tenant farming, land-leasing, and crop-lien contractual arrangements with White property owners that “shunted black Southerners back to a way of life more nearly slave than not.”¹⁶⁸ By 1879, as federal troops withdrew from the South, Black freedmen were left to the mercy of White redeemers who, “with their two hundred years of experience in the science of maintaining dominance, had withstood the brief but furious challenge to their way of life, and were now gaining momentum in their struggle to put down equality of blacks.”¹⁶⁹ So, Black people turned to the same survival instinct “to leave the South since that first fugitive slave had set his sight and heart on the North Star.”¹⁷⁰ And Kansas became their new North Star.

The Black Southern political refugees of 1879, who came to be known as “Exodusters,”¹⁷¹ left home for Kansas because Kansas was the ancestral land of John Brown, because the State had fought the Civil War under the

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¹⁶⁸ Billy D. Higgins, *Negro Thought and the Exodus of 1879*, in *Phylon*, 1st Qtr., Vol. 32, No. 1 at 42 (1971.)

¹⁶⁹ Higgins, *Negro Thought* at 42.

¹⁷⁰ Higgins, *Negro Thought* at 42.

¹⁷¹ Nell Irvin Painter, *Exodusters: Black Migration to Kansas After Reconstruction* 4 (1985 ed.)

banner of “Free Labor, Free Soil, Free Men,”¹⁷² and because they believed the federal government would provide them with the means of obtaining their own land.¹⁷³ So, for a two-year period, they headed West in a grassroots movement that wasn’t controlled or directed by any political party or elite leader but in many ways was the brainchild of two formerly enslaved persons: Henry Adams and Benjamin “Pap” Singleton.

Born in Georgia and raised in Louisiana, Adams became emancipated in 1865.¹⁷⁴ Beginning in 1870, he organized a mass movement of Black People to emigrate to Liberia, going so far as to present a petition with over 90,000 signatures of Black Southerners ready to leave if the federal government would fund their passage. When his efforts failed, he turned his sights to western territories, where Pap Singleton had begun to sponsor riverboat trips for freedmen wishing to leave the South. Singleton too had been born in slavery and made a living during Reconstruction as a cabinet maker in Nashville, Tennessee. Early historians of the 1879 Kansas Exodus tended to dismiss him as “an ignorant negro, who in himself seems to embody the longings and the strivings of the bewildered negro race.”¹⁷⁵ Singleton was far from that; he’d survived being sold into slavery several times, successfully escaped to Canada, and returned to Nashville after the war, becoming adept at community and political organizing, though he insisted he was not a politician and never ran for public office.¹⁷⁶ He called himself “Moses” and “the Father of the Exodus”¹⁷⁷ because he saw his mission as doing God’s will by delivering Black people to a new promised land, and by bringing “peace to the South” and “teaching the Southern white person a lesson. To Singleton, “by talking the Black people out of the South, he would show Southern whites that they must live with their Black neighbors in tranquility.”¹⁷⁸ The 1879

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¹⁷⁴ Painter, *Exodusters* at 71-72,

¹⁷⁵ Walter Fleming, “Pap” Singleton, *The Moses of the Colored Exodus*, *American Journal of Sociology*, Vol. 15, No. 1 at 61 (July 1909)

¹⁷⁶ Painter, *Exodusters* at 109.

¹⁷⁷ Painter, *Exodusters* at 207. In congressional testimony, Singleton, not only took sole credit for the Exodus, but also spoke of his work in divine terms:

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

https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=4022

¹⁷⁸ Painter, *Exodusters* at 116.

was not new to Singleton. At least as far back as 1875, Singleton was already part of a movement in Nashville to emigrate out of the state because “neither the laws nor their enforcement were adequate for the protection of negroes and their rights.”¹⁷⁹ He organized recruitment and fundraising meetings throughout the South and, while these events on the surface seemed like church revivals, the religious fervor masked the radical liberation message Singleton preached as he led his people in singing odes to Kansas from sheet music he sold to raise money:



¹⁷⁹ The Restless Race: A Gathering of the Colored Class Yesterday, Nashville Union and American, Sunday May 16, 1875, page 1.

*We have held a meeting to ourselves, to see if we can't
Plan some way to live.
Marching along, yes we are marching along
To Kansas City we are bound.
We have Mr. Singleton as our President, he will go on
Before us, and lead us through.
Surely this must be the Lord that has gone before him
And opened the way.
For Tennessee is a hard slavery state, and we find
No friends in the country.
Truly, it is hard, but we all have to part, and flee into a
Strange land unknown.
We want peaceful homes and quiet firesides; no one to
disturb us or turn us out.*

Singleton's movement, which Nell Painter called "the Kansas Fever," attracted federal attention in the form of congressional hearings, during which Singleton himself warned Congress that he had awakened "millions" of Black people and they were all going to leave the South.¹⁸⁰ In reality, the Exodus ended barely two years after it begun;¹⁸¹ the vast majority of Exodusters were

¹⁸⁰ https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=4022. D. W. Woorhees, democrat from New Jersey, Zebulon B. Vance, a former confederate soldier and governor of North Carolina, George Pendleton, democrat from Ohio. William Windom, Republican from Minnesota. Henry Blair, Republican from New Hampshire.

¹⁸¹ "Ultimately, some ten to twenty thousand Negroes participated in the Exodus of 1879. Estimates of the number of 'Exodusters' varied greatly from observer to observer since anyone bothering to make an appraisal was usually trying to make a political point." See Billy D. Higgins, *Negro Thought and the Exodus of 1879*, in *Phylon*, 1st Qtr., Vol. 32, No. 1 at 39. (1971.) Most estimates place the number from a low of about 10,000 to a high of 80,000. For example, Historian Nell Irvin Painter places the number at around 6000 Black freedmen from Louisiana, Mississippi and Texas, and about [redacted] from Tennessee and Kentucky, who emigrated to Kansas between 1879 and 1881. See PAINTER, *EXODUSTERS* at 184. Others believe the more accurate number to be around 40,000. See RANDALL BENNETT WOODS, *A BLACK ODYSSEY: JOHN LEWIS WALLER AND THE PROMISE OF AMERICAN LIFE*, 25 (2021). But whatever the final number, most commentators tend to agree that it turned out to be relatively insignificant. As one scholar noted: "Only one fact stands out about the numerical extent of the Exodus: it was relatively small. The general westward expansion, the contemporary European immigration to America, and the great influx of Southern Negroes into Northern cities following WWI dwarf the Exodus of 1879. Despite dire warnings to the contrary by Southern Black politicians and Northern white politicians, the Exodus had spent itself by the next year." Higgins, *Negro Thought and the Exodus of 1879* at 39-40.

poor laborers who could barely pay for their passage to Kansas and had no resources to purchase and cultivate land or start a business of their own.¹⁸² But, while it lasted, the movement posed a challenge to Black political elites, who understood full well, and indeed shared in, the grievances of the Exodusters but nonetheless saw the Exodus as a threat to Black electoral prospects in the South.¹⁸³ To be sure, elite opposition was by no means uniform; for example, Richard T. Greener, the first Black graduate of Harvard College and eventual dean of Howard University School of Law, publicly cheered the exodus,¹⁸⁴ as did John M. Langston, the first person of color to represent Virginia in Congress.¹⁸⁵ But, for others, including P. B. S. Pinchback, former lieutenant governor of Louisiana,¹⁸⁶ and Blanche Bruce, the first Black person to be elected to a full term to the U.S. Senate,¹⁸⁷ the Exodus was being pursued “thoughtlessly” and would bring good “to no one, who is engaged in it.”¹⁸⁸ Indeed, so concerned were Black political leaders that none other than Frederick Douglass published an open letter in Washington DC, making it clear that he was opposed to the Exodus “because it will pour upon the people of Kansas and other Northern states a multitude of deluded, hungry, homeless people to be supported in a large measure by alms,” because he believed conditions in the South were “steadily improving,” and Black people would “ultimately realize the fullest measure of liberty accorded and secured in any section of our common country.”¹⁸⁹

As for white landowners, faced with the prospect of losing their main source of cheap labor, they vacillated between insisting that Black people

¹⁸² “In 1889, ten years after the exodus movement, a Topeka newspaper...said that of those coming in during 1879 and after a portion had undoubtedly bettered their conditions but a large number had undergone severe hardships through destitution and sickness, a good many had died, and of the survivors a good number remained in poverty-stricken conditions.” ATHEARN, IN SEARCH OF CANAAN at 278.

¹⁸³ Painter, at 243.

¹⁸⁴ See KATHERINE REYNOLDS CHADDOCK, UNCOMPROMISING ACTIVIST: RICHARD GREENER, FIRST BLACK GRADUATE OF HARVARD COLLEGE 1, 79, 103 (2017); PAINTER, at 243.

¹⁸⁵ <https://history.house.gov/People/Detail/16682>; Painter at 245

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¹⁸⁸ Painter at 243.

¹⁸⁹ Journal of Negro History at ___; see also Athearn, In Search of Canaan at 96. In contrast to Douglass, radical abolitionists, among the fiercest opponents of slavery before the war supported the Exodus. Sojourner Truth called it “the greatest movement of all time.” Painter, Exodusters at 247. Such abolitionists as William Lloyd Garrison, Wendell Phillips, Henry Highland Garnet, George T. Downing, all championed it. *Id*

were content in the South and were being misled by demagogues,¹⁹⁰ and arguing that the South would be better off if the Exodusters left because it would improve the work force and “white immigration, now kept back by negroes, will come this way.”¹⁹¹ But, in truth white planters were sufficiently panicked about the Exodus that they appealed to the Governor of Mississippi to call for a bi-racial convention of landowners and workers “to take steps to check the emigration of laborers to Kansas.”¹⁹² The meeting, which came to be known as the Mississippi Valley Labor Convention, took place over two days in Vicksburg, Mississippi on May 6 and 7, 1879, and received national press coverage.¹⁹³ Its intended purpose was, according to the Southern press, to achieve “a good and proper understanding between the races.”¹⁹⁴ White organizers published newspaper notices, in which they “earnestly call[ed] upon the colored people to send to the convention such delegates as they choose to appoint to in its deliberations, and discuss with us fully and freely the important questions which it will be called upon to determine.”¹⁹⁵

On the second day of the Convention, the chairman of the committee on resolutions, a former confederate officer by the name of Colonel William L. Nugent,¹⁹⁶ brought to the floor a resolution, offering five reasons to

¹⁹⁰ PAINTER at 236

¹⁹¹ PAINTER at 236

¹⁹² ATHEARN, IN SEARCH OF CANAAN at 96. In an open letter addressed to “The People of the Mississippi Valley,” J. M. Stone, Governor of Mississippi, described the Vicksburg convention as “a matter of great importance” and called upon “every county, parish, and city in every State in the Valley interested in the growth of cotton and sugar, to send delegates of both races to this Convention.], selected from their ablest and most influential citizens.” *The Negro Exodus: Mississippi Labor Valley Convention*, *The Clarion Ledger*, April 23, 1879, page 2.

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¹⁹⁴ *The Vicksburg Herald*, Thursday, April 24, 1879, page 1. “We believe...in allowing to emigrate to Kansas or wherever they may wish to go,...and think at the same time it would be a blessing to our Southern land if they should all leave, as then our vacant fields would soon be occupied by a more industrious and intelligent class of laborers – white people – who would add vastly more to the wealth and prosperity of the South.” *The Democrat-Star*, Friday May 2, 1879 page 2.

¹⁹⁵ *The Negro Exodus: Mississippi Labor Valley Convention*, *The Clarion Ledger*, April 23, 1879, page 2.

¹⁹⁶ From the start it was patently obvious which race dominated the proceedings. Among the officers elected, the titled ‘general,’ ‘colonel,’ and ‘judge’ abounded suggesting that the establishment had the managerial situation well in hand.” ATHEARN, IN SEARCH OF CANAAN at 96. William Lewis Nugent, the author of the resolution, is a characteristic example of how the convention was intended, above all else, to defend the interests of southern white landowners. Nugent was a soldier in the confederate army who became a wealthy planter after the war as the owner of two plantations in Bolivar County, Mississippi. Kent Doby Dollar, *Soldiers of the Cross: Confederate Soldier-Christians and the Impact of War on their*

explain the Exodus, none of which included an honest reckoning with the economic exploitation and political violence freedmen were experiencing in the South. Instead, the Nugent resolution cited to: 1) the high price of cotton and the prior year's crop failure; 2) "irrational" planting practices; 3) predatory credit practices that mortgaged crops before they were planted; 4) "apprehension" on the part of Black people based on "insidious reports" that their civil and political rights were endangered; and 5) "hurtful and false rumors... that by emigrating to Kansas, the colored people would obtain land, mules and money from the federal government without cost to themselves and become independent forever."¹⁹⁷ The resolution expressed "astonishment" that Black people would give credence to "idle stories circulated of a promised land," and reassured them that nowhere but in the South could the "honest toil" of "unskilled" black labor achieve "a larger return."¹⁹⁸ In conclusion, the document resolved that "this convention does affirm that the colored race has been placed by the constitution of the United States, and the States here represented, and the laws thereof, on a plane of absolute legal equality with the white race; and does declare that the colored

Faith, at 221. https://trace.tennessee.edu/utk_graddiss/3237. Though known as "Colonel" until his death in 1897, he never rose above the rank of Captain during the war. Dollar, *Soldiers of the Cross*: at 20. Born in Louisiana, he grew up on his father's sugar plantation. *Id.* at 21. At nineteen, he travelled to and settled in Greenville Mississippi, where he met and married his wife Nellie. *Id.* at 22. Nugent was not himself a slaveholder but he believed in the institution of slavery and supported the war to uphold it. *Id.* at 23. In fact, for much of his war service, he used one of his employer's slaves as a body servant. *Id.* at 23-4. When war came, Nugent ardently supported it. Writing to his wife at the start of the war, Nugent insisted: "Almost everyone I meet has come to the determination to vindicate the rights of our outraged section if need be at the point of bayonet." As the war raged on, he never wavered: "We are now driven to fight to the bitter end, if conquest itself be the result. The ruling majority are contending to emancipate our slaves, and if the negroes are freed the country, as a general thing, is not worth fighting for at all." MY DEAR NELLIE: THE CIVIL WAR LETTERS OF WILLIAM L. NUGENT TO ELEANOR SMITH NUGENT at 117 (Cash & Howorth eds. 1977). "I own no slaves and can freely express my notions without being taxed with any motive of self interest. I know that this country without slave labor would be wholly worthless, a barren waste and desolate plain—we can only live and exist by this species of labor: and hence I am willing to continue the fight to the last." MY DEAR NELLIE, at 132. Nugent grew in wealth and prominence after the war, becoming President of the Mississippi Bar Association, and playing a crucial role in ending republican reconstruction and "redeeming" Mississippi to democratic control. Dollar, *Soldiers of the Cross*: at 221-3. In time, his daughter, Eleanor "Nellie" Nugent Sommerville, would serve as the first woman elected to the Mississippi state legislature. <https://mississippiencyclopedia.org/entries/nellie-nugent-somerville/>; his granddaughter, Lucy Somerville Howorth was also elected to the Mississippi legislature. DOROTHY SHAWHAN, LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH 67 (2011).

¹⁹⁷ *Journal of Negro History* at 51.

¹⁹⁸ *Journal Of Negro History* at 52.

race shall be accorded the practical enjoyment of all rights, civil and political, guaranteed by the said constitution and laws.”¹⁹⁹

From the start, Black political leaders were weary of the Mississippi Valley Labor Convention.²⁰⁰ In fact, most prominent Black leaders did not come to Vicksburg but rather chose to attend a meeting of the National Conference of Colored Men taking place at the same time in Nashville, Tennessee. The Kansas exodus dominated discussions at the conference and Black leaders adopted their own resolution, making it clear that the exodus was caused by “a determined and irrepressible desire, on the part of the colored people of the South, to go anywhere where they can escape the cruel treatment and continued threats of the dominant race in the South.”²⁰¹ Black people wanted out of the South, the resolution continued, because “they are now told, and...made to feel the full force of this declaration: that this is a white man’s government, and none but white men shall govern it, rule it, or dominate it.”²⁰²

Back in Vicksburg, the few Black delegates who did attend the meeting remained circumspect in stating their views, having been “cautioned ... against voting on various issues on the ground that the convention was bound to fail, and that when it did the responsibility should belong to the planters.”²⁰³ So, in response to the Nugent resolution, blaming the Exodus on the credulity of Black people, and expressing astonishment that Black laborers thought themselves mistreated, one Black delegate declared “he had strong hopes of a better feeling hereafter between the two races.”²⁰⁴ But Henry Foote, who had been invited as a delegate for Louisiana, pushed back, arguing that the pending resolution avoided the real causes for the Exodus, and offering a substitute resolution that would have acknowledged that Southern states had “flagrantly violated” the Fourteenth and Fifteenth Amendments, and that the rights of Black people in the South had been “deliberately disregarded.” Further, Foote’s resolution proposed to set up local boards in each county or parish throughout the South with the power to arbitrate complaints by Black laborers.”²⁰⁵

¹⁹⁹ Journal of Negro History at 52.

²⁰⁰ Athearn, *In Search of Canaan* at 97

²⁰¹ Proceedings of the National Conference of Colored Men of the United States, *Ma6* 6, 7, 8, 9, 1879 at 5, 13, <https://omeka.coloredconventions.org/items/show/323>

²⁰² *Id.*

²⁰³ ATHEARN, *IN SEARCH OF CANAAN* at 96.

²⁰⁴ Vicksburg Convention, *The Daily Memphis Avalanche*, May 7, 1879, page 1; see also PAINTER, *EXODUSTERS* at 218-19.

²⁰⁵ Vicksburg Convention, *The Daily Memphis Avalanche*, May 7, 1879, page 1; see also PAINTER, *EXODUSTERS* at 218-19.

White planters decried Foote's substitution, with some delegates calling him a political trickster and demagogue."²⁰⁶ Later, newspapers editors dismissed him as an "old and scheming politician who had gone over to the Blacks," and an "uneasy and disturbing spirit,"²⁰⁷ who "assumed all whites to be wicked and filled with animosity toward the Black race, that he thought it was impossible for the two races to live side by side."²⁰⁸ Needless to say, the Convention voted down Foote's substitution, adopting the Nugent resolution instead.

Weeks after the convention, on May 21, 1879, Foote spoke to a large Black gathering in New Orleans, and, while he expressed regret at the Exodus, he confessed that "even if only a small part of the injustices admitted at [the] Vicksburg [Convention] were true...the offenses were sufficiently serious to justify blacks leaving the country." So, the man who branded Jefferson Davis a traitor, the man who told mourners at Robert E. Lee's memorial service to stop whining about the lost cause, the man who called Black Fisk University students "our young people," and the man who told an audience of would-be Black refugees that the harms southerners such as himself had visited upon Black people more than justified them wanting to leave for a place of their own, was almost certainly the same man who wrote to the Tennessee Supreme Court that the Reconstruction Amendments had brought about "radical changes in the framework of our civil polity,"²⁰⁹ that to keep going back to the ante-bellum order was to akin to Rip Van Wrinkle sleeping away twenty years,²¹⁰ and that there could never be social peace until Black people were part of "the great *populus americanus*" even if it meant their having the right to marry "among the sons and daughters of our people."²¹¹

VII

The Limestone House on Sixteenth and Church Streets

Foote spoke the truth to power but David lost his appeal. He had not been immediately remanded to the state penitentiary upon his conviction but remained in the county workhouse while Campbell and Foote argued before

²⁰⁶ Vicksburg Convention, The Daily Memphis Avalanche, May 7, 1879, page 1; see also Painter, *Exodusters* at 218-19.

²⁰⁷ PAINTER, *EXODUSTERS* at 219.

²⁰⁸ ATHEARN, *IN SEARCH OF CANAAN* at 96.

²⁰⁹ Tennessee Supreme Court Brief at 50.

²¹⁰ Tennessee Supreme Court Brief at 51.

²¹¹ Tennessee Supreme Court Brief at 60.

the Supreme Court. Once the Court upheld the conviction, the institution David walked into on January 11, 1873 was a torture chamber, a slave labor camp, and one of the earliest institutional models for mass incarceration of Black men.²¹²

The Penitentiary had opened in Nashville in January 1831 “on Sixteenth and Church Streets on land that is now a downtown parking lot.”²¹³ The limestone building housed two hundred cells along two wings surrounded by four-foot thick, twenty-foot tall walls;²¹⁴ each cell was seven and a half-feet long, three and one-half feet wide, and seven feet high.²¹⁵ The new penitentiary was heralded as a modern reform institution but the humane measures it purported to adopt did little to stop the mistreatment of prisoners: guards routinely tortured inmates in their care by lashing on their bare back with a three-inch wide leather strap fitted with a long wooded handle, placing them in a small iron box in direct sunlight to make them sweat, and locking them in solitary confinement in dungeon-like cells on a diet of bread and water for up to thirty days at a time.²¹⁶ Even outside of solitary confinement, cells were barely large enough for one person but quickly came to be used for two prisoners. With no sewer system, the penitentiary dumped raw sewage on a vacant lot next door.²¹⁷ In the second year of the penitentiary's operation, a cholera outbreak killed almost 25% of the inmates.²¹⁸

²¹² See Penitentiary Records

²¹³ Larry D. Gossett, *The Keepers and The Kept: The First Hundred Years of the Tennessee State Prison System, 1830-1930* at xxi see https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=6306&context=gradschool_diss_theses

²¹⁴ Larry D. Gossett, *The Keepers and The Kept* at 34.

²¹⁵ Gary Shockley, *A History of the Incarceration of Juveniles in Tennessee, 1796-1970*, *Tennessee Historical Quarterly* Vol. 43, No. 3, 229, 231 (Fall 1984).

²¹⁶ Gossett, *The Keepers* at 38.

²¹⁷ Gossett, *The Keepers* at 41-42

²¹⁸ Gossett, *The Keepers* at 40.



From its inception, the Penitentiary was a camp for cheap inmate labor. The very first inmate, Washington Cook, a free Black man and tailor by trade, was required to make his own uniform.²¹⁹ Prison officials bought raw materials, processed them with inmate labor, and sold the finished products on the open market. By 1836, the state built a new hospital wing at no cost to the state using profits from the penitentiary. In 1844, the General Assembly used \$10,000 of penitentiary profits toward building of the new State Capitol in Nashville.²²⁰ Beginning in 1856, Tennessee’s Legislature enacted laws authorizing penitentiary officials to contract with outside private manufacturers to employ inmates to work behind the walls of the penitentiary.²²¹ “A Nashville furniture maker, a hosiery company, and a company making soles, heels, and taps for shoes were all active in working the convicts behind the fences of the Tennessee state penitentiary prior to the

²¹⁹ Gossett, *The Keepers* at 36, 231

²²⁰ Gossett, *The Keepers* at 46-47

²²¹ Act of Tennessee, Ch. 117, p130-132 (1856); Ch. 28, p 24; Ch. 63. P47 (1859); See KARIN SHAPIRO, *NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN TENNESSEE COALFIELDS, 1871-1896* (1998): “Once Tennessee officials succumbed to the convict lease as a method of penal administration, they first negotiated contracts with small operators who agreed to employ convicts in manufacturing enterprises within the main penitentiary. From 1865 to 1870, a Nashville firm employed the state’s felons in the production of reapers, mowers, thrashers, plows, wagons, saddles, and cedarware. The company paid forty-three cents per day per convict; under this arrangement, the welfare of the inmates remained the responsibility of the state.”

Civil War.²²² One of the first manufacturers to rely on inmate labor, Hyatt and Briggs, a furniture maker, remains in business to this day.²²³

At first the war did not stop Tennessee's exploitation of inmate labor. While Nashville was still under confederate control, inmates worked to supply southern forces.²²⁴ When Union troops occupied the City, they turned the penitentiary into a military prison and at one point in 1864 it held more than 2400 confederate prisoners.²²⁵ Once war ended and the penitentiary was turned back to state control, it resumed operation as a slave camp.

And, like their modern equivalents, the penitentiary came to serve a warehouse for Black men, often for minor property offenses. A report of the penitentiary directors noted that many of the black men were serving time "for offenses ranging from eight cents, the value of a fence rail, to all intermediate sums not reaching \$5, from remote counties of the state."²²⁶ In a place that routinely tortured prisoners, Blacks received the worst treatment. They were segregated from the rest of the population, forced to take the most menial jobs, such as hauling night waste, and punished more severely than whites. Penitentiary records show that "on a per capita basis, blacks were whipped and placed in solitary confinement on restricted diets about five times as often as white convicts."²²⁷

For its first thirty-years, between 1831 and the start of the Civil War, the penitentiary's population was generally less than 8% Black.²²⁸ That changed after the War. Whereas in 1860, Black people comprised less than 3% of the prison population, by 1866, they were 33%,²²⁹ by 1867, 58%,²³⁰ and more than 66% at around the time when Galloway served his sentence.²³¹ For the remainder of the 19th Century and into the modern era, Blacks never represented less than 60 percent of inmates, though at no point did their number in the general population of Tennessee ever exceed 25%.²³² The rapid

²²² Gossett, *The Keepers* at 62-63

²²³ Gossett, *The Keepers* at 73; W. CALEB MCDANIEL, *SWEET TASTE OF LIBERTY*, 182 (2020);

²²⁴ Gossett, *The Keepers* at 63

²²⁵ Gossett, *The Keepers* at 56

²²⁶ Gossett, *The Keepers* at 69

²²⁷ Gossett, *The Keepers* at 234.

²²⁸ Gossett, *The Keepers* at 231.

²²⁹ Gossett, *The Keepers* at 67

²³⁰ Gossett, *The Keepers* at 67

²³¹ Gossett, *The Keepers* at 66

²³² Gossett, *The Keepers* at ____

increase in the prison population and requirement that prisoners be segregated by race rendered conditions inside even more intolerable for Black inmates. The penitentiary had been built with a capacity for 352 single-person cells; doubling inmates per cell increased it to 704; by 1866 the population was over 1000, the vast majority Black men. The solution was inmate leasing.

Prior to the war, inmates worked inside the prison under the care and custody of penitentiary officials to produce goods for the private market; after the war Tennessee leased inmates out to private parties who not only controlled their work conditions but also were responsible for their welfare.²³³ Inmates leasing didn't just solve overcrowding, nor was it just a matter of the state making a profit. "Next to repayment of the public debt, which consumed between 40 and 60 percent of postbellum annual budgets, the government spent more on law enforcement and costs incurred by the judiciary than it did on social services, pensions, public administration, and a host of other governmental duties."²³⁴ Rather, Tennessee, like most of its southern neighbors, used the criminal justice system in general and inmate leasing in particular to return young Black men to a state of near-slavery, while making private businesses owned by white men enormously rich:

[C]onvict leasing became a means of accomplishing several impost post-bellum Tennessee goals. One, it dealt very well with the problem of "free" blacks, returning the white establishment to its assumed superior position. Two, it provided a system of very inexpensive labor (943 cents per day in 1867) to industry and agriculture to replace the slavery system eliminated by the Civil War. Third, it provided relief from onerous expenditures to build and maintain prisons and to support convicts. Fourth, it provided a source of income to a badly depleted state treasury. Fifth, ...it provided a source of building great personal wealth to a select group of Tennessee businessmen and political leaders.²³⁵

²³³ See KARIN SHAPIRO, *NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN TENNESSEE COALFIELDS, 48-49 1871-1896* (1998):

²³⁴ Shapiro at 55. "Between 1888 and 1894, the government spent around one-fifth of taxpayers' money on the criminal justice system, including state prosecutions, the national guard, and court costs. In comparison, education, hospitals, and oversight of the state's human and physical resources together received only 14 to 21 percent of the budget."

²³⁵ The keepers at 242-43; "Between 1870 and 1890, Tennessee's lessees paid over one million dollars into state coffers, four-fifths of which constituted a net surplus." See Shapiro, *New South Rebellion* at 53. But, the true value of the system "lay in the savings that it

Starting in 1866, the General Assembly formalized the practice of inmate leasing. From that point on and for all practical intents and purposes, the penitentiary became a state business using black labor for white profit. The state advertised inmate leasing in major newspapers across Tennessee and surrounding states.²³⁶ Lease contracts between the penitentiary and private business typically called for an annual payment to the state of \$30,000 - around \$600,000 in current value; the lessee, not the penitentiary, provided food, shelter and clothing for the inmates; the lease placed restrictions on neither the type nor the conditions of work inmates were required to perform.²³⁷

In 1871, a year before David would be convicted and sent to the penitentiary, Tennessee began leasing inmates to railroad companies and mine operators.²³⁸ For a period of about a dozen years – 1871-1883 – one man, Thomas O’Conner, a controlling director of the Tennessee Coal, Iron and Railroad Company, leased the entire Tennessee penitentiary system.²³⁹ So, on January 11, 1873, when David walked into the state penitentiary for marrying Malinda, he essentially became O’Conner’s property.²⁴⁰

represented. If the convict lease had not been in place, the state governments would have had the responsibility of transporting, housing, clothing, and feeding their prison inmates. *Id.*

²³⁶ Gossett, *The keepers* at 78.

²³⁷ Gossett, *The keepers* at 80

²³⁸ See KARIN SHAPIRO, *NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN TENNESSEE COALFIELDS, 48-49 1871-1896* (1998)

²³⁹ Robert M. McBride, Book review: *May the Sod Rest Lightly. Thomas O’Conner; Halifax Court House, Virginia, 1836-Knoxville, Tennessee, 1882* by Rebecca Hunt Moulder *Tennessee Historical Quarterly* Vol. 36, No. 4, 554, 556 (WINTER 1977).

²⁴⁰ Here’s a contemporary account of the life on an inmate working for the Tennessee Coal Iron and Railroad Company:

The life of a Tennessee convict whether he is worked in a coal mine, or on railroad construction, as the Tenn. Coal, Iron and Railroad Company worked some of them has been short and terrible. A writer in the New York Sun of Sept. 11, 1891, in giving a description of some of the convicts said in part: "They are herded about from place to place like wild animals. No life could be more horrible. The company counts upon the guards to get a certain amount of work out of each convict. As the guards are from the lowest sort of white men in the State, the treatment of the wretches can easily be imagined. Sickness is not counted as inability to work. The policy is to work him until he drops and then cure him if possible; if not let him make way for some other for there is never a lack. . . . The guard curses, kicks, clubs or kills at pleasure. The company asks no questions; the State has meagre chance of finding the truth and would be slow to act unless public indignation should be aroused. To make a dash for liberty is simply

O’Conner’s lease ended in 1883 only because, as Mark Twain would later document in his memoir, *Life on the Mississippi*, O’Conner was killed in the middle of the street in front of his bank in Knoxville, Tennessee in a shootout with a business rival over a land deal.²⁴¹ Along with other company directors such as E.J. Sanford, father of future Supreme Court Justice Edward T. Sanford, O’Conner used inmates like David to build a mining and manufacturing enterprises that came to rival J.P. Morgan’s United States Steel Corporation.²⁴² Tennessee Coal and Iron still survives today - as part of U.S. Steel.²⁴³

VIII

David and Malinda In Middle-Age

David served six hundred and thirty-seven days in the penitentiary; he walked in on January 11, 1873, and walked out on October 10, 1874.²⁴⁴ Like most inmates, David would have spent these twenty-one months working six days a week from sunup to sundown with one midday break for a cold meal.²⁴⁵ When working, he would have been shackled to other inmates with a heavy chain around one ankle; when not working, he would have been locked up in a cage loaded on a wagon; had he tried to escape, he would have been shot.²⁴⁶ It’s a minor miracle he survived. On the page of the handwritten records of the penitentiary where David appears, a total of four inmates are listed: three black - David, William Barrow, and John Nelson

a way of committing suicide; . . . convicts frequently court death by making this bold dash. The rifle rings out its challenge. The convict runs on a bit, then his striped and ragged legs begin to totter, and then he sink down. A hole is dug and the dead zebra is put out of sight speedily.

Hell Holes: Imprisonment in Tennessee and Alabama, 10 J. OFFENDER Counseling, Services & REHAB. 107, 111 (1985).

²⁴¹ Twain reproduced a newspaper report of the shootout, misspelling O’Conner’s name as O’Connor. The Tennessee Coal, Iron and Railroad Company’s lease of Tennessee’s penitentiary system did not end with O’Conner’s death in 1883; it continued until 1896 when the state ended the practice of inmate leasing. The keepers at 81.

²⁴²

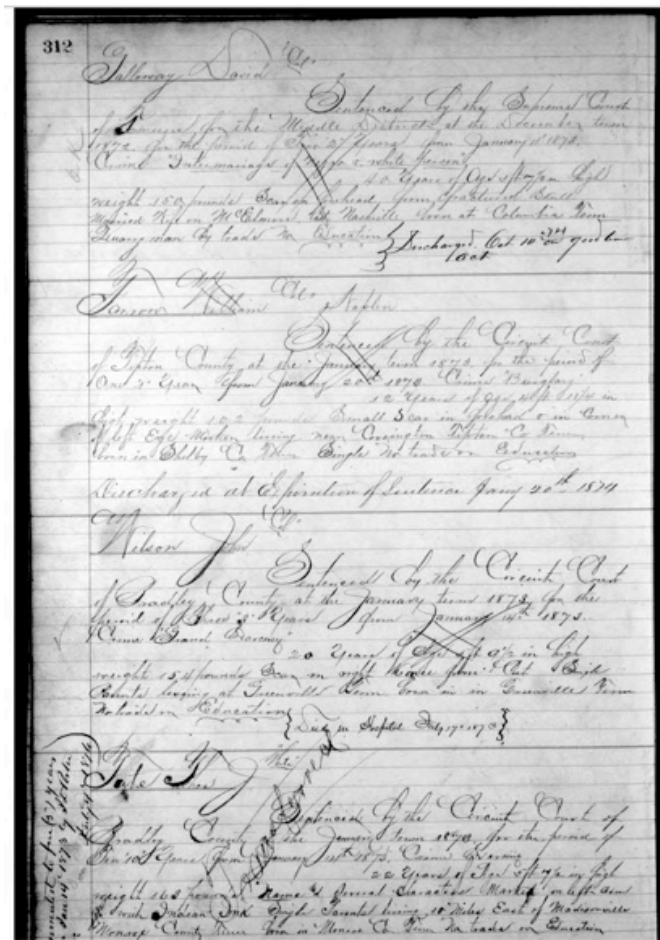
²⁴³

²⁴⁴ In the archives of the Penitentiary Records, David’s entry appears in Volume XX-Convict Records: State Penitentiary, Nashville, TN, Book XX 1877-882 Slide 1072, Roll Number RG25-25.

²⁴⁵ Gossett, The keepers at 81-82

²⁴⁶ The mortality rate was horrendous. The keepers at 82: “In 1890, there was not a single convict who had lived long enough to complete ten years on the rolls of the penitentiary, and there were only two who had survived nine years under the lessees.”

– and one white – Thomas Tate. Of the four, John Nelson, the youngest, barely made it six months into his three-year sentence for grand larceny; he entered on January 14, 1873 and died in the prison hospital on July 17, 1873.²⁴⁷



Once released, David returned to Malinda but the two were rearrested less than a week later, on October 14, 1874, for living together in violation of the miscegenation law.²⁴⁸ David was fined \$50 and he and Malinda were sent back to the same workhouse where they'd both been incarcerated while

²⁴⁷ State of Tennessee, Penitentiary Archives, Volume XX- Convict Records: State Penitentiary, Nashville, TN, Book XX 1877-882 Slide 1072, Roll Number RG25-25.

²⁴⁸ Miscegenation: An Outrage for the Chattanooga Shriekers, Nashville Union and American, Thursday October 15, 1874

awaiting their first miscegenation trial back in 1871.²⁴⁹ Campbell, still David’s – and presumably Malinda’s – attorney, filed a writ of habeas corpus in federal court before Judge Connally Findlay Trigg.²⁵⁰ President Abraham Lincoln appointed Trigg to the bench after Congress impeached and removed Judge West Humphreys Hughes for supporting secession and the confederacy.²⁵¹ But, while Trigg was a unionist, he also proved himself hostile to civil rights during Reconstruction.²⁵² In the habeas petition, Campbell argued that David could no longer be arrested for a crime for which he’d previously been tried, convicted, and sentenced to the penitentiary, and that, in any event, the 1870 statute was unenforceable as a violation of the 14th and 13th Amendment.²⁵³ By then, Campbell was running for office in Nashville. On November 9, 1874, true to his anti-civil rights reputation, Judge Trigg denied the motion, holding that the court had no jurisdiction over the matter and, even if the court had jurisdiction, it would hold that the 1870 violated neither the 13th nor 14th amendments.²⁵⁴

Having failed to obtain relief in federal court. David’s lawyers returned to state Court and filed a *writ of certiorari and supersedeas* based on David taking a “pauper’s oath.”²⁵⁵ The procedure would have allowed for David and Malinda to swear that they were too poor to pay the \$50 fine and be released on bond from the workhouse while pursuing further appeals. The City opposed the motion, arguing that, if granted it would create a loophole for every person sentenced to the workhouse to avoid serving their time by claiming poverty.²⁵⁶ On November 15, 1874, Judge Nathaniel Baxter, a

²⁴⁹ Miscegenation: An Outrage for the Chattanooga Shriekers, Nashville Union and American, Thursday October 15, 1874; The Election Next Tuesday, Nashville Union and American, Sunday, November, 1 1874; The Tennessean, Wednesday, October 21, 1874, page 1.

²⁵⁰ Miscegenation, Galloway Before the Federal Courts on a Writ of Habeas Corpus: An Important Case, Nashville Union and American, Saturday, October 24, 1874.

²⁵¹ CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE, 148 (2006).

²⁵² ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 59 (1985).

²⁵³ Miscegenation, Galloway Before the Federal Courts on a Writ of Habeas Corpus: An Important Case, Nashville Union and American, Saturday, October 24, 1874. The Election Next Tuesday, Nashville Union and American, Sunday, November 1, 1874; Miscegenation, Nashville Judge Nathaniel Baxter Union and American, Saturday, November 7, 1874.

²⁵⁴ Galloway’s Petition Dismissed, Nashville Union and American, Tuesday, November 10, 1874; Intermixture of the Races, _____ November 12, 1874.

²⁵⁵ All Over the City, Nashville Union and American, Sunday, November 15, 1874.

²⁵⁶ Out at Last, Nashville Union and American, Sunday, November 22, 1874

former confederate officer who'd originally opposed secession²⁵⁷ granted the motion on the condition that David post a \$250 bond and directed the City recorder to release David; the Recorder declined to release David, claiming that he's never been properly served with the Court's order.²⁵⁸

Six months prior, the Tennessee State Colored Convention, meeting in Nashville, had taken up David's cause. In its final resolution, the Convention, among other things, decried that "David ...is now condemned to a felon's life through the barbarous decisions of the unjust code and Constitution of the state of Tennessee, for having in civil life married... the wife of his choice, a white woman, a woman of mature age and every way competent to contract with whomever she pleased." The resolution declared that "[David's] marriage was in conformity with his privilege as an American citizen in the land of his birth...", and proposed to raise funds to retain lawyers to bring the case to the United States Supreme Court.²⁵⁹

David's case never made it to the Supreme Court but it did make it into the pages of the Congressional Record. Two weeks after the State Colored Convention, while David remained locked up in Nashville's workhouse, the Senate resumed debate over the Civil Rights Act of 1875. The bill had in fact been one of the main topics of the convention. In addition to condemning David's continued imprisonment, the convention urged Congress to pass the bill, warned Republicans that Black people would boycott any member who did not support the bill, and branded former Tennessee Governor, now republican Senator, Brownlow a Judas and a traitor to Black people for opposing the bill and betraying the people who'd helped him gain office. In the August 1867 election, in which he was reelected governor, Brownlow received 5,454 black votes out of 5817 eligible black voters in Nashville, or close to 94% of the black vote. Statewide, he received a similarly high percentage of the Black vote.

When the bill that would become the Civil Rights Act came up for discussion in the Senate, John Stockton, democrat from New Jersey, rose to dismiss it as a "fraud" and an "affront" to the principles of majority rule and to respond to what his perceived insult to Brownlow's honor. "In the history of the world," Stockton argued, "from the earliest records we have, no people belonging to a majority and a dominant race have ever attempted to take a small minority, inferior in number, inferior in education, inferior in intellect,

²⁵⁷ The Papers of Andrew Johnson at 169 (Vol. 5 1861-1862) (1979)

²⁵⁸ All Over the City, Nashville Union and American, Sunday, November 15, 1874; Criminal Notes, Nashville Union and American, Saturday, November 21, 1874, page 4.

²⁵⁹ The Negro Ultimatum, Nashville Union and American, Thursday April 30, 1874.

and placed them alongside themselves as social equals and governors of the country.”²⁶⁰ Stockton had the Clerk read the entire Resolution into the record because, in his view, its impertinent tone and substance showed that the bill’s true purpose was to “elevate the colored man above the white man.”

Then, not wishing to let the insult to his colleague go unanswered, Stockton also had the Clerk read into the record remarks from Brownlow who, being sick, was not present that day. In his remarks, which he’d previously published as an open letter to Tennessee citizens, Brownlow reminded Black people that he had done much “for the colored race without owing my election to it or having the remotest idea of ever having been a candidate for its votes or support.” Instead, he did what he did for Black people out of “a sense of duty and because of a sincere and unselfish desire to ameliorate its condition.” But, for Brownlow, when Black people demanded integrated public schools and equal access to public accommodation in the 1875 Act, “they seemed to have reversed Taney’s decision and proclaimed in substance that a white man has no rights which a negro is bound to respect.” To Brownlow, racial integration in schools and in public places was the “sum of villainess and quintessence of abomination,” and “the twenty-five thousand white republicans of East Tennessee have resolved to get along without the colored race” rather than submit to it.

The fact that Brownlow opposed the 1875 bill and did so on such racist terms was hardly surprising. Prior to the War, Brownlow, a Methodist preacher, had been a proslavery ideologue. He’d transformed himself into a radical republican who championed black enfranchisement because he saw the opportunity to align himself with the republican party in general and the black vote in particular as a path to power and he took it. In reminding Black people in Tennessee that whites were resolved to get along without them, Brownlow was simply returning to his roots. On the surface, the abomination Brownlow decried in his letter to Tennesseans may have been the prospect of school integration in the 1875 bill, but the actual abomination that most troubled men like Brownlow ran much deeper. Brownlow favored slavery because he viewed black people as less than human; neither the 13th nor the 14th Amendment had changed that and, to him, a bill requiring equal public accommodation meant that the “next step will be that they [blacks] will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters.”²⁶¹ At times, black

²⁶⁰ 43rd congress, first session, Volume 2 Congressional record page 4143 (1874)

²⁶¹ 2 Cong. Rec. app. at 343 (1874)

supporters of the bill pushed back, reminding white representatives that Black women were the ones who long had to fear the predation of white men:

Do you suppose for one moment I would introduce into my family a class of white men I see in this country? Do you suppose for one moment I would do it? No sir; for there are men even who have positions upon this floor, and for whom I have respect, but of whom I should be careful how I introduced them into my family. I should be afraid indeed their old habits acquired beyond Mason and Dixon's line might return.²⁶²

But, for the most part, supporters of the bill, particularly Black representatives serving in the House, went out of their way to assure their colleagues that the “negro is not asking social equality. We do not ask . . . that the two races should intermarry one with the other.”²⁶³ “[I]t is not social rights that [blacks] desire. We have enough of that already. What we ask is protection in the enjoyment of public rights. Rights which are or should be accorded to every citizen alike.”²⁶⁴

So, in using David and Malinda's marriage as an argument in favor of the 1875 Civil Rights bill, the Tennessee State Colored Convention chose to do that which supporters of the bill had carefully avoided doing: make the issue of interracial sex and interracial marriage a matter of constitutional right. Yet, it was not at all surprising that the resolution in support of David and Malinda came out of the convention. By the time David was incarcerated in the workhouse for a second time, the defense team that sought collateral review of his case included a black lawyer by the name of Samuel Lowery and it is a virtual certainty that Lowery himself, who was a delegate at the convention, made David's incarceration a cause of the convention and almost certainly drafted the resolution demanding his release and vowing to raise money for his defense.²⁶⁵

Born a free man in Davidson County, Tennessee between 1830 and 1832, Lowery came from a family of civil rights activists.²⁶⁶ His father, Peter Lowery, who'd purchased his freedom with the help of his Native American

²⁶³ 2 Cong. Rec. 343-44 (1874) (statement of Rep. Joseph H. Rainey).

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²⁶⁵ Lowery was admitted to the Bar of the United States Supreme Court on in February 1880. *See Times Union*, Tuesday February 3, 1880, page 2. Belva A. Lockwood, the first woman to be admitted to the Supreme Court Bar, moved his admission. *Id.*; see also

²⁶⁶

wife,²⁶⁷ was a vice-president of the National Convention of Colored Men held in Syracuse New York in October of 1864 and presided by Frederick Douglass.²⁶⁸ Meeting six months before General Lee would surrender to Grant at Appomattox, the Convention reminded whites that Black people, “having shared with you in some measure the hardships, perils, and sacrifices of this war for the maintenance of the Union and Government, we rejoice also with you in every sign which gives promise of its approaching termination.”²⁶⁹ The Convention also warned: “we are among you and must remain among you; and it is for you to say whether our presence shall conduce to the general peace and welfare of the country or be a constant source of discussion and of irritation, -- troubles in the State, troubles in the Church, troubles everywhere.”²⁷⁰

Before the war, the Lowerys had themselves experienced the wages of racial troubles when White Nashville residents rioted, targeting free Blacks and burning down black schools. The family went into exile in Ohio and Canada and did not return to the city until after 1863 when Union troops, including David’s regiment, occupied Nashville. From that point on, the Lowerys - father and son - were at the forefront of post-bellum political movements by black people in Tennessee.²⁷¹ They brought the very first colored people convention in Tennessee in 1864 and helped organize the convention of 1865.²⁷² Samuel served as delegate in 1871, and again in 1874, and co-founded the Nashville Chapter of the National Equal Rights League, the country’s oldest human rights organization.²⁷³ The Lowerys’ work made them a target of the KKK. In October of 1870, Samuel filed a criminal complaint in federal court against a group of KKK members who came to his

²⁶⁷ WILLIAM J. SIMMONS & HENRY McNEAL TURNER, *MEN OF MARK: EMINENT, PROGRESSIVE AND RISING* 144 (1887).

²⁶⁸ <https://omeka.coloredconventions.org/items/show/282>

²⁶⁹ *Id* at 42.

²⁷⁰ *Id* at 42

²⁷¹ John Cimprich, *The Beginning of the Black Suffrage Movement in Tennessee, 1864-1865*, Volume 65, No. 3 *The Journal of Negro History* 185, 187 (Summer 1980).

²⁷² Judy Bussell LeForge, *State Colored Convention of Tennessee, 1865-1866*, Volume 65 No. 3 *Tennessee Historical Quarterly* 230, 236 (Fall 2006).

²⁷³ Judy Bussell LeForge, *State Colored Convention of Tennessee, 1865-1866*, Volume 65 No. 3 *Tennessee Historical Quarterly* 230, 232 (Fall 2006); *Proceedings of the First Annual Meeting of the National Equal Rights League (1865)* at XX.

house in the middle of the night to threaten his family; he refused to withdraw it, demanding that the men be put to trial.²⁷⁴

Like his father before him, Lowery remained involved in Nashville public life, including unsuccessfully running for public office, but eventually he left the city for Huntsville, Alabama.²⁷⁵ There, while still practicing law, he raised silkworms on forty acres of mulberry trees grown from seeds imported from France.²⁷⁶ One of Lowery's daughters had introduced him to silk production.²⁷⁷ When she died while still a teenager, Lowery continued the practice and, for years, grieving for her, he travelled the country with samples of fine garments woven from his prize-winning silkworms to raise money for an agricultural school he established near Huntsville to teach women and children the art of sericulture.²⁷⁸ In the end, he founded a cooperative commune in Jefferson County near Birmingham, Alabama, and called it Lowerydale²⁷⁹ and in that dale, between the sandstone of Shades

²⁷⁴ Arrested as Ku-Klux, Nashville Union and American, Wednesday October 26, 1870; Let Us Have Peace, Nashville Union and American, October 25, 1870; Retaliation, Nashville Union and American, November 5, 1870.

²⁷⁵ In some ways, Samuel's life was proof that he was his father's son; he was born into and grew up in a free and educated family with a deep and rich tradition in religious service, civil rights activism, and political engagement. But, for all of his accomplishments, like his father before him, Samuel also led a peripatetic life, always starting grand plans but never quite finishing them, always moving from one place to another, always dreaming big dreams. Here's how he described himself: "Hope is a large faculty in my organization. I have tried to abandon it and become indifferent to its inviting fields. When I do, I am really not myself; yet I know I do not hope vainly or recklessly." William J. Simmons & Henry McNeal Turner, *Men of Mark: Eminent, Progressive and Rising* 147 (1887). By the time he left Nashville, most of his projects had come to naught. He settled in Huntsville because his wife, who was probably far more practical than her husband, had a connection to the place. Adora Lowery, born Adora Johnson, came from a prominent free black family. Her father, John Robinson, was born into slavery but bought his freedom, that of his wife and his five children. Unlike the Lowerys, the Robinsons did not move from one scheme to the next. John was a successful businessman in Huntsville prior to and after the war; so were his children.

²⁷⁶ WILLIAM J. SIMMONS & HENRY MCNEAL TURNER, *MEN OF MARK: EMINENT, PROGRESSIVE AND RISING* 147 (1887).

²⁷⁷ WILLIAM J. SIMMONS & HENRY MCNEAL TURNER, *MEN OF MARK: EMINENT, PROGRESSIVE AND RISING* 145-46 (1887).

²⁷⁸ S.R. & R.M. Lowery's Industrial Academy, *Cleveland Gazette*, March 29, 1884. See <http://dbs.ohiohistory.org/africanam/html/pageb095.html?ID=14156>; Silk Culture in the South, *Memphis Evening Herald*, Friday, June 21, 1878 page 2; A Colored Lawyer's Mission, *New York Times*, February 3, 1880; *The Tennessean*, May 8, 1879, page 1.

²⁷⁹ Nancy M. Rohr, *Free People of Color In Madison County, Alabama*, 146 (2015). There are no extensive scholarly descriptions of Lowerydale. Rohr's slim volume, while providing a fair amount of information about Lowery's background in Huntsville, Alabama, has less information about the community Lowery established after he left Huntsville and moved to

Mountain and the waters of Shades Creek, he spent his remaining years convinced until the last that black people would find freedom from the slavery of tenant cotton farming in the silk cocoons of mulberry trees.²⁸⁰

But back in Nashville, on November 22, 1874, when Judge Baxter granted David and Malinda's bond on a pauper's oath, it was Lowery who stood in court to argue the case,²⁸¹ and a month later it was Lowery who finally caused David and Malinda to be free the week before Christmas of 1874. The Nashville Union, which had written numerous articles in two years about the case, posted a notice that David, "well known to our readers, [was] released for good behavior during his confinement."²⁸² Between the six months in Nashville's workhouse after his arrest for marrying Malinda and while waiting trial and resolution of his appeal, the twenty-one months in the State Penitentiary following conviction, and the four months back in the workhouse for returning to her on his release from the Penitentiary, David had served nearly three years in prison.

Birmingham. A number of contemporary online accounts of Lowery's life refer to the commune as Loweryvale without pinpointing its location or providing supporting documentation for the name. By contrast, every contemporary newspaper called the cooperative community Lowerydale. See To the Paris Exhibition, The Birmingham News, Tuesday, December 17, 1895, page 4; Current Events of the Day Epitomized, The Vernon Courier, Thursday, July 28, 1892, page 2; Lowery's Silk Farm, The Birmingham News, Saturday, July 2, 1892, page 6; Current Events of the Day Epitomized, The Times-Democrat, Thursday, July 7, 1892, page 1. It is fair to assume these contemporary newspaper accounts are more likely correct. In any event, the two terms – vale and dale – have the same meaning - a glen or valley - and the commune was in fact located in a valley in the shadow of Shades Mountain in Jefferson County, Alabama.

²⁸⁰ Volume 5, No. 5 Journal of Negro History at 107. Lowery believed that "the culture of the silk worm will take the place of cotton, and give to the women and children a refining and remunerative, employment, which only takes six weeks in a year, and at the same time gives two and three-fold more pay than they could earn all the year in their present employment." WILLIAM J. SIMMONS & HENRY MCNEAL TURNER, MEN OF MARK: EMINENT, PROGRESSIVE AND RISING 147 (1887); see also, Silk Vulture in the South, Springfield Journal & Herald, December 2, 1882 ("Silk culture will give employment in a branch of domestic industry, ...securing more profit in a few acres of land and several weeks of light work to families, than years of toil in the field....The delightful climate of Alabama especially, and the South, will prove that its silk in the near future will rank with our cotton." Apparently, Lowery never passed on an occasion to promote his silk ventures. In May 1879, during a convention of the National Conference of Colored Men in Nashville, Tennessee, Lowery took to the floor to read a newspaper editorial praising his silk work. See Proceedings of the National Conference of Colored Men of the United States, May 6, 7, 8, 9, 1879 at 36 <https://omeka.coloredconventions.org/items/show/323>

²⁸¹ Out At Last, Nashville Union and American, Sunday, November, 22 1874

²⁸² Free Once More, Nashville Union and American, Sunday, December 20, 1874.

By the time David and Malinda walked out of the workhouse, they were, by the standards of their time, two middle-aged people; David now in his mid-forties; Malinda, in her early thirties. Free again, they went back home. Two months after his release from the workhouse, David successfully petitioned a state court in Nashville to restore the citizenship rights that had been stripped from him upon his 1872 conviction for miscegenation.²⁸³ Malinda went back to calling herself Brandon again, as she had been when she first started living with David back in 1870 before they married; they were still together in 1880;²⁸⁴ except David was now listing himself as white in the census.²⁸⁵

²⁸³ Nashville Union and American, Thursday, February 4, 1875

²⁸⁴ Page 16, lines 22 and 23 of the 1880 First Division Ward 14 Nashville census show David Galloway and Malinda living in the same household as husband and wife. No last name is listed for Malinda, though a hash mark seems to imply she shares David's last name. This is the first instance in census records where Malinda is not listed as either Brandon or Vines.

²⁸⁵ *Id.* Both David and Malinda are reported as “white” in the 1880 Census but it is extremely unlikely that this is a different white couple with the exact same names in Nashville. To begin with, no such couple with the same names appear in any prior census. While it is possible that this white couple moved to Nashville after the 1870 Census, or simply didn't happen to be recorded in prior census for the city, there is persuasive evidence that this is indeed David and Malinda, with David passing for white. Specifically, David and Malinda are listed as white but every single one of their neighbors appearing on the same census page is either black or mulatto; no one else in that neighborhood is listed as white. To be sure, in the late Nineteenth Century, residential racial segregation had not yet hardened in Nashville. As Nashville historian Bobby Lovett notes, “although slavery, Civil War and Reconstruction, and then racial segregation dictated the development of black Nashville, its residents became scattered in neighborhoods in all sections of the city. Blacks and whites lived in close proximity (as in slavery times), and Negroes were not enclosed in a huge ghetto as in northern cities by the first half of the twentieth century.” However, it is still unlikely that the lone white couple residing in a seemingly all-black neighborhood would happen to share the same names as the interracial couple who had been arrested on at least two separate occasions between 1871 and 1874 for being together. Far more likely, this is David and Malinda living together on a black block. David and Malinda got married after Malinda tried passing for “colored” on their marriage license and listed herself as Black in the 1870 census; it didn't work. It makes sense that they would have instead tried to declare David as white for purposes of the census, even though in real life David was probably too dark-skinned to convincingly pass for white.

CRIMINAL NOTES.

Eighty dollars at the police court yesterday.

Thomas Brown was sent to the work-house yesterday for sixty-six days, on the charge of vagrancy.

The Recorder fined Joe Robertson ten dollars yesterday for running a hack without license.

Lee Boyd, colored, in jail on the charge of an assault with a knife, was released on bond yesterday.

Sallie Murphy was arrested by officer Dale yesterday, and committed to the work-house, on the charge of vagrancy.

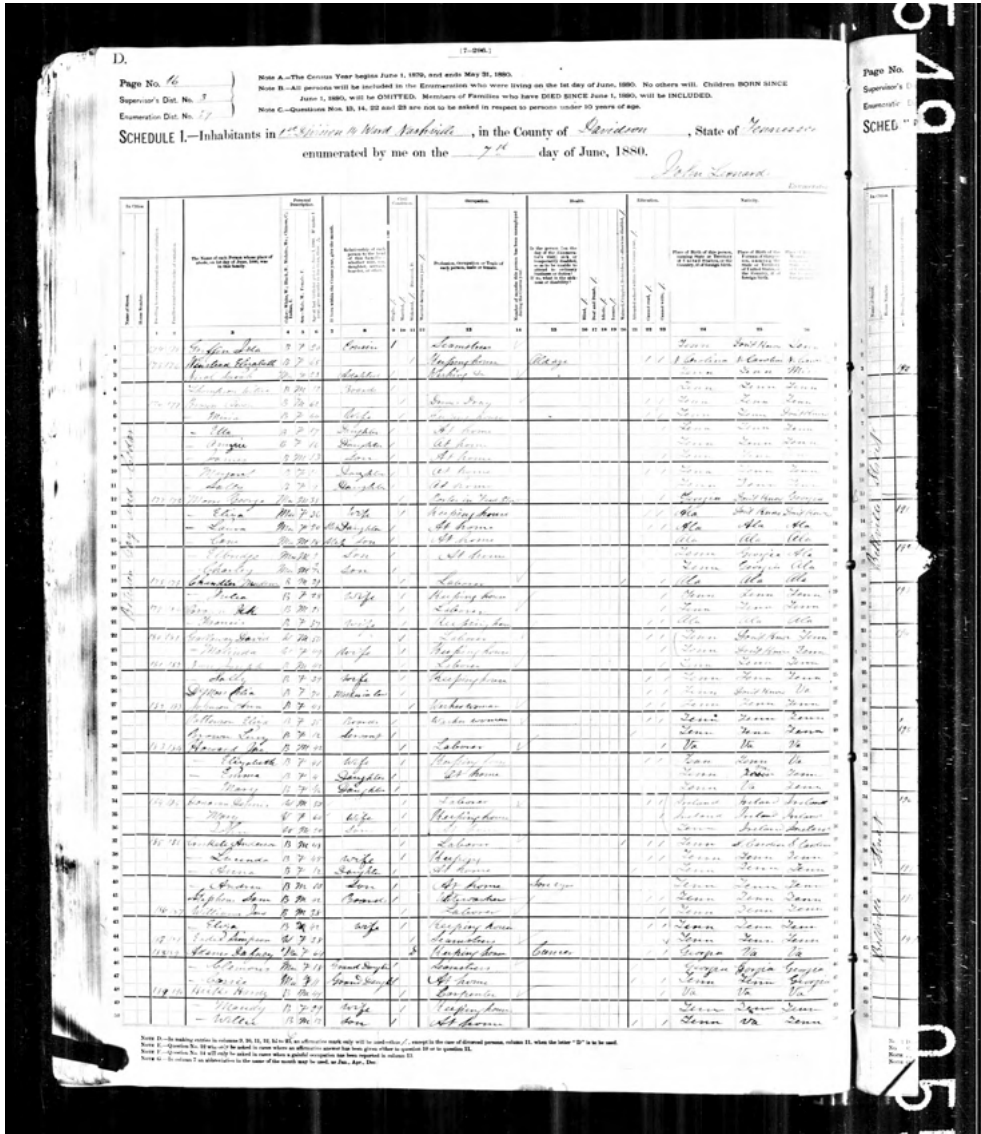
Wesley Harris and W. M. Goch, both colored, were arrested at Mt. Juliet, and lodged in jail at Lebanon yesterday, on the charge of stealing bacon from Marler & Turner.

C. C. Spears, Sheriff of Hawkins county, added one to the penitentiary force yesterday, in the person of James Burchfield, sentenced to one year for robbing a hen roost.

Thomas Allen, colored, and John Caldwell, were committed to jail yesterday by Sheriff Mitchell, of Giles county, for trial before the Supreme Court, the former charged with malicious shooting and the latter with horse-stealing.

Moses Perry, colored, was committed to jail yesterday by Jailer Jackson, of Rutherford county, to await trial before the Supreme Court, on the charge of murder. The prisoner had been tried on an indictment for the murder of Goch, and sentenced to be hanged.

The Law Court has restored David Galloway, colored, to citizenship—a boon which he forfeited by miscegenation, but which he has regained by serving a term in the penitentiary and a term in the work-house, and in the meantime behaving himself with much credit as a prisoner.



IX

Speak to Your Dead

“Speak to your dead. Write for your dead. Tell them a story. What are you doing with this life? Let them hold you accountable. Let them make

you bolder or more modest or louder or more loving, whatever it is, but ask them in and listen, and then write.”²⁸⁶

I did not start out to write about slavery in the early Catholic Church in New Orleans, Louisiana, or orphans in the time of cholera in Nashville, Tennessee, or Black people on an exodus in search of Canaan, or post-bellum state colored conventions, or female sex workers wandering the Ohio on a luxury riverboat, or sericulture in an Alabama commune. Nor did I intend to turn David and Malinda’s story into a symbol for Reconstruction itself.²⁸⁷ From the first to the last, my more modest goal was to reconstruct these two people as completely as I could, as clearly as I could, and as honestly as I could.

I now know a lot more about David and Malinda than when I started. And yet, there remains much I still don’t know or understand. At times and in places, I’ve felt like an archeologist with a tiny brush, slowly clearing away soil, looking in every layer of dirt, in every particle of dust, for the faintest of fragmented traces of dead creatures and departed cultures. But, if I did not find intact artifacts at the bottom of the hole that opened up as I searched for David and Malinda, and if my sifting through the remains of their lives didn’t always reveal definitive answers, I have, purposefully, resisted the impulse to fill in the missing gaps - to write into the empty spaces because, for all the lulls and pauses in their story, and even in the dim light of all those fading years, David and Malinda, stand out more sharply than any cliché stock script I could possibly conjure up about a wounded soldier and the sex worker with a heart of gold discovering each other in the midst of war and surviving trials and tribulations to find happiness with one another.²⁸⁸

I have no intimate insight into the nature of their relationship, nor a firm grasp of what their daily life must have been like, except that they were poor, had no family, and, through it all, they kept returning to one another.

²⁸⁶ ALEXANDER CHEE, *HOW TO WRITE AN AUTOBIOGRAPHICAL NOVEL*, 277 (2018)

²⁸⁷ And yet, the arc of David’s life does mirror the arc of the Civil War and Reconstruction: he was born in slavery, fought in the Union Army, was consigned to near slave-labor after the war, experienced first-hand the early workings of white supremacy and, the Thirteenth and Fourteenth Amendments notwithstanding, lived a significant portion of his adult life in de facto slavery.

²⁸⁸ Because David was born into slavery, it is difficult to arrive at definitive answers about his early life. While owners were required to report persons they enslaved, they did not have to record their names - only their gender, age, and, sometimes, distinguishing physical marks. As for Malinda, newspapers and court transcripts were inconsistent in recording her first name. It’s most likely she was Malinda but at various times she was also referred to as Melinda and even Matilda. The same was true of her last name; in various sources she is listed as Brandon, Galloway, Vine, and Vines.

The hard lives the two seemed to have led didn't begin with their incarceration for their union. More than a year before they would be married, but when they were already living together, on March 15, 1870, David was fined \$10 in criminal court for an unknown offense.²⁸⁹ A few months later, on November 1, 1870, the two were arrested together for the first time but not for miscegenation; David was convicted of “larceny of a coat, lewdness, and assault, and sentenced to one hundred and twenty days in the Nashville workhouse;”²⁹⁰ in the same proceedings, Malinda too convicted of “lewdness” and sentenced to twenty days in the workhouse;²⁹¹ almost certainly they were arrested as part of the same incident. Then, barely a month after completing her twenty-day sentence, and with David still serving his one hundred and twenty days, Malinda was arrested for “drunkenness and disorderly conduct” on January 24, 1871, and sentenced to fifty-three days in the workhouse.²⁹² During both of her arrests, Malinda was still going as Vine; perhaps she remained a sex worker and the arrests were incident to her trade. The two married just three months after David was released from his November 1870 conviction.

²⁸⁹ The Courts, *The Tennessean*, Tuesday March 15, 1870, page 4.

²⁹⁰ The Courts, *The Tennessean*, Tuesday, November 1, 1870

²⁹¹ *Id.*

²⁹² The Courts, *The Tennessean*, Tuesday, January 24, 1871.



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

Over the years, scholars writing about David and Malinda captured them only in brief snatches – quick mentions in texts, short references in footnotes. In these works – law review articles, history books, unpublished PhD theses - David and Malinda make appearances mostly as random examples of the history and jurisprudence of miscegenation laws.²⁹³ None

²⁹³ Alfred Avins, *Anti-Miscegenation Laws and The Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224, 1250 n.138 (1966); Steven A. Bank, *Anti-Miscegenation Laws*

of these scholars identify their case as being especially legally or historically significant and, in a sense, they are correct: David and Malinda's multiple prosecutions do not necessarily offer anything new in terms of doctrinal conclusions, theoretical insights, or historical developments in the country's experience with miscegenation that would not be evident from an examination of *Pace v. Alabama*, *Naim v. Naim*, or *Loving v. Virginia*.²⁹⁴

But there is a sense in which David and Malinda's case stands out. In the main, Reconstruction-era black civil rights litigants tended to present themselves as black avatars of white middle-class respectability – as if the 13th, 14th, and 15th Amendments were not enough to grant them equality and they needed to display their pedigreed family, courteous speech, good manners, and modest dress in order to earn the right to exist free and equal in society.²⁹⁵ David and Malinda were different; they carried no such insignias

and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875, 2 U. Chi. L. Sch. Roundtable 303, 334-35 (1995); Emily Field Van Tassel, Only The Law Would Rule Between Us: Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War, 70 Chicago-Kent L. Rev. 873, 915 (1995); David Upham, Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause, 42 Hastings Const. L. Q. 213, 280 (2015); ALAN FRIEDLANDER & RICHARD ALLAN GERBER, THE WELCOMING RUIN 203 (2020); Paul E. Coker, Is This the Fruit of Freedom? Black Civil War Veterans in Tennessee at 185-86 (unpublished dissertation) available at https://trace.tennessee.edu/utk_graddiss/1067/; Byron Curti Martyn, Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation at ____ (unpublished dissertation) available at <http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll3/id/270693>. One point of clarification, Professor Upham's article, noted above, states incorrectly that David Galloway's counsel on appeal was former Supreme Court Justice John A. Campbell, who voted in the majority in *Dred Scott v. Sanford* and resigned his seat on the Court to join the Confederacy at the start of the Civil War. Professor Upham argues that Campbell saw Galloway's and other interracial marriage cases as an opportunity to advance the expansive view of the privileges and immunities clause he would later use in his argument in *The Slaughter-House Cases*. See Upham, *Interracial Marriage* at 280-81. In other words, just as Campbell argued in *Slaughter-House* that economic liberty was an incident of federal citizenship, so too, according to Professor Upham, he planned to claim inter-racial marriage as a federally protected right under the privileges and immunities clause. Unfortunately, former Supreme Court Justice Campbell was not Galloway's lawyer. As I explained earlier, David's lawyer was indeed named John A. Campbell but his middle initial "A" stood for Alexander, whereas former Justice Campbell's middle initial was Archibald. We know enough details of John Alexander Campbell's life for there to be no doubt that he was not the Campbell who sat on the Supreme Court before the Civil War. In any event, given Justice Campbell's well documented hostility to social equality, it is hard to fathom he would have ever brought himself to appear as counsel in defense of an interracial couple.

²⁹⁴ 106 U.S. 583 (1883); 197 Va. 80 (1955); 388 U.S. 1 (1967).

²⁹⁵ See Kenneth Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 LAW AND SOC. INQUIRY

and symbols of propriety, flew no flag or banner of respectability. Theirs was a messy life, no doubt made harder by the persecution they faced, but, all in all, they seemed to have lived on their own terms with no apparent effort to be or become paragons of virtue who needed to prove themselves worthy of basic human rights: they quarreled, had sex, drank; they were loud, they got into brawls with others, and they spent time in the workhouse long before they were persecuted for their marriage. If they were freaks, then they flew their freaks flag high. Yes, the 1874 Colored Convention did emphasize David's patriotism and military service in advocating for his release,²⁹⁶ but the resolution made neither excuse nor concession for it being no one's business if David and Malinda chose to be with one another. So, in the end this former soldier with a criminal record and sex worker raised an orphan, demanding equal rights for the simple fact that they were human beings, was in its own way an enactment of citizenship far more radical than those of black civil rights litigants who, for all their heartbreakingly earnest efforts at presenting themselves as the right sort of people, somehow never quite managed to convince white Reconstruction society they were worthy of respect.

David and Malinda are heroic figures. This can be said without the least bit of sentimentality because there is nothing sentimental about their story.²⁹⁷ Whatever their flaws may have been, in whatever ways they may have failed one another, and in whatever wretched conditions some of their days may have passed, there was something heroic about their commitment to one another, whether or not that commitment may have been borne as much out of convenience as out of conviction; as much out of habit as out of love.

And in their heroic commitment, David and Malinda's story holds one last lesson still: the words and phrases typically used to describe the prosecution they and people like them endured often conceal the violence it entailed: anti-miscegenation laws, interracial marriage bans, the color line. In reality, the state enforced these laws by brutalizing its own citizens. The fact that in David and Malinda's case the state turned its instruments of

377, 381 (1999); Barbara Y. Welke, *When all the Women Were White and all the Blacks Were Men: Gender, Class, Race, and the Road to Plessy*, LAW AND HISTORY REVIEW, VOL. 13 NO. 2, 261 (1995); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777 (2008).

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²⁹⁷ "Sentimentality... is the mark of dishonesty...the wet eyes of the sentimentalist betray his aversion to experience, his fear of life, his arid heart; and it is always, therefore, the signal of secret and violent inhumanity, the mark of cruelty." JAMES BALDWIN, NOTES OF A NATIVE SON, collected in THE PRICE OF THE TICKET

violence against two ordinary people with no power, no money, and no family lays bare the ways in which, and the extent to which, these bans were not just state discrimination but state terrorism. David and Malinda spent much of their marriage in an out of the Nashville workhouse and penitentiary. Tennessee did not discriminate against them; it hunted them, caged them, terrorized them, and, in the end, broke them.

I first came across David and Malinda not while researching miscegenation, but while writing about the story of Sallie Robinson’s lawsuit against the Memphis & Charleston Railroad Company under the Civil Rights Act of 1875.²⁹⁸ The Act, which was such a central concern of the 1874 Tennessee Colored Convention that advocated for David’s release, was signed into law in March of 1875.²⁹⁹ Sallie used the statute to sue the Railroad after she boarded a train near midnight at Grand Junction, Tennessee, and the conductor forced her to sit in the second-class even though she held a first-class ticket.³⁰⁰ Her suit, which would ultimately be joined with four others to form the United States Supreme Court decision in *The Civil Rights Cases*, invalidating the Act of 1875, was the first to squarely present the Court with the opportunity to hold in 1883 that under the Commerce Clause Congress had the power to prohibit racial discrimination by private parties.³⁰¹ The Court declined to do so, stating, in spite of the evidence to the contrary, that none of the parties had made the commerce clause argument to the Court.³⁰² Sallie had in fact made that very same argument in her brief to the Court.³⁰³ It would take eighty years for the Court to do in *Katzenbach v. McClung* under the 1964 Civil Rights Act that which it had refused to do in *The Civil Rights Cases* under the 1875 Civil Rights Act.³⁰⁴

In writing about Sallie’s story, the eighty-year span between *The Civil Rights Cases* and *Katzenbach v. McClung* turned out to be, at least for me, less significant than the realization that Ollie McClung, the owner of the barbecue restaurant, who challenged the constitutionality of the 1964 Civil Rights Act in *Katzenbach v. McClung*, descended from the same family tree as Charles McClung McGhee, the owner of the Railroad that denied Sallie

²⁹⁸ See, *The Civil Rights Cases*, 109 U.S. 3 1883).

²⁹⁹ Act of March 1, 1875, ch. 114, 18 Stat. 335

³⁰⁰ Aderson Bellegarde Francois, A Lost World: Sallie Robinson, *The Civil Rights Cases*, and Missing Narratives of Slavery in the Supreme Court’s Reconstruction Jurisprudence, *Geo. L. J.* ____ (2020).

³⁰¹ *Id.* at ____.

³⁰² *Id.* at ____.

³⁰³ *Id.* at ____.

³⁰⁴ *Id.* at ____.

her seat in the first class car in 1879, resulting in *The Civil Rights Cases*.³⁰⁵ And that thread, spinning out and reaching outward and over eighty years and tying together a Black woman on a midnight train from Memphis in 1879 to black customers grabbing food out of the back takeout window of a barbecue place on a 1964 Birmingham summer night, seemed to me not merely the sort of accidental rhymed verse the passage of time habitually conjures up, but more importantly a piece of evidence of how so much of American identity is buried in the short constitutional moment of Reconstruction.

As radical an experiment as the American constitution may have been, James Baldwin once remarked, “the establishment of democracy on the American continent was scarcely as radical a break with the past as was the necessity, which Americans faced, of broadening this concept to include Black people.”³⁰⁶ David and Malinda were two ordinary people – two everyday people - who, by the very fact of their daily existence, made an attempt at that radical break.³⁰⁷ I write about them in order to speak to and write for the dead, to “ask them in and listen, and then write.” I write about them in order to remember the lives they led; lives that remain as artifacts of a time in American history in general, and American constitutional jurisprudence in particular, when, for a brief moment, between *Dred Scott v. Stanford* and *Plessy v. Ferguson*, between the civil war and Jim Crow, between the bondage of cotton plantations and the segregation of drinking fountains, between the charnel house of Gettysburg and the strange fruits hanging from southern trees, the old world of racial slavery had fallen into pieces and had not yet rebuilt itself into the new social order of racial apartheid; everything seemed, again for a brief moment, possible, everything changing, in flux, in motion, like David and Malinda, two people trying for a new life in a different world together.³⁰⁸

³⁰⁵ Id. at ____.

³⁰⁶ JAMES BALDWIN, STRANGER IN THE VILLAGE, collected in THE PRICE OF THE TICKET (1985).

³⁰⁷ Everyday People: Sly and the Family Stone:
Sometimes I'm right and I can be wrong
My own beliefs are in my song
The butcher, the banker, the drummer and then
Makes no difference what group I'm in
I am everyday people

³⁰⁸ “If the Reconstruction of the Southern States, from slavery to free labor, from aristocracy to industrial democracy, had been conceived as a major national program of America, whose accomplishment at any price was well worth the effort, we should be living today in a different world.” W.E.B. Dubois, *Black Reconstruction* 798 (1935).

Epilogue

David and Malinda’s story does not end where I left them after their second miscegenation arrest, back home together in 1880, living in a black Nashville neighborhood, David passing for white in the census, his citizenship rights restored.³⁰⁹ They had spent nearly their entire lives in Davidson County but there was no future for them in Nashville; so long as they remained married, Tennessee was never going to stop prosecuting them. better to leave the city; better to leave the State altogether; better to follow John “Pap” Singleton, the Negro Moses,³¹⁰ on the exodus out of Tennessee to the new Canaan of Kansas, where land was free for the taking to anyone willing to work it,³¹¹ where they would know what it feels like to be free, and, through way overdue, they’d be starting anew.³¹²

First, a steamboat from Nashville to Paducah, Kentucky, then on to Memphis, where they camp for weeks on the banks of the Mississippi River, waiting for passage to St. Louis, Missouri;³¹³ then a train to Kansas.³¹⁴ They put down roots near Nicodemus, one of the earliest Black settlements in Kansas.³¹⁵ They homestead some land; after ten years of working it, they

³⁰⁹ See notes **XX** and accompanying text.

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³¹² I Wish I Knew How it Would Feel to Be Free by Bill Taylor and Dick Douglas:

I wish I knew how

It would feel to be free

I wish I could break

All the chains holdin’ me

...

I wish I could do

Al the things that I can do

And though I’m way overdue

I’d be startin’ anew

³¹³ From Tennessee, exodusters took a number of routes to Kansas, including riverboats that began in Nashville on the Cumberland River. See Trials, Triumphs, and Transformations: Tennesseans’ Search for Citizenship, Community, and Opportunity. (From The Middle Tennessee State University Walker Library Digital Archives at <https://cdm15838.contentdm.oclc.org/digital/collection/p15838coll7/id/237>)

³¹⁴ St. Louis, Missouri was a major waypoint for Freedmen seeking passage final passage to Kansas. See NELL IRVIN PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION 185-87 (1985 ed.); ROBERT G. ATHEARN, IN SEARCH OF CANAAN: BLACK MIGRATION TO KANSAS 1879-1880, 20, 26 (2020).

³¹⁵ “The first well-known settlement of Black Kentuckians in Kansas was Nicodemus, located well out on the prairie, on the Solomon River in Graham County. It was founded by Black colonists from Lexington, Kentucky, who arrived in five groups in 1877 and 1878.” PAINTER, EXODUSTERS, at 149-150.

earn title.³¹⁶ They build a house; a cottage with gables, dormer windows, and a wide veranda, where, in the evening after the day's work, David sits looking out onto his fields in the setting sun; inside Malinda finished preparations for supper and now plays her piano; on the side of the cottage is a large barn and carriage house where their children play; it is almost time to come inside.³¹⁷

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

Some Exodusters who came to Kansas chose to remain and, even if it was not the new Canaan they'd hoped for, they build their lives there and found purpose. Among them were Albert Bass and Jennie Mason, both from Missouri, who came to Kansas part of the 1879-1880 migration. They had a daughter named Lutie who grew up to marry a man by the name of Charles Francis Brown; Charles and Lutie had a son they named Oliver Brown; Oliver married Leola Williams; when Oliver and Leola tried to enroll their daughter, Linda Brown, in their Topeka neighborhood school a few blocks away from their house, they were turned away and directed to a segregated school more

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³¹⁷ Following the Mississippi Valley Labor Convention in Vicksburg, Mississippi, an article appeared in a number of newspapers purporting to explain how deceptive advertisement duped Black people into emigrating to Kansas. In the article, the writer described "gorgeously illuminated chromo-lithographs of Kansas scenes" being distributed to Black people to entice them to leave the South. According to the writer, one such scene, entitled "A Freedmen's Home," showed:

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

See *Journal of Negro History*, The Proceedings of a Mississippi Migration Convention in 1879 – How the Negroes were Duped at 55.

than a mile from their home; on Linda’s behalf Oliver sued the school district and became a named plaintiff in *Brown v. Board of Education*.

But for countless others, Kansas in the end proved to be an “Eldorado of foolish dreams.”³¹⁸ The majority of Black Southerners did not heed the call of Pap Singleton, the Black Moses; they stayed where they were born,³¹⁹ so did David and Malinda. The two did not leave Nashville in the great Kansas Exodus of 1879 or any time after. A decade after their first miscegenation conviction, on May 1, 1882, they were rearrested in Nashville for remaining married; convicted, they were sentenced to the state penitentiary: David, to a term of three years; Malinda, to a term of two.³²⁰ By then, they’d lost their champions: Samuel Lowery left Nashville in 1875 less than a year after obtaining their release from the workhouse and, by the time David and Malinda came up for their second miscegenation trial, Lowery was settled in Alabama, mourning his daughter’s memory in the silk commune of Lowerydale;³²¹ Foote was no longer there to help either; he had died two years earlier in Nashville on May 19, 1880.³²²

David and Malinda began serving their sentence the same day: June 6, 1882.³²³ In the penitentiary’s intake pages for that day, only two inmates separate them; David appears in the top row of the page; then two Black boys

³¹⁸ ROBERT G. ATHEARN, *IN SEARCH OF CANAAN: BLACK MIGRATION TO KANSAS 1879-1880*, 90 (2020). Historian Nell Irvin Painter, who wrote the first full treatment of the Exodus of 1879, said it best when she wrote that, while the immediate the Exodus may have been contemporaneously described as driven by economic necessity, it was above all else a political movement by a people who had been denied the other means of exercising political power: “Lacking the classic tool for public redress - the reasonably independent exercise of the vote - their best alternative was flight. Exodusters on their way to Free Kansas said no, we do no acquiesce in Redemption; we do not believe that this is the way of American democracy. Yet, off the more than six million Blacks subjected to Southern rule, only a few thousand acted on their faith that a Promised Land of Freedom and equality might exists for them somewhere in this country.” PAINTER, *EXODUSTERS* at 261.

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³²⁰ The Courts, Nashville Banner, Wednesday May 24, 1882; The Courts, Nashville Banner, Wednesday, May 31, 1882.

³²¹ It appears Lowery left Nashville for Alabama in _____. He travelled back to Nashville on occasion, including in May 1879 as an Alabama Delegate at National Convention of Colored men. See Proceedings of the National Conference of Colored Men of the United States, May 6, 7, 8, 9, 1879 at 5, 13, <https://omeka.coloredconventions.org/items/show/323>. However, he remained settled in Alabama and was not in Nashville at the time of David and Malinda’s 1882 arrest and prosecution for miscegenation.

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³²³ In the archives of the Tennessee Penitentiary Records, David and Malinda’s entries for their 1882 conviction and imprisonment appear in Volume 51- Convict Records: State Penitentiary, Nashville, TN, Book B 1877-882 Slide 821, Roll Number RG25-25

in the second and third row, Leo Hodge, nineteen-years old, and Bowling Townsend, twenty years old; sentenced to one year and five years respectively for larceny; and then, in the fourth row, Malinda.³²⁴ David is listed as having no education; Malinda, as having some – probably from her time in the orphanage of the Sisters of Charity.³²⁵ David’s entry initially reads: “wife lives in Davidson [County]” but then the entry is edited to note: “[wife] sent to the penitentiary for 2 years... June 6, 1882.” In the box marked “Station of Life” David is at first listed as “Married” but then, as Tennessee’s final rejection of his marriage to Malinda, the word “Married” is crossed out and replaced with “single.”³²⁶ Malinda, three rows down, is also listed as single.³²⁷

David was fifty-three years old by then; medium-build at five feet seven inches and one hundred and fifty-three pounds, dark-skinned, with dark eyes and dark hair, the years marked on his face, a scar on his right cheek, another above his left eye from an old skull fracture, a piece of his left ear missing.³²⁸ At thirty-eight, Malinda was five feet six inches, one hundred and forty pounds, fair-skinned, blue eyes, sandy hair, turning to gray, a ballerina tattoo on her right arm just below the elbow.³²⁹

As in the record of court proceedings, Malinda’s professional name is noted in her intake form next to her married name: “Malinda Galloway, alias Vines.” While living in the Sisters of Charity orphanage, Malinda grew up on Campbell’s Hill.³³⁰ The neighborhood, which would in time become the site of the state’s capitol, had once been a poor district that had turned into one of the better residential areas of Nashville - a place of “quadrille and fancy costume balls,” where party guests dined on “Russian cheese, French bonbons, nougats, fancy cakes and ice cream pyramids.”³³¹ On most

³²⁴ Id.

³²⁵ *Come North* at 63.

³²⁶ Id.

³²⁷ Id.

³²⁸ Id.

³²⁹ Id.

³³⁰ When the Sisters of Charity first came to Nashville, they settled at the top of Campbell’s Hill, which was considered “the best residential district.” See Josephine Murphey, “Their Work is Never Done,” *THE NASHVILLE TENNESSEAN MAGAZINE*, 34, 49 (July 9, 1950).

³³¹ JULIA GILMORE, *COME NORTH: THE LIFE OF MOTHER XAVIER ROSS, FOUNDRRESS OF THE SISTERS OF CHARITY OF LEAVENWORTH* 49 (Mc. Mullen Books 1951). Campbell’s Hill was sold to the City of Nashville in 1853, which was transferred to the State of Tennessee as the permanent site for the state’s capitol. See Louis Littleton Veazey, “George Washington Campbell,” *TENNESSEE ENCYCLOPEDIA*, <https://tennesseencyclopedia.net/entries/george-washington-campbell/>

mornings, carrying a basket to bring food donations back from the market,³³² seven-year old Malinda Brandon would have walked out of the orphanage’s front door on Vine Street - the name she would, in time, take on as her own when the orphanage closed and, alone in Nashville, she became, for a while, in Joseph Overby’s brothel on Smoky Row, Malinda Vine.³³³

Malinda served her time and was freed in Nashville, about four months early for good behavior on February 29, 1884.³³⁴ David did not survive his second stint in the penitentiary,³³⁵ two months after Malinda’s release, on April 13, 1884, barely a year left on his sentence, David died as he was born, in a state of slavery, a fifty-five year old Black man shackled at the ankle, mining coal for the Tennessee Coal, Iron, and Railroad Company in the inmate camp of Tracy City,³³⁶ near the Cumberland mountain range of East Tennessee.³³⁷

³³² GILMORE, COME NORTH at 56.

³³³ Between 1842 and approximately 1851, the Sisters of Charity’s Nashville location for their school and orphanage was on Vine Street in Campbell’s Hill. GILMORE, COME NORTH at 49. In newspaper reports and court proceedings, Malinda’s professional alias is variously written as “Vine” or “Vines.”

³³⁴ See Names of Prisoners Discharged under the Act of 1836 and 1870: From December 1, 1883 to December 1, 1884, Tennessee Journal Appendix to the 44th General Assembly, House of Representatives 96-97. Malinda was freed early pursuant to a Tennessee statute enacted in 1836, providing for the commutation of a prisoner’s term for good behavior.

³³⁵ Volume 51- Convict Records: State Penitentiary, Nashville, TN, Book B 1877-882 Slide 821, Roll Number RG25-25

³³⁶ Id. The Tennessee Coal, Iron, and Railroad Company operated coal mines in Tracy City, located in Grundy County, Tennessee, approximately 100 miles from Nashville. See Larry D. Gossett, *The Keepers and The Kept: The First Hundred Years of the Tennessee State Prison System, 1830-1930* at 112. Once processed in the main Penitentiary facility in Nashville, inmates consigned to forced labor were shipped off to various work camps around the state. David would have been shipped off to Tracy City soon after he and Malinda arrived in the Penitentiary on June 6, 1882.

³³⁷ The poet and visual artist John Berger once wrote an anticipatory eulogy that ended this way:

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

JOHN BERGER, *AND OUR FACES, MY HEART, BRIEF AS PHOTOS* xx (1991). When she died Malinda’s bones were not buried and strewn together with David’s; she probably never got his body back. David did not make it out of Tracy City; those who died in the camps were

