I. INTRODUCTION

Under the “peculiar institution” of American chattel slavery, the enslaved family found itself at the mercy of economic forces that threatened to forever shatter precious familial bonds and ties of kinship. The dire circumstances under which these families lived are well documented. However, as the United States began its westward expansion during the early nineteenth century, these circumstances were both punctuated and elucidated by hope born of the rule of law. A ray of light
emanated from approximately three hundred “freedom suits” brought by
slaves in the courts of the state of Missouri, perhaps the best known being
the United States Supreme Court's decision in Dred Scott v. Sandford. These “freedom suits,” filed between 1840 and 1861, were based upon a
statute providing enslaved persons with what may have been unprecedented access to the courts. Twenty-three of these cases were
brought by enslaved mothers who, once having gained their own freedom,
subsequently returned to court to petition for the freedom of their enslaved
children based upon the legal doctrine of partus sequitur ventrem. These
women were mothers who had lost or feared losing “custody” of their children through slave trading, because families were separated by cruel

6 60 U.S. 393 (1857).
7 ST. LOUIS PROJECT, supra note 5.
9 Id. Economist and social historian Colin Heywood has explored the dynamics of the enslaved family from the perspective of the child:

[Gr]uelling days working in the fields left slave mothers in the
American South with little time or energy for their children. Jennie
Webb informed a researcher, ‘All my childhood life, I can never
remember seeing my pa or ma gwine to wuk or coming in from wuk in
de daylight, as dey went to de fiel’s fo’ day an’ wukked till after dark. It
wuz, wuk, wuk, all de time.’ In addition, these slave mothers faced the
peculiarly debilitating circumstances of plantation life for close family
relationships: rivalry from the all-powerful masters and mistresses for
the affections of their children, and the constant threat of separation
through being sold on to different owners.

COLIN HEYWOOD, A HISTORY OF CHILDHOOD: CHILDREN AND CHILDHOOD IN THE WEST FROM MEDIEVAL TO MODERN TIMES 85 (2001) (citations omitted). It can be argued that the protection of children is one of the most basic of our cultural and moral values. Brian Simmons, Child Welfare Ethics and Values: Participants Guide, CAL. SOC. WORK EDUC. CENTER 7 (2003), http://calswec.berkeley.edu/files/uploads/pdf/CalSWEC/Participant_Ethics_Values.pdf. The value of childhood is embodied in the following Biblical account:

(continued)
commercial practices that had no regard for the sanctity of familial unity.10 Through these suits, they were able, in some instances, to return the children to their families.11 The “freedom suit” statute12 that provided the statutory basis for these causes of action and the specific procedural requirements contained therein may provide inspiration for recommendations with implications for the present day.

Although this research is primarily historical in nature, lessons learned during its course may help to shed light on the discussion of ways in which to address the persistent disproportionate rates of children of color in the social welfare foster care system.13 This disproportionality has been described as follows:

Children of color are disproportionately represented in the United States foster care system. In most states, there are higher proportions of African American/Black . . . children in foster care than in the general child population. . . . In 2000, African American/Black children represented 38% of the foster care population while they comprised only 16% of the general child population, indicating a

And they brought young children to him, that he should touch them: and his disciples rebuked those that brought them. But when Jesus saw it, he was much displeased, and said unto them, Suffer the little children to come unto me, and forbid them not: for of such is the kingdom of God. Verily I say unto you, Whosoever shall not receive the kingdom of God as a little child, he shall not enter therein. And he took them up in his arms, put his hands upon them, and blessed them.

Mark 10:13-16 (King James).

10 HEYWOOD, supra note 9, at 88.

11 See, e.g., Rachel v. Walker, 4 Mo. 350 (1834), available at http://stlcourtreCORDS.wustl.edu/display-case-images.php?caseid=6875&page=1 (where a woman successfully sued in the Missouri Supreme Court for her own freedom as well as the freedom of her son).


13 Tanya Asim Cooper, Racial Bias in American Foster Care: The National Debate, 97 Marq. L. Rev. 216, 217 (2013) (providing that the system removes children of color from their families at a higher rate than children of other races).
disproportionality index\textsuperscript{14} of 2.5 (i.e., African American children were disproportionately represented in foster care at a rate 2.5 times their rates in the general population). . . . In 2012, 12 years later, these numbers have changed. While disproportionality rates increased between 2000 and 2004, African American/Black disproportionality has now decreased to 2.0 from 2.5 nationally.\textsuperscript{15}

The disproportionate representation of children of color in child welfare and foster care today did not happen overnight.\textsuperscript{16} Through the lens of legal history, the case law of freed mothers suing to regain legal and custodial rights to their children in antebellum Missouri becomes a philosophical point of departure for consideration by the contemporary attorney and policy maker.\textsuperscript{17} The case–by–case details of the valiant struggles of these women reveal the challenges faced by those Missouri families and demonstrate how those challenges could shape the development of remedies for today's families of color.\textsuperscript{18}

This paper pays tribute to each and every professional who serves as “boots on the ground” in the struggle to work toward the betterment of the lives of the most vulnerable among us, our children. These efforts, it is

\textsuperscript{14} The Technical Assistance Bulletin published by the National Council of Juvenile and Family Court Judges offers the following definition of the term “disproportionality index”:

Disproportionality is the level at which groups of children are present in the child welfare system at higher or lower percentages or rates than in the general population. An index of 1.0 reflects no disproportionality. An index of greater than 1.0 reflects overrepresentation. An index of less than 1.0 reflects underrepresentation.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Whittico, \textit{supra} note 8, at n.17.

\textsuperscript{18} Id.
argued, must be redoubled in order to ensure that all children and African-American children in particular who, despite advances noted in recent years, continue to be overrepresented among the foster care ranks. The next section of this paper will look back upon the historical struggles of the African-American family through a lens calibrated to reveal how some of the ways in which the struggles of the past may help to inform an analysis of the struggles faced in present times.

II. THE AFRICAN-AMERICAN FAMILY: THE EXPERIENCE UNDER SLAVERY

Much has been written about the negative effects that chattel slavery had upon the integrity of the enslaved families. As the author has argued elsewhere, one of the best sources of information regarding these negative effects can be found in the writings of those enslaved persons who survived to recount their experiences during slavery. These writings, referred to as “slave narratives,” attest to the precarious status of the enslaved family. Celebrated historians John Hope Franklin and Evelyn Brooks Higginbotham have noted this historical significance of the slave narrative:

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19 Summers & Wood, supra note 14, at 1.

20 Id.

21 See infra Part II. The author does not intend to suggest that the experiences of families enslaved in past are perfect analogues of those of the African American family of today. As will be discussed below, the legacy of chattel slavery and the deleterious effects of that institution upon families in the past may be related in ways that while not rising to the level of causation, may have a something more than a correlational effect on some of the problems faced by some African American families of today. Id.


23 See Whittico, supra note 8.


25 Id.
Slave narratives, as well planters’ probate records, legal suits, and advertisements, all confirm the persistent practice of family separation by sale. One firm, advertising for slaves in the age group between twelve and twenty-five, solicited in the newspaper: “Those having such property to sell, will find it in their interests to bring them to us, or drop a line to us and we will come and see them. One of us can always be found at home, prepared to pay the highest prices for such negroes as suit us, in cash.” Nor was it unusual to see advertisements in which traders specifically sought young blacks from eight to twelve years of age. The large number of single slaves on the market testifies to the constant separation of families during the slavery period.26

The final two sentences of this paragraph stand as harsh confirmation of the proposition that chattel slavery, by its very nature, worked about these tremendous hardships for the enslaved family.27 While it might be suggested that the practices described above were primarily anecdotal, one writer has documented the concerns expressed by Congress as it contemplated the Thirteenth Amendment.28 William M. Carter, Jr. has observed, “The Thirteenth Amendment debates . . . did not focus on the wisdom of ending slavery itself, but on what effect the Amendment would have beyond manumission . . . . Many of the Amendment’s advocates identified particular incidents of slavery that would be abolished by the Amendment.”29 One of the supporters of the Amendment spoke specifically to the concern about the havoc that slavery has wreaked upon the enslaved family:30

Senator James Harlan of Iowa, elaborating upon the Amendment’s purposes, indicated that the incidents of slavery that the Amendment would abolish included the lack of respect for familial bonds, inability to hold property, denial of equal status before the justice system,

27 Id. at 135.
29 Id. at 1323–24.
30 Id. at 1324 n.34.
suppression of freedom of speech, and prohibition on blacks’ ability to seek education.\textsuperscript{31}

The recognition of a “lack of respect for familial bonds” during debates concerning the Thirteenth Amendment was, far from being an isolated occurrence, a commonplace argument during the times of slavery.\textsuperscript{32} The theme of a “lack of respect for familial bonds,” it may be argued, persists into the present.\textsuperscript{33} A discussion of this notion will follow.

\section*{III. The African-American Family: Conditions Reinforcing the “Lack of Respect for Familial Bonds”}

It may be helpful at this juncture to look back at some of the developments in the mid-twentieth century that contributed to the continuation of the “lack of respect for familial bonds” that began under slavery and, despite the provisions of the 13th Amendment, arguably persist today.\textsuperscript{34} Doris Kearns Goodwin describes the genesis of President Lyndon Baines Johnson’s “Great Society” as follows:

In the spring of 1964, only four months after he had become President, Lyndon Johnson had spoken at the campus of the University of Michigan, and there he sketched the outlines for a program intended to go beyond the “Kennedy legacy”—one that would be his creation, his gift, and the monument to his leadership. In that address he spoke of a “Great Society”—a phrase used a few times before, but at Ann Arbor for the first time given substantial content and thus, by inference, intended as history’s label for his administration.\textsuperscript{35}

Goodwin continues by postulating a conceptual connection with presidential initiatives of the past.\textsuperscript{36} “[N]ow when commentators discuss the Great Society, they concentrate on programs for the relief of poverty,

\begin{itemize}
  \item \textsuperscript{31} Id.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} DORIS KEARNS GOODWIN, LYNDON JOHNSON AND THE AMERICAN DREAM 210 (1991).
  \item \textsuperscript{36} Id.
\end{itemize}
help to education, etc.—measures, in the New Deal tradition, for the just distribution of rising abundance.\textsuperscript{37}

Against the backdrop of this presidential direction, the Civil Rights Movement of the mid-1960s took hold, as described by Daniel Patrick Moynihan in 1965:

The Negro American revolution is rightly regarded as the most important domestic event of the postwar period in the United States.

Nothing like it has occurred since the upheavals of the 1930’s which led to the organization of the great industrial trade unions, and which in turn profoundly altered both the economy and the political scene. . . .

There has been none more important. The Negro American revolution holds forth the prospect that the American Republic, which at birth was flawed by the institution of Negro slavery, and which throughout its history has been marred by the unequal treatment of Negro citizens, will at last redeem the full promise of the Declaration of Independence.\textsuperscript{38}

Having thus situated the Civil Rights Movement within the domain of social revolutions of monumental proportions, Moynihan proceeds to offer dire descriptions of the present status and prognostications about the future of the so-called “Negro family.”\textsuperscript{39} In a chapter entitled “The Tangle of Pathology,” Moynihan offers the following assessment of the status quo of African-American families in some less fortunate quarters of society:

That the Negro American has survived at all is extraordinary—a lesser people might simply have died out, as indeed others have. That the Negro community has not only survived, but in this political generation has entered national affairs as a moderate, humane, and constructive national force is the highest testament to the

\textsuperscript{37} Id.


\textsuperscript{39} Id. at 47, 75–76.
healing powers of the democratic ideal and the creative vitality of the Negro people.\textsuperscript{40}

After acknowledging the conditions under which African-Americans existed in this nation, Moynihan articulated a theory that he thought explained the plight of some African-American families, describing “a fearful price for the incredible mistreatment...over the past three centuries”\textsuperscript{41}:

In essence, the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.\textsuperscript{42}

With these words, and reactions to them from differing quarters, there commenced a controversy\textsuperscript{43} over the implications of the notion that the African-American family was beset by a “tangle of pathology.”\textsuperscript{44} While many involved in crafting public policies relevant to the problems facing the African-American family hoped that now, almost five decades after Moynihan issued his report, many of the concerns he expressed would

\textsuperscript{40} Id. at 75.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{44} MOYNIHAN, supra note 38, at 76.
have been resolved or at least ameliorated to some degree, this does not appear to be the case. In June 2013, The Urban Institute published a study comparing the status of the African-American family of the 1960s to that of the early 21st century.

The authors of this report paint a sobering picture for the status in more recent times:

Over the past five decades, the statistics that so alarmed Moynihan in the 1960s have only grown worse, not only for blacks, but for whites and Hispanics as well. Today, the share of white children born outside marriage is about the same as the share of black children born outside marriage in Moynihan’s day. The percentage of black children born to unmarried mothers, in comparison, tripled between the early 1960s and 2009, remaining far higher than the percentage of white children born to unmarried mothers.

These data compel the conclusion that despite the best intentions of public policy makers at all levels of government, the disparities at work in the African-American community continue to persist. A number of scholars have put forth remedial directives and programmatic suggestions, but the facts remain: The African-American family still suffers from the “lack of respect for familial bonds” which now owes its origin not to slavery laws or practices, but instead to massive levels of unemployment, marginalized fathers, and unprecedented levels of incarceration.

IV. THE AFRICAN-AMERICAN FAMILY: THE CENTURY 21ST EXPERIENCE

As discussed above, the experience of African-American children and families became a concern of the federal government during the nineteenth

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45 Gregory Acs with Kenneth Braswell, et. al., supra note 33, at 2.
46 Id.
47 Id. at 3.
This concern continues today. For example, in 2007 the United States Government Accounting Office made the following observations:

A higher rate of poverty is among several factors contributing to the higher proportion of African American children entering and remaining in foster care. Families living in poverty have greater difficulty accessing housing, mental health, and other services needed to keep families stable and children safely at home. Bias or cultural misunderstandings and distrust between child welfare decision makers and the families they serve are also viewed as contributing to children’s removal from their homes into foster care. African American children also stay in foster care longer because of difficulties in recruiting adoptive parents and a greater reliance on relatives to provide foster care who may be unwilling to terminate the parental rights of the child’s parent—as required in adoption—or who need the financial subsidy they receive while the child is in foster care.50

49 See supra Part II.

African-American children take longer to achieve permanency, particularly through adoption, than other children in foster care. Data from the U.S. Government Accountability Office show that “over the last five years, African American children as well as Native American children have consistently experienced lower rates of adoption than children of other races and ethnicities.” A 1997 study quantified the lower adoption rates for black children, finding that white children had a five-times-greater chance of being adopted than others, and that the adoption process proceeded more slowly for black than for white children. Moreover, data from the U.S. Department of Health and (continued)
As these observations attest, the disproportionalities under discussion arise from a number of complex factors.\textsuperscript{51} In 2008, Kay Brown, Director of Education, Workforce, and Income Security, addressed these disproportionalities in testimony before the Subcommittee on Income Security and Family Support, Committee on Ways and Means of the U.S. House of Representatives.\textsuperscript{52} She testified as follows:

I am pleased to be here today to discuss our work on African American children and the extent to which they are disproportionately represented in foster care relative to their share of the general population. Nationwide, about 510,000 children were in foster care at the end of fiscal year 2006, a significant proportion of them African American children. African American children were about three times as likely to be placed in foster care compared with White children in 2006, and African American children remained in foster care about 9 months longer as well. This disproportionality occurs despite the fact that national studies have shown that children suffer from abuse and neglect at the same rates regardless of their race or ethnicity. Although states vary considerably, data from nearly all states show some overrepresentation of African American children in foster care.\textsuperscript{53}

The emphasized text in Ms. Brown’s testimony raises an important question for consideration: If it has been demonstrated that African-American children do not suffer from abuse and neglect at rates any higher

\begin{footnotesize}
\begin{enumerate}
\item Human Services indicate that the percentage of African Americans adopted from foster care each year is consistently lower than the percentage of foster children waiting to be adopted. In fiscal year 2008, for example, black children represented 31 percent of waiting children but only 25 percent of adopted children.

\textit{Id.}

\item See sources cited supra note 48.


\item Id. (emphasis added).
\end{enumerate}
\end{footnotesize}
than children of other races, how can the current state of disproportionalities be first explained and then ameliorated? One response to this question came in the form of federal legislation. In a May 2014 U.S. Government Accountability Office “Report to Congressional Requesters” subtitled “Foster Care: HHS Needs to Improve Oversight of Fostering Connections Act Implementation,” the effect of the legislation was described as follows:

The Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act) made a number of changes to part E of title IV (title IV-E) of the Social Security Act, which authorizes federal support for state foster care and adoption assistance programs. According to its co-sponsors, the legislation was intended to address shortcomings in the existing foster care system that disconnected foster children from family and school, leaving them ill-prepared to transition out of care at age 18.

This law has been described by one of the actors who were involved in its promulgation:

Fostering Connections is one of the most beneficial federal laws for foster children in decades. It provided, at state option, federal matching funds to extend eligibility for foster care up to age 21 and to support relatives who serve as guardians for children that have been removed from their home.

The bill also made it default federal law that states place siblings together; allow children and youth in foster

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56 U.S. Gov’t Accountability Office, GAO-14-347, Foster Care: HHS Needs to Improve Oversight of Fostering Connections Act Implementation 1 (2014). The Fostering Connections Act is codified at Pub. L. No. 110-351, 122 Stat. 3949, and was described in this Report as “amended in scattered sections of 42 U.S.C . . . and also amend[ing] other parts of the Social Security Act, including part B of title IV, which authorizes federal funding for certain child welfare services.” Id. at 1 n.3.
care to remain in their school of origin; and better track and coordinate the health needs of foster children.

But no sooner had President George W. Bush signed Fostering Connections into law than the financial system collapsed. The fallout from the banking crisis and subsequent recession devastated state budgets across the country, creating an inhospitable fiscal environment for pursuing new state initiatives and programs.57

The Fostering Connections Act’s vulnerability to the precarious financial state of affairs that followed closely in the wake of its promulgation was certainly beyond the control of those who supported its passage.58 One can only speculate about the possibility that if the Act had been enacted with a more robust federal component, this vulnerability might have been ameliorated. Sean Hughes offers commentary regarding this possibility: “We wanted to create a new federal funding stream dedicated to child abuse and neglect prevention, get rid of the outdated and illogical income-based eligibility requirements for federal foster care assistance, and establish new means to better support and professionalize a beleaguered child welfare workforce.”59

Although a more robust federal solution did not result, it is argued that such a national effort might have produced more of a reduction in the disproportionalities currently under discussion.60 In the next section of this paper the discussion will return to a nineteenth century problem, a governmental solution, and, it is hoped, will provide some inspiration for crafting effective solutions for the disparities that persist in the foster care system.61

V. FREEDOM SUITS OF 19TH CENTURY MISSOURI

From the earliest days in the history of our nation, people of color have turned to the courts in their attempts to improve the quality of life for

58 Id.
59 Id.
61 See supra Part V.
themselves and their families. For example, the legal history of the state of Virginia contains many of these attempts. One notable example is the case of John Graweere. An indentured servant, Graweere purchased the freedom of his son and went to court to vindicate his parental rights in the child. The seventeenth century courts reported their decision and rationale for ruling in the father’s favor:

**March 31, 1641-Suit of John Graweere**

*Whereas* it appeareth to the court that John Graweere being a negro servant unto William Evans was permitted by his said master to keep hogs and make the best benefit thereof to himself provided that the said Evans might have half the increase which was accordingly rendered unto him by the said negro and the other half reserved for his own benefit: And *whereas* the said negro having a young child of a negro woman belonging to Lieut. Robert Sheppard which he desired should be made a christian and be taught and exercised in the church of England, by reason whereof he the said negro did for his said child purchase its freedom of Lieut. Sheppard with the good liking and consent of Tho: Gooman’s overseer as by the deposition of the said Sheppard and Evans appeareth, the court hath therefore ordered that the child shall be free from the said Evans or his assigns and to be and remain at the disposing and education of the said Graweere and the child’s godfather who undertaketh to see it brought up in the christian religion as aforesaid.

There are other examples of cases in which the judicial power of the government has been employed in the pursuit of justice for those who were

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66 Minutes, supra note 67, at 477.
marginalized by legal status, legislative action, and socioeconomic status. Among these cases are the “freedom suits” brought in the courts of the territory and state of Missouri. From 1814 until 1860, the courts of the state of Missouri heard approximately three hundred lawsuits brought by enslaved persons who sued for their freedom. These cases were the legal antecedents of *Dred Scott v. Sandford.* Of this the most famous, or perhaps infamous, of the Missouri freedom suits in which Scott, his wife, Harriet, and their daughter, Eliza, hung their hopes for freedom on the decision of the Supreme Court of the United States, the late Judge A. Leon Higginbotham writes:

By all expectations, the Scotts’ petitions for freedom should have been granted fairly quickly. In 1847, it was a settled tenet of Missouri law that a slave became emancipated the moment his master took him to reside in a state or territory where slavery was prohibited. Even if the master was required to travel to a free state or territory, the slave would still become emancipated. Thus in *Rachel v. Walker*, a case particularly relevant to the Scotts’ petitions, the Missouri Supreme Court had held

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67 See Konig, supra note 5, at 54.
68 Id. at 53.

All [“freedom suit”] records were created in the course of business by the Circuit Court, its inferior courts, and predecessors as provided for by federal and state law. Upon the separation of St. Louis City and St. Louis County as provided for in the 1875 constitution, the city retained custody of all court records previously produced. These records have remained in the custody of the St. Louis Circuit Court since that time, both in the historic Old Courthouse (constructed 1839-1852) and the Civil Courts Building (constructed in 1930).

Id.

In addition to the physical records of the “freedom suits,” The Missouri State Archives and the American Culture Studies Program, Washington University, St. Louis have developed a database containing contains digital facsimiles of the court records of these cases. Whittico, supra note 8.
70 60 U.S. 393 (1857).
that Rachel, a slave, had become emancipated when her master, a military officer, had taken her to live at his post at Fort Snelling and at Prairie du Chien.  

The freedom suits under consideration here have been characterized as follows:

Each of the Missouri “freedom suits” demonstrates some of the methods by which legal process was employed by *in forma pauperis* petitioners and their court-appointed attorneys to vindicate legal rights and restore families. In some of the “freedom suits”, mothers who prevailed and were granted their own freedom returned to court to sue for the freedom of their children.

It is important to note that these freedom suits were based upon a statute, first of the Territory of Louisiana and subsequently of the state of

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71 A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 63 (1996) (citations omitted) (quoting what may be the seminal work regarding the Dred Scott decision, DON E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 252 (1978)). Dred Scott and his wife, Harriet, did not become the beneficiaries of that “settled tenet.” *Id.*

After framing the issue before the U.S. Supreme Court, Chief Justice Taney wrote:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?

*Dred Scott*, 60 U.S. at 403.

Chief Justice Taney answered that, during the founding of this nation, African-Americans were never meant to be “constituent members” of society, but:

On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

*Id.* at 404–05.

72 See Whittico, *supra* note 8.
Missouri when it entered the Union in 1824. In Chapter 35 of the Laws of the Territory of Louisiana, the freedom suit as a cause of action was established. Entitled “AN ACT to enable persons held in slavery, to sue for their freedom,” the statutory basis for the freedom suit was passed in 1807. In substantially similar form, the Chapter 35 “Freedom” statute became the law of the state of Missouri in 1824.

Chapter 35 contained five key provisions of both a substantive and procedural nature, and may be summarized as follows based upon its key provisions. The five provisions were:

1. Persons held in slavery to sue as paupers, when.
2. Suits, how instituted—counsel assigned petitioner—petitioner not to be removed.
3. Petitioner about to be removed, defendant may be required to enter into recognizance; petitioner may be hired out when—person hiring to enter into recognizance.
4. Weight of proof on petitioner—judgment.
5. Appeal to general court.

Each of these statutory provisions can be classified as belonging to one or more of the following categories: substantive, procedural, administrative, or other. For example, the statutory provision that a freedom suit petitioner was permitted to sue in forma pauperis is logically compelled by the recognition that most, if not all enslaved persons would not possess the funds necessary to pay for court costs or to retain counsel.
This procedural provision enabled those without the necessary financial resources to gain access to the courts in order to vindicate claims to freedom as provided by the substantive provisions of the freedom suit statute.\footnote{1807 Mo. Laws 96 (enabling the \textit{in forma pauperis} freedom suit for slaves, who frequently had no money to pay court or legal fees).}

The development of a similar “freedom suit” cause of action might be helpful in attempting to ameliorate the disproportionalities that continue to plague African-American children in the foster care system. During a discussion of this topic during the 10th Annual Wells Conference on Adoption Law (Conference) hosted by Capital University Law School during the first week of March 2014, adoption law and practitioner experts considered the question of which possible areas of reform might be postulated and arrayed across the four categories described above. A lively discussion ensued. Some of the suggestions for reform are described in the table below:

\textit{King \textquoteleft \textquoteleft willed and intended indifferent justice to be had and ministered according to his common laws to all his true subjects as well to poor as rich.	extquoteright\textquoteright).}
TABLE 1: 10TH ANNUAL WELLS CONFERENCE ON ADOPTION LAW SUGGESTIONS FOR FOSTER CARE REFORM (MARCH 2014)

<table>
<thead>
<tr>
<th>Substantive</th>
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<tr>
<td>Presumptive eligibility for relatives</td>
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<td>Uniform codification of “fictive kin” concept</td>
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<tr>
<td>Adopt recommendations of Donaldson Adoption Institute</td>
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<tr>
<td>Define and address notion of “maternal bias”</td>
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<td>Incorporate provisions designed to include fathers</td>
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<th>Procedural</th>
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<tr>
<td>Separate drug courts from family courts</td>
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<td>Reform drug laws</td>
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<td>Utilize “judicial bench cards”; extend use to case workers and attorneys</td>
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<th>Administrative</th>
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<tr>
<td>Implement “implicit bias” training</td>
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<td>Case worker training</td>
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<td>Provide better access to putative fathers registries</td>
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<td>Extend subsidies/benefits to “kinship guardian” arrangements</td>
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<th>Other</th>
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<tr>
<td>Family education including fathers</td>
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<tr>
<td>Establish attorney/ CASA support networks</td>
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<tr>
<td>Re-think assumptions (e.g. each child must have own bedroom)</td>
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VI. CONCLUSION AND CALL TO ACTION

During the course of the Conference discussion, one scholar was mentioned as being a possible source of ideas regarding substantive improvements for the foster care system. Dr. Ruth McRoy has propounded some suggestions to guide such a reform effort.82 “Policy makers have yet to develop fully-funded programs to effectively address the causes of the disproportionate number of African-American children in the child welfare system.”83 Among her recommendations are: “Placement Prevention”; “Address[ing] [the] Negative Impact of Child Removal”; “Address[ing]...

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83 Id. at 487.
Disparate Service Delivery”; and “Expand[ing] Views of Permanency and Kin as Resources for Children.”

Another suggestion that arose out of the Conference discussion was the establishment of formal or informal networks of attorneys who practice in the foster care and adoption law area. A powerful example of the ways in which counsel may assist each other can be found in a letter from one attorney to another offering assistance in the prosecution of a fellow attorney’s freedom suit in a lawsuit filed in the Circuit Court of the city of St. Louis in the July 1841 term.

Today, the power of counsel working together is illustrated in the author’s home state by the work of the Richmond-based Virginia Poverty Law Center. Through the efforts of VPLC counsel Christie Marra and others, the group has established its 2014 Family and Child Welfare Legislative Priorities, including, but not limited to, recommendations to extend foster care services to age twenty-one: establishing regulation for kinship diversion practice, as well as engaging in careful monitoring of proposed legislation in the General Assembly.

The late Leroy Rountree Hassell, the first African-American Chief Justice of the Supreme Court of the Commonwealth of Virginia, once wrote: “A court’s decision regarding custody of a child is perhaps one of the most important decisions that a court can ever make.”

84 Id. at 487–88.
85 Whittico, supra note 8. (“In Jackson’s case, the court files contain a letter from Thomas Smith to James L. Murray, Jane’s attorney. The letter traces her lineage and offers advice to her attorney, Murray, regarding the merits of her case. A review of several sections of this letter attests to what may have been a cooperative spirit among the attorneys who were involved in these lawsuits.”).
was to assist in this regard.\textsuperscript{90} The “Virginia Lawyers Helping Families”\textsuperscript{91} initiative was designed to “‘provide lawyers, at no charge, who will assist truly poor litigants in custody and child visitation disputes.’”\textsuperscript{92} The program included training and continuing legal education credit for attorneys who were involved.\textsuperscript{93} The extension of such a program into the foster care system would provide welcome assistance as well. Although budgetary constraints abound and the current political climate militates against what may be viewed in some quarters as just more social welfare legislation, such measures nonetheless, it is argued, deserve due consideration.\textsuperscript{94}

In conclusion, another source of remediation of the disproportionalities beleaguering African-American children in foster care may lie in an observation offered by another leading theoretician, Dorothy Roberts.\textsuperscript{95} She writes:

\begin{quote}
THE CHILD WELFARE SYSTEM has always discriminated against Blacks, but its racism looked very different a century ago. Black families were virtually excluded from openly segregated child welfare services until the end of World War II. Wealthy do-gooders began a charitable mission in the late nineteenth century to save poor children
\end{quote}


\textsuperscript{91} Id.

\textsuperscript{92} Wilmer, supra note 94, at 2.

This is a pro bono program conceived of by Chief Justice Leroy Hassell of the Virginia Supreme Court and designed by his Pro Bono Initiative Commission. In this program, volunteer attorneys agree to represent low-income parents involved in child custody litigation. These clients are screened by the local legal aid society and referred to the pro bono attorney. Volunteer attorneys do not need to have a strong family law background in order to participate effectively, as the program provides experienced family law attorneys as mentors to guide the pro bono attorney in the case as needed.

PROBONO.NET, supra note 90.

\textsuperscript{93} Wilmer, supra note 94, at 2.

\textsuperscript{94} See Hughes, supra note 58.

from parental cruelty and indigence. The orphanages they established to rescue destitute immigrant children refused to accept Blacks.... Needy Black children were more likely to be labeled delinquent.... In the early part of the century, Black people relied primarily on extended family networks and community resources such as churches, women’s clubs, and benevolent societies to take care of children whose parents were unable to meet their needs.96

If past is indeed prologue, perhaps a general philosophy of foster care reform should be predicated upon these lessons learned, in addition to the development of a comprehensive legislative package that incorporates some of the substantive, procedural, administrative, and other related reforms discussed in this paper.97 As in the freedom suits of the nineteenth century, it is argued that any real hope for reform lies in the operation of the rule of law with its inherent ability to potentiate the pursuit of “justice for all.”98

96 Id.
97 See supra Part VI.
Appendix A

MISSOURI FREEDOM SUITS STATUTES
LAWS OF THE TERRITORY OF LOUISIANA
CHAPTER 35
FREEDOM

AN ACT to enable persons held in slavery, to sue for their freedom.*

1. Persons held in slavery to sue as paupers, when. 2. Suits, how instituted–counsel assigned petition–petitioner not to be removed. 3. Petitioner about to be removed, defendant may be required to enter into recognizance; petitioner may be hired out when–person hiring to enter into recognizance. 4. Weight of proof on petitioner–judgment. 5. Appeal to general court.

Be it enacted by the Legislature of the Territory of Louisiana, [as follows.]

1. It shall be lawful for any person held in slavery to petition the general court or any court of common pleas, praying that such person may be permitted to sue as a poor person, and stating the grounds on which the claim to freedom is founded. If in the opinion of the court the petition contains sufficient matter to authorize their interference the court shall award the necessary process to bring the cause before them.

2. The court to whom application is thus made, may direct an action of assault and battery, and false imprisonment, to be instituted in the name of the person claiming freedom against the person who claims the petitioner as a slave, to be conducted as suits of the like nature between other persons. And the court shall assign the petitioner counsel, and if they deem it proper shall make an order directing the defendant or defendants to permit the petitioner to have a reasonable liberty of attending his counsel, and the court when occasion may

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require it, and that the petitioner shall not be taken nor removed out of the jurisdiction of the courts, nor be subjected to any severity because of his or her application for freedom.

3. If the court, or any judge thereof in vacation shall have reason to believe that the above order has been or is about to be violated, in such case the said court, or any judge thereof in vacation, may require that the person of the petitioner be brought before him or them, by writ of *habeas corpus*, and shall cause the defendant or defendants, his, her, or their agent, to enter into recognizance with sufficient security, conditioned as recited in the above order, or in case of refusal to direct the sheriff of the district to take possession of the petitioner, and hire him or her to the best advantage, which hire shall be appropriated either to the petitioner, or to the defendant or defendants, as the event of the suit may justify. And the person hiring the petitioner shall enter into recognizance with sufficient security, conditioned as the above order directs.

4. The court before whom such suit may be tried, may instruct the jury that the weight of proof lies on the petitioner, but to have regard not only to the written evidences of the claim to freedom, but to such other proofs either at law or in equity as the very right and justice of the case may require. And the court on a verdict in favor of the petitioner, may pronounce a judgment of liberation from the defendant or defendants, and all persons claiming by, from, or under, him, her, or them.

5. Suits instituted in any court of common pleas under this law, may be removed into the general court before judgment, or if judgment is given in any such cause in the court of common pleas, appeal, or writ of error shall lie to the general court as in other cases.

The foregoing is hereby declared to be a law for the territory of Louisiana, to take effect and be in force from and after the passage thereof.

LAWS OF THE STATE OF MISSOURI

FREEDOM

AN ACT to enable persons held in slavery to sue for their freedom.*

Sec 1. Be it enacted by the General Assembly of the state of Missouri,

That is shall be lawful for any person held in slavery to petition the circuit court, or the judge thereof in vacation, praying that such person may be permitted to sue as a poor person, and stating the ground upon which his or her claim to freedom is founded; and if, in the opinion of the court or judge, the petition contains sufficient matter to authorize the commence of a suit, such court or judge may make an order that such person be permitted to sue as a poor person to establish his or her freedom, and assign the petitioner counsel, - which order shall be endorsed on the petition. And the court or judge shall, moreover, make an order that the petitioner have reasonable liberty to attend his or her counsel and the court, when occasion may require; and that the petitioner shall not be taken or removed out of the jurisdiction of the court, nor be subject to any severity because of his or her application for freedom, - which order, if made in vacation, shall be endorsed on the petition, and a copy thereof endorsed on the writ and served on the defendant.

Sec 2. Be it further enacted, That if the court, or the judge thereof in vacation, shall be satisfied, at the time of the presenting the petition, or at any time during the pendency of any suit instituted under the provisions of this act, that any petitioner hath been or is about to be restrained by any person from reasonable liberty of attending his or her counsel or the court, or that the petitioner is about to be removed out of the jurisdiction of the court, or that he or she hath been or is about to be subjected to any severity because of his or her application

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for freedom, or that any order made by the court or judge in the premises as aforesaid has been or is about to be violated, then and in every such case, the court, or the judge thereof in vacation, may cause the petitioner to be brought before him or them by a writ of habeas corpus; and shall cause the defendant, or the person in whose possession the petitioner may be found, his or their agent, to enter into a recognizance, with a sufficient security, conditioned that the petitioner shall at all time during the pendency of the suit have reasonable liberty of attending his or her counsel, and that such petitioner shall not be removed out of the jurisdiction of the court wherein the action is to be brought or is pending, and that he or she shall not be subjected to any severity because of his or her application for freedom, - which recognizance shall be recorded and filed among the records of the court, and be deemed and taken to all intents and purposes to be a record of such court. But if the party required to enter into a recognizance as aforesaid shall refuse so to do, the court or judge shall make an order that the sheriff take possession of the petitioner and hire him or her out to the best advantage, from time to time, during the pendency of the suit; and that he take a bond from the person hiring the petitioner, in such penalty as the court shall in such order direct, and with such security as the sheriff shall approve, conditioned as directed in the recognizance of the defendant, and moreover that he will pay the hire to the sheriff at the time stipulated, and return the petitioner at the end of the time for which he or she is hired, or sooner if the action shall sooner be determined; and the sheriff shall proceed accordingly, and pay the money received for hire to the party in whose favor the suit shall be determined.

Sec 3. Be it further enacted, That all actions to be commenced and prosecuted under the provisions of this act, shall be in form, trespass, assault and battery, and false imprisonment, in the name of the petitioner, against the person holding him or her in slavery, or claiming him or her as a slave. And whenever any court of judge shall make an order as aforesaid, permitting any such suit to be
brought, the clerk shall issue the necessary process, without charge to the petitioner: the declaration shall be in the common form of a declaration for assault and battery and false imprisonment, except that the plaintiff shall aver that before and at the time of the committing the grievances he or she was and still is a free person, and that the defendant held and detained him or her and still holds and detains in slavery, - upon which declaration the plaintiff may give in evidence any special matter; and the defendant may plead as many pleas as he may think is necessary for his defense, or he may plead the general issue, and give the special matters in evidence. And such actions shall be conducted in other respects in the same manner as the like actions between other persons, and the plaintiff may recover damages as in other cases.

Sec. 4. Be it further enacted, That in all actions instituted under the provisions of this act, the petitioner, if he or she be a Negro or mulatto, shall be held and required to prove his or her right to freedom; but regard shall be had not only to the written evidence of his or her claim to freedom, but to such other proofs, either at law or in equity, as the very right and justice of the case may require. And if the issue be determined in favor of the petitioner, the court shall render a judgment of liberation from the defendant or defendants, and all persons claiming from, through or under him, her or them.

Sec. 5. Be it further enacted, That if any party to a suit instituted under the provisions of this act, shall feel him or herself aggrieved by the judgment of the circuit court, he or she may have and prosecute an appeal or writ of error to the supreme court, as in other cases; Provided, That if the petitioner appeal or prosecute a writ of error, he or she shall not be required to enter into a recognizance, but such appeal or writ of error shall operate as a supersedeas without such recognizance.

This act shall take effect and be in force from and after the fourth day of July next.

Approved, December 30, 1824.