The Challenge of Litigating Freedom

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Loren Schweninger, *Appealing for Liberty: Freedom Suits in the South*. New York: Oxford University Press, 2018. x + 428 pp. Appendix, notes, bibliography, and index. $39.95.

Recent years have seen the publication of excellent new scholarship on "freedom suits," legal action by enslaved African Americans to obtain release from bondage. Loren Schweninger's *Appealing for Liberty* adds to this growing body of literature by offering unparalleled geographic breadth and temporal scope, making this the most comprehensive book on such suits available. This is not simply a book about slavery, courts, and the law, however. Records of freedom suits, Schweninger explains, are "social and legal history fused" (p. 6) and offer insights into the experiences, values, and desires of enslaved Americans.

Much of the strength of this book derives from Schweninger's massive source base. Freedom suits are difficult to locate because they are intermixed with other cases in local court records. As a result, most scholarship on freedom suits has focused on a handful of cases or utilized records from a confined geographic region. This book draws on 2,023 lawsuits, involving 4,601 plaintiffs, representing 200 counties in 15 states and the District of Columbia, filed between 1779 and 1863. Schweninger has spent much of his career working to gather this documentary evidence as director of the Race and Slavery Petitions Project at the University of North Carolina at Greensboro and founder of the Digital Library on American Slavery.

The bills of complaint, depositions, affidavits, and sometimes even oral testimony represent a unique, arguably unparalleled, collection of what the author calls "contemporary and real-time testimony" (p. 4) by enslaved African Americans. Schweninger recognizes that this testimony was frequently filtered through third parties, most often attorneys, and that those who filed freedom suits were but a small fraction of the entire enslaved population. Nonetheless there is still much to be learned from this evidence about the vulnerabilities, aspirations, and lives of enslaved people, relationships between and among them, and their connections with members of free communities.

Appealing for Liberty begins with an exploration of the role of women in freedom suits and an analysis of how sex, gender, and culture interacted to

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make information about maternal ancestry both important and contested. Slave states adhered to the principle of *partus sequitur ventrem*, meaning that slave status followed that of the mother. Knowledge about maternal ancestry was thus valuable information that was passed on from generation to generation especially by free blacks. Partly because of its legal utility, knowledge of family heritage was a vital part of African American culture. African American women played a central role in keeping this history. White slaveowners paid more attention to slave maternity in contrast to paternity, which they often had reason to obscure. Native American maternal ancestry could also be the basis for a freedom claim, since states at various times outlawed Native American slavery. Freedom suits also reflected gendered experiences with regard to self-purchase and the purchase of spouses and family members. Enslaved men had more lucrative opportunities on the labor market, so their role often revolved around saving money and making claims to purchase.

Enslaved people had several legal grounds on which to claim free status, each of which is given a chapter-length consideration. Those who had been granted freedom by a will or deed used courts to enforce that promise, as did term slaves— individuals promised freedom at a certain age or after a certain time period. Those born to free women could claim freedom, but those born to enslaved mothers who subsequently achieved freedom usually could not. Sometimes residence in free states or countries could offer grounds for legal assertions of freedom, though many states made provisions for "sojourners" whose visit was deemed temporary and thus did not affect slave status.

Schweninger's book significantly expands our understanding of state-level and regional variations in freedom suits, variations that belie regional differences in the larger slave experience. The central finding with regard to region is that the Upper South saw a much larger number of suits filed. The freedom suits considered here do not represent all such litigation, of course, but nonetheless the difference between the Upper and Lower South is stark. 1,649 suits came from five Upper South states, Maryland, Delaware, Kentucky, Missouri, Virginia, plus Washington, D.C. Louisiana had 210. The remaining 164 were filed in nine states: Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Texas.

A variety of factors helps account for this relative preponderance in Upper South states. For one, these states offered more legal avenues to manumission, including the possibility of self-purchase. In Kentucky, Tennessee, and Louisiana, term slaves held longer than their contract stipulated could sue for damages as part of a freedom suit. The promise of a cash windfall if freedom was proven helped them hire attorneys and made their litigation more likely to succeed, as did a similar Missouri law that allowed, until that law was changed in 1835, wrongly held individuals to sue for damages. While the prevalence of Upper South freedom suits was in some ways a reflection of expanded paths

for liberty in this region, it was also a sign of the vulnerability of free blacks and harassment of this population in this region. Freedom could be curtailed by kidnappers and slave traders at any minute, and in such emergencies free blacks turned to the courts in an attempt to protect themselves.

Laws varied significantly from state to state, making the potential and avenues for freedom different in different locations. In many states, individuals promised freedom in a will might be denied it if they were sold to settle estate debts, but under Kentucky law, debts owed by an estate had to be settled by selling land before human property. This gave enslaved Kentucky residents a better chance at manumission and stronger arguments for their cases in court. Maryland, Delaware and Washington, D.C. had the largest number of freedom suits, due in part to a large free black population as well as a variety of relevant laws, including anti-importation and/or anti-exportation laws. These laws could offer a basis for a claim. For example, in Delaware, any slave sold out of state was declared free, opening an avenue for individuals in such situations to petition for freedom. Individuals who could prove they were imported as slaves into one of these states could also claim freedom.

Most Lower South states made it illegal, or at least very difficult, to free slaves through wills and deeds. Moreover, term slavery was illegal in the Lower South, except Louisiana. In a number of Lower South states, enslaved African Americans could not file a freedom suit without a white person, i.e. a guardian, filing on their behalf. This made accessing the legal system much more challenging. Laws and legal procedures that might have enabled more slaves to petition for freedom were disregarded in practice in Deep South states. Those filing for freedom in these states were more likely to base their claim on their mother's free status, rather than, for example, being a term slave which was outlawed in the Lower South. All this added up to a scarcity of such suits in most Lower South states.

Louisiana had a large number of suits, unlike its neighboring Lower South states, because it had a large free black population. In addition, a unique state law dating back to the era of Spanish rule required that owners accede to self-purchase by slaves who could pay their market value. Louisiana also had laws allowing successful litigants to sue for back wages. All this added up to make the patterns for freedom suits in this state more like those in the Upper South.

Schweninger steers clear of making broad theoretical claims about law and historical change, but embedded throughout the text are moments of subtly insightful analysis of the relationship between law and the social, political, and economic context. A key argument is that differences in local law matter—to enslaved people but also to historians seeking to understand the diverse dynamics of the era. The ability of states to enact their own laws and court processes allowed for the development of different local legal cultures, which "became reflections themselves of differences in the economy and politics of

the upper and Lower South" (p. 4). The legal system is embedded in the larger culture, and it reflects and perpetuates the values and priorities of those with political power. Historians must have knowledge of the larger context within which laws are written and enforced in order to understand the experiences of those encountering the law.

The fact that this is a book about formal law and the ways it bound or liberated people may be, at least in part, a product of the very nature of the cases under scrutiny. Important recent work on encounters between enslaved and formerly enslaved Americans and the legal system, particularly in local law courts, has examined the creation of popular legal culture and suggested that that African Americans shaped legal processes through informal means.[1] But other recent scholarship on freedom suits in particular shares Schweninger's focus on how enslaved people engaged with formal law.[2] The kinds of courts involved may account for this difference. Freedom suits often were filed in chancery courts rather than law courts, though this depended on both the state and the facts of the case. Chancery courts had a kind of flexibility built in, with defined procedures that allowed for equitable remedies. If formal law offered litigants in chancery courts more opportunities to maneuver, they would have been wise to learn it. Schweninger's analysis of the differences between law and equity courts and the implications of these differences would be of interest to those studying these particularly technical legal questions.

Schweninger also draws some conclusions about change over time. The two most far-reaching changes limiting freedom suits came from U.S. Supreme Court decisions: an 1813 case that excluded hearsay evidence to prove race and of course *Dred Scott v. Sandford* in 1857. As the 19th century progressed, more free people of color worked in skilled occupations, particularly in Upper South states and Louisiana, making self-purchase and/or the purchase of family members more common. At the same time, the expanding cotton market and western migration made kidnapping more common and lucrative. The results of these two dynamics played out in Baltimore, where the free black population grew by more than 1500% in the two decades after 1790. Slave catchers chased escaped slaves, who tried to disappear into the free black community, and often arrested freedmen instead. As a result, Maryland courts heard a large number of freedom suits.

The stories of those who lost in court, as well as those who claimed some legal victories, populate this book. Cases detail the incredible efforts taken by African Americans in the slave era to protect their families and the constant threats and disruptions that had to be parried. The tragedy of kidnapping and separation haunted free black families, but filing a freedom suit entailed its own significant risk. Facing a legal claim to freedom, a slaveholder might quickly sell such individuals to traders who would transport them to the Lower South. Though a significant number of the cases here resulted in partial vic-

tory, stories of anguish, anxiety, and tragedy abound. Should a case in which a parent secured freedom for some but not all of their children be considered a victory or a defeat? Purchasing a family member did not, in most cases, free them from slavery. If still enslaved, even if owned by a family member, spouses and children of free blacks could be seized to cover debts. Calamity lurked at every corner.

Recent scholarship that considers the encounters of enslaved people in the southern courts has been careful not to portray the legal system as just or fair simply because some litigants found a path to freedom. Schweninger is similarly judicious, never suggesting that courtroom victories provide evidence of white southerners' nagging sense of justice or an inherent impulse in support of liberty and equality in American law. Rather, as he states in the book's conclusion, "the laws permitting a small number of black people to test their status in the courts were uniquely designed to honor the bequests of slaveholders who wished to free their slaves in wills and deeds" (p. 284). In short, the right of enslaved people to sue was "incidental" and the law's fundamental priority was to protect the right of slaveholders "to dispose of their human property as they wished" (p. 47).

Schweninger also steps cautiously around narratives of interracial cooperation. Whites could be allies in achieving and protecting freedom, but they could also be a threat. Cases where whites willingly testified in support of freedom suits may have been a sign that some southern whites saw glimmers of humanity in their enslaved neighbors, but African Americans could never forget that relationships with whites were dangerous and fraught. A promise of freedom in a will could be contested by family members of the deceased. Term slaves could be re-sold as life slaves, a change of status which could be challenged in court but not always successfully. White attorneys, who receive significant consideration in this book, advocated for enslaved clients for diverse motivations. Many such individuals were slaveowners and few seemed to have had anti-slavery sentiments. Instead, attorneys seemed to have been motivated by a dedication to upholding the law and a personal commitment to their clients.

Appealing for Freedom will likely be the key work on which future scholarship on freedom suits will rely. With thirteen chapters plus an introduction and conclusion and nearly 300 pages of text, this work is in some ways encyclopedic. An eighteen-page appendix offers insight into the data analysis—each suit, for example, was coded for twenty-seven variables—and offers some conclusions about the relative success rates of the various grounds for freedom suits. Chapters sometimes feel a little formulaic, with many opening by introducing a case relevant to the chapter's theme, followed by a dive into law and a bevy of other similar cases, and then concluding with a wrap up of the case that began the chapter. At times arguments or explanations are repeated, but

this repetition is in some ways a strength because it means that many of the chapters could stand alone. Diving into a few chapters—or assigning selected chapters to students—would be quite possible.

The growing body of knowledge about freedom suits offers opportunities to re-think the connections between slavery and incarceration. This comparison is often made today, most frequently to point out the cruelties and of the current American penal system, the forced labor of prisoners, and the disproportionate rate of incarceration for African Americans. But other resemblances resonate in the tales told here. Lives, families, and dreams are interrupted by capture and bondage when people are seized, tried, and punished by incarceration and sometimes execution. Legal processes, protections, and punishments still vary widely from state to state as, for example, some states expand capital punishment while others eradicate it. Those impacted by the criminal justice system work to understand the law and advocate for themselves while doing a sometimes-complicated dance with their attorneys, pushing them to provide adequate representation without alienating them. Incarcerated people are shipped to distant sites, sometimes thousands of miles from home and family, when local prisons fill up. One's experience in court is correlated with one's financial resources. But at the end of the day, today as in the past, ties to community and family are among the most powerful means of protecting each other when danger approaches.

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1. Dylan Penningroth *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South*, (2003); Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (2000), Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (2009).

2. Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787-1857* (2016); Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery* (2017).