# Response to Rebecca Scott's "Discerning a Dignitary Offense"

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"Discerning a Dignitary Offense" uncovers the efforts of activists in New Orleans to write an expansive vision of rights into the Louisiana state constitution, one that allowed access to public space, including all "places of business and public resort," to all "persons, without distinction or discrimination on account of race or color." This conception of rights had its roots in a particular, cosmopolitan milieu, one that reached from New Orleans through the Caribbean to the European continent, particularly France. Drawing on this broad legal tradition, activists repurposed elements of French law that prohibited distinctions based on caste to fit within the legal context of the United States. These "public rights" not only predated the Fourteenth Amendment, but also pushed well beyond federal law at that point. It was not until the Civil Rights Act of 1876 that access to public accommodations was explicitly included under the rubric of civil rights. Even then, its place there was short lived. The memory of public rights, however, continued to guide activists and set expectations long after the United States Supreme Court refused accept access to public accommodations as a federally protected, civil right.

Scott's fine-grained account of legal innovation opens up new conceptual terrain in our understanding of both rights and Reconstruction era policies. Specifically, Scott locates the dynamics of legal change outside the nation's statehouses and even outside the nation's jurisdictional borders. Recent work in legal history has extended the process of lawmaking, exposing the roots of Reconstruction's legal changes in the activism of free people of color, the enslaved, women, working people, and others in the decades following the

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Revolution.[1] Building on that literature, Scott focuses on free black activists, who were limited in terms of formal legal and political participation, but were intent on changing the laws and, ultimately, successful in doing so. Her story is neither top-down, nor bottom-up. Instead, it charts a complicated, wide-ranging dialogue among a variety of people, with different relationships to the governing order. In so doing, Scott exposes a surprisingly unexamined assumption in the legal history of the period: although historians have expanded our understanding of legal dynamics in other times and places, the scholarship on Reconstruction era policy change still tends to focus within the United States, as if debates about conceptions of rights, citizenship, and government stopped at the nation's borders. Scott challenges us to stop, look up, and consider the broader interplay of legal concepts that informed those policies.

I applaud Scott's contributions. In this comment, I would like to take them up and push them further. Doing so points to a very different understanding of people's relationship to law and the legal system in the nineteenth century than is now current in much of the historiography. That perspective, I argue, can transform our understanding of the law and legal change in the Civil War era and in the nineteenth century more broadly.

"Discerning a Dignitary Offense" exposes an unresolved tension in historiographical views of people's relationship to law in the nineteenth century. One strand of the scholarship posits a divide between the two, characterizing law in instrumental terms and focusing either on people's use of it or its impact on their lives. The emphasis was once on how those in power used the law to maintain a hierarchical order that

1. See, for example, Laura F. Edwards, "The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Governance," *Journal of Supreme Court History* 42 (2016): 310–28; Martha S. Jones, *All Bound Up Together: The Woman Question in African American Public Culture, 1830–1900* (Baltimore, MD: Johns Hopkins University Press, 2007); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (New York: Cambridge University Press, 2018); Sarah Levine Gronningsater, "'On Behalf of His Race and the Lemmon Slaves': Louis Napoleon, Northern Black Legal Culture, and the Politics of Sectional Crisis," *Journal of the Civil War Era* 7 (2017): 206–41; Sarah Levine Gronningsater, "'Expressly Recognized by Our Election Laws': Certificates of Freedom and the Multiple Fates of Black Citizenship in the Early Republic," *William and Mary Quarterly* 75 (2018): 465–506; Stephen Kantrowitz, *More than Freedom: Fighting for Black Citizenship in a White Republic, 1829–1889* (New York: Penguin, 2012); Kate Masur, *An Example for All the Land: Emancipation and the Struggle Over Equality in Washington, D.C.* (Chapel Hill: University of North Carolina Press, 2010); Lisa Tetrault, *The Myth of Seneca Falls: Memory and the Women's Suffrage Movement, 1848–1898* (Chapel Hill: University of North Carolina Press, 2014); Dawn M. Winters, "Armed with Truth, Justice, and Hatchets": A New History of Antebellum Temperance and Woman's Rights" (PhD diss., Carnegie Mellon University, 2018).

legitimized their authority and allowed them to amass property and exploit labor. Recently, the perspective has shifted, and historians have uncovered all the ways that those whom the law subordinated—enslaved people, free people of color, Native Americans, the working poor, and all women—also used the legal system to advance their own interests.[2] Another strand of the scholarship blurs the divide, positing law as a constitutive element in people's lives: a field of authority through which they moved, but which they could never completely control. As such, law defined the terms of their lives, framing their identities and relationships, while also providing a means for reshaping those identities and relationships.[3] The line between these two approaches is far from clear, let alone stable. In fact, individual works of scholarship often move back and forth between the two, without

2. For recent work, see, for example, Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in America's Confluence, 1787–1857* (New York: Cambridge University Press, 2016); Kirt Von Daacke, *Freedom Has a Face: Race, Identity, and Community in Jefferson's Virginia* (Charlottesville: University Press of Virginia, 2012); and Kimberly Welch, *Black Litigants in the Antebellum South* (Chapel Hill: University of North Carolina Press, 2018). Also see Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006); Victoria E. Bynum, *Unruly Women: The Politics of Social and Sexual Control in the Old South* (Chapel Hill: University of North Carolina Press, 1992); Clare A. Lyons, *Sex Among the Rabble: An Intimate History of Gender and Power in the Age of Revolution in Philadelphia, 1730–1830* (Chapel Hill: University of North Carolina Press, 2006); Ted Maris-Wolf, *Free Blacks and Re-Enslavement Law in Antebellum Virginia* (Chapel Hill: University of North Carolina Press, 2015); Joshua D. Rothman, *Notorious in the Neighborhood: Sex and Families Across the Color Line in Virginia, 1787–1867* (Chapel Hill: University of North Carolina Press, 2003); and Dianne Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2004).

3. Hendrik Hartog's pathbreaking article, "Pigs and Positivism," *Wisconsin Law Review* 4 (1985): 899–935, is exemplary, as is Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 56–107. Subsequent work built on those conceptual shifts. For the nineteenth century, see, for example, Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton, NJ: Princeton University Press, 2000); Michael Grossberg, *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America* (New York: Cambridge University Press, 1996); Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Dylan C. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2003); Christopher L. Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (New York: Cambridge University Press, 2010); and Barbara Y. Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (New York: Cambridge University Press, 2001).

noting the implications.[4] The historiography, for example, assumes the constitutive power of law when it sorts people according to legal status, putting enslaved people, free people of color, poor laboring men, and free women (married and unmarried) into different categories, as if the legal disabilities placed on them constituted the most salient facts in their lives and the entirety of their relationship to law. But the scholarship then suggests the limits of such a view, focusing on all the ways that those people did not accept the law's vision of them or the social order more generally. Like so much of the scholarship, "Discerning a Dignitary Offense" straddles this divide. While deeply enmeshed in the law, the activists who sit at the center of the analysis clearly did not see themselves or society in the way that the law—at least the laws of the state of Louisiana and the United States—defined them.

Actions such as those of the activists in "Discerning a Dignitary Offense" are often characterized as "challenges" to "the law," as if they were initiated outside the legal order. Similarly, instances in which "the law" produced outcomes favorable to those on the margins seem like "exceptions," as moments when "the law" was suspended. But what if such examples were neither challenges nor exceptions? What if they represented competing visions of law *within* the existing legal order? That perspective alters the legal landscape, giving those on the margins as much claim to legal knowledge as those in power. In fact, "Discerning a Dignitary Offense" suggests as much, although it does not frame the issue in this way. As the article deftly shows, free black activists moved within a wider legal culture, one layered with competing principles and practices. To bring those layers into focus, the article zooms out to the Atlantic context and highlights the cosmopolitan connections of this particular group of activists. Stymied within the United States context, they reached out to legal traditions elsewhere.

It was not necessary to go abroad, however, for more expansive conceptions of law or rights. Layers of legal meaning existed within the borders of the United States as well. The commonplace book of Elizabeth Bagby, a white, married woman who lived on a modest Virginia plantation, provides a revealing example. Bagby began with an inscription. "Charge yourself for every article bot [sic] for, and used . . . whether to eat, drink, wear, furniture for the House or Kitchen . . . Doctors Fees &c &c.," she noted. For all the things that she bought and used for the household, Bagby knew that she acted as the legal agent of her husband. As such, she needed to keep

4. My own work is an excellent example of that tension. See Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

careful, written records, so that he would not be vulnerable to creditors. The historiography has focused on this area of law, one that restricted not only married women, but also enslaved people, people of color, laboring people, unmarried women, and children. But the rules in that part of the legal system did not define her relationship to the law or her identity as a wife. Bagby made that clear in the next part of inscription: "such things as you pay for, in weaving, in butter, cloth or any thing made entirely within yourself, it may be as well to take no acct of, except in way of memorandum." The following pages then kept track of the thousands of yards of cloth that she made and sold, keeping the proceeds for her own use. Bagby knew what was later lost in the historiography: married women could claim some forms of property and act as their own agents in some areas of the legal system, but not in others. That was why she separated accounts (which tallied expenditures that lay within the legal purview of her husband) from memoranda (which kept track of property that belonged to her). Accounts took particular forms and had meaning in certain areas of law. Memoranda looked different and had power in others.[5]

What might seem like a contradiction was central to the operation of law in the nineteenth century, as recent scholarship suggests. There is now an extensive body of literature that documents the pervasiveness of crosscutting legal practices, where claims denied in one part of the legal system were recognized elsewhere. Married women and enslaved people without property rights, like Elizabeth Bagby, maintained legal claims to some forms of property. Those without the legal capacity to prosecute cases in their own names made complaints against their husbands, fathers, masters, employers, neighbors, and social betters. Restrictions placed on free people of color were unevenly enforced: sometimes ignored altogether and sometimes brought to bear with extreme brutality. Those who were defined as subordinates—whether because of their status as household dependents or because of their gender, race, or class—did not necessarily equate subordination with powerlessness within, let alone exclusion from, legal venues. On the contrary, they had much to say about the exercise of authority, and regularly tried to enlist legal officials to intercede on their behalf when they experienced what they thought to be abuses of power.[6]

Although these crosscutting dynamics were particularly pronounced for those on the margins, without the full range of rights, they also described the experiences of those with resources and rights. A compelling example is Gautham Rao's analysis of the federal customs system, in which it was

5. Elizabeth Lumpkin Motely Bagby Commonplace Book, 1824–1832, Virginia Historical Society, Richmond, Virginia (hereafter VHS).

6. See, for example, the literature in notes 2, 3, and 4.

expected that federal laws would accommodate established practices in particular port cities, at least in the first decades of the Early Republic. Another is Kimberly Welch's study of free blacks' property claims in the lower Mississippi River Valley, which reveals the extent of local discretion in this area of law, one over which states and the federal government maintained the tightest control and generated specific rules. Although her focus is on free blacks, her analysis suggests the extent to which everyone—even propertied white men—were enmeshed in the jurisdictional layers that made up the legal order at this time.[7]

That institutional structure had deep roots in the colonial past, which was characterized by multiple jurisdictions and conceptions of state sovereignty that dispersed legal authority. As Lauren Benton has argued, the idea that states could claim sovereignty within certain geographic bounds developed slowly, over time. As a result, the territorial borders of nation states remained porous in the early modern period, resulting in overlapping legal regimes, connected to different authorities operating in the same place. That conclusion comports with recent work in Indian history, which emphasizes the persistence of native sovereignty within the geographic boundaries of European colonies in North America as well as the new United States.[8]

Similar dynamics obtained within nation states as well. The legal order of early modern England consisted of a patchwork of jurisdictions associated with different governing bodies: estates, municipalities, corporations, the military, Parliament, the church, and the king. Operating

7. Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016); and Welch, *Black Litigants*. Also see William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History,* ed. Meg Jacobs, William J. Novak, and Julian Zelizer (Princeton, NJ: Princeton University Press, 2003), 85–119.

8. Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (New York: Cambridge University Press, 2011); Mary S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004); Jack Green, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville: University Press of Virginia, 1994); Eliga Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, cira 1772," *The William and Mary Quarterly* 60 (2003): 471–510; Eliga Gould, "Entangled Histories, Entangled Worlds: The English-Speaking Atlantic as a Spanish Periphery," *American Historical Review* 112 (2007): 764–68; Vicki Hseuh, *Hybrid Constitutions: Challenging Legacies of Law, Privilege, and Culture in Colonial America* (Durham, NC: Duke University Press, 2010); and Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005). For Native American history, see, for example, Susan Sleeper-Smith, Juliana Barr, Jean M. O'Brien, Nancy Shoemaker, and Scott Manning Stevens, eds., *Why You Can't Teach United States History Without American Indians* (Chapel Hill: University of North Carolina Press, 2015).

simultaneously and handling similar issues, these jurisdictions reflected the political context of the time, one in which authority was dispersed through multiple governing bodies. The North American colonies were no different. As Stanley Katz has described it, the legal system in early America was "a complex, pluralistic, asymmetrical, gendered, and multicultural set of systems—messy systems, if indeed the term 'system' can be applied . . . at all." That context was on full display in colonial South Carolina, where the slaveholding elite in the low country saw the colonial government as a body that addressed their needs, not those of the colony generally. They apportioned representation to the colonial legislature so as to exclude other areas and located the colonial court in Charleston, which was convenient for them. Everyone else had to travel there, if they wanted to avail themselves of that legal body. It was not just that South Carolina's slaveholding elite believed in their own superiority—although they clearly did. They operated within a particular institutional context, one where governing bodies proliferated and their jurisdictions overlapped. The colonial government belonged to low country slaveholders, who felt no obligation to share that jurisdiction with others just because they happened to live within the same colony.[9]

That messiness—continuing with Katz's term—persisted after the Revolution. The Articles of Confederation created "the United States of America," but located sovereignty within the states, which retained "the sole and exclusive Regulation and Government of its internal police." That term—"internal police"—represented an open-ended grant of authority, which covered virtually any issue that touched on the public interest, including most minor criminal offenses, the provision of poor relief, and the regulation of markets and morals. At the time, conceptions of police power were decidedly local as well as exceptionally broad, which meant that the actual practice of internal policing lay with local governments. States generally kept that system in place for most of the period between the Revolution and the Civil War. Although the United States Constitution did elevate the federal government as a sovereign authority, at least in certain areas, it did not alter the situation otherwise. On paper, the division of authority was clear: the federal government dealt with

9. Stanley N. Katz, "Explaining the Law in Early American History: Introduction," *William and Mary Quarterly*, *Law and Society in Early America* 50 (1993): 6. Also see David Thomas Konig's insightful summary of the field, "A Summary View of the Law of British America," *William and Mary Quarterly*, *Law and Society in Early America* 50 (1993): 42–50. For South Carolina, see Rachel N. Klein, *Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760–1808* (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1990).

certain issues; the states handled matters relating to the public welfare; and local governments administered the states' policies. In practice, however, this system operated just like the overlapping jurisdictions of the colonial era: a distant central government (although considerably weakened); states instead of colonies (although states had more power than colonies, at least in theory); and local government (which still had expansive authority, particularly in matters involving the public order).[10]

In this context, states and even the federal government did not express "the law" in the way that many historians assume they did, because they operated in a context where legal authority was shared not only with various other jurisdictions, including counties and municipalities, but also with a range of non-governmental bodies, including churches, households, and voluntary organizations.[11] Telling in this regard is the charge of Judge John Faucheraud Grimké—father of Sarah and Angelina, who became abolitionists and women's rights activists—to a South Carolina grand jury in 1789. After going over their various duties—including a lengthy explanation of the importance of attending to the actual evidence presented in the cases as well as a plea to set aside the partisan divides that had emerged over ratification of the new United States Constitution— Grimké gave the jury a green light to review and revise the 1740 statute on slaves, which he clearly thought too harsh. "Give it an attentive perusal," he advised, and alter "any defects in the policy of it." Grimké presided over a legal order where it was possible for a judge to tell a grand jury to ignore a statute, if they saw fit. Forty years later, petitioners gently reminded the North Carolina governor of the state's limited authority in their pardon request for a man convicted of trading with slaves. "In this section of the state," they wrote, "there seems not to exist the same necessity for enforcing the rigid execution of this act of Assembly as in other parts." They did things differently in their neck of the woods and assumed that the governor would acknowledge that. They had a point. In the decades following the Revolution, it was entirely possible that a statute relating

10. Articles of Confederation, March 1, 1781, http://avalon.law.yale.edu/18th_century/artconf.asp (accessed April 10, 2020). For police powers, see Markus Dirk Dubber, *Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); Edwards, *The People and Their Peace*; Kate Masur, "State Sovereignty and Migration before Reconstruction," *Journal of the Civil War Era* 9 (December 2019): 588–611; Novak, *The People's Welfare*; and Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993).

11. See Laura F. Edwards "Sarah Allingham's Sheet and Other Lessons from Legal History," *Journal of the Early Republic* 38 (2018): 121–47. Also telling is William J. Novak, "The American Law of Association: The Legal–Political Construction of Civil Society," *Studies in American Political Development* 15 (2001): 163–88.

to public matters—even one worded in universal terms—was intended to apply only in a specific county or to a particular group of people. According to Naomi Lamoreaux and John Wallis, the idea that the primary business of state legislatures was to pass *universal* laws that applied to *all* the state's residents was not institutionalized until the 1830s and 1840s. Until then, private bills (which responded to the requests of particular counties, groups, or individuals) far outweighed general legislation. When state legislatures did pass general laws relating to the public interest, local jurisdictions still retained considerable discretion over their interpretation. State regulation in the Midwest of free blacks' legal status provides a revealing example, as Kate Masur shows in her new book project. Legislatures passed statutes restricting free blacks' movement and imposing registrations requirements, but enforcement was left to local areas, which resulted in wide variations: some free blacks struggled under the laws' weight, whereas others lived without much sense of them at all.[12]

Different bodies of law flourished within this institutional context. Military authorities maintained their own legal jurisdictions, and the remnants of church law held on as well, despite disestablishment. Most states set up separate courts to deal with common law and equity, two bodies of law that dealt with similar kinds of issues with entirely different principles and procedures. Within common law, all states observed the distinction between private (civil) and public (criminal) matters, a distinction that remains in the legal system today. Private—or civil—law dealt primarily with property: not just disputes over it, but also its sale and exchange through wills, contracts, notes, and other negotiable instruments. Where private matters were decided in terms of the rights of those involved, public matters rose to a level where they involved the interests of the entire community, even people who were not directly implicated in the dispute. This area of law included crimes as well as the broad range of issues that affected the public order, which police powers were intended to protect.[13]

Public law had particular relevance for those on the margins. It was more accessible to them, because court officials acted on complaints as an

12. John Faucheraud Grimké, December 15, 1789, Charge to the Charleston Grand Jury, October 1789, *Pennsylvania Packet and Daily Advertiser*, John Faucheraud Grimke Papers, South Caroliniana Library. Petition for the Pardon of Thomas Gallion, to James Iredell, August 3, 1828, 117–18, vol. 27, Governor's Letter Book, North Carolina State Archives. Naomi R. Lamoreaux and John Joseph Wallis, "Fixing the Machine that Would Not Go of Itself: State Constitutional Change and the Creation of an Open-Access Social Order in the Mid-Nineteenth-Century United States," unpublished working paper in possession of the author, presented at the Tobin Project on American Democracy, Cambridge, Massachusetts, May 2018. Masur, "State Sovereignty and Migration before Reconstruction."

13. See, in particular, Edwards, "Sarah Allingham's Sheet."

offense against the public, not the rights of the individual complainant. It also allowed for the handling of situations—such as the property claims of those without property rights or claims to public space by people of color—that did not have legal standing in other areas of law. As Maggie Blackhawk has shown, the petitioning process at the federal level operated according to a similar logic, making space for those without rights to make claims on governing authority.[14]

The historiography, however, has not fully incorporated the importance of public law within the legal system. One reason is evidentiary: its practices are not lodged in the kinds of published texts that historians identify with legal authority. But, as the area of public law suggests, historians' reliance of written texts tends to misconstrue the legal order of the nineteenth century, a time when law and the written word were not as tightly tied together as they were to become later.[15]

People at the time were familiar about the practices of law, even if they were not written down. Elizabeth Bagby clearly knew that established principles—in both private and public law—recognized the attachment of clothing to the person who wore it. She also knew that married women and other people without strong claims to property rights had stretched those principles to extend to textiles that were not worn, but were produced and traded for profit, particularly in the area of public law. Those principles, however, did not exist as things that people could simply pick up and claim whenever they felt like it. To have standing in public law, they had to be used and shown to be part of the public order. The memoranda in Bagby's commonplace book were one of many legal strategies that those without the full range of rights used to give legal principles standing within public law. Those memoranda documented *practice*: they recorded how much cloth Bagby wove, what it sold for, and—most importantly—that she controlled the proceeds. Those facts had legal meaning in public law, which relied on common law in its traditional sense as a

14. Maggie McKinley, "Lobbying and the Petition Clause," *Stanford Law Review* 68 (2016): 1165–205; and Maggie McKinley, "Petitioning and the Making of the Administrative State," *Yale Law Journal* 127 (2018): 1538–637. Maggie McKinley is now known by her married name of Maggie Blackhawk.

15. For the general point about the written word and the law, see Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987). For the developing importance of published texts within governing institutions in the United States, see Edwards, *The People and Their Peace*, ch. 2. Also see Felicity Turner, "Rights and the Ambiguities of Law: Infanticide in the Nineteenth-Century U.S. South," *Journal of the Civil War Era* 4 (2014): 350–72; Kimberly Welch, "William Johnson's Hypothesis: A Free Black Man and the Problem of Legal Knowledge in the Antebellum United States South," *Law and History Review* 37 (February 2019): 89–124.

flexible collection of principles rooted in a wide range of sources: customary practices and popular wisdom as well as various written texts and the laws issued by states. Memoranda mattered, as did oral evidence. In these kinds of cases, witness after witness came forward to tell what they knew, a situation that officials bore with patience, knowing that the repetition of detail was necessary in establishing the practices that the public law was supposed to uphold. With her commonplace book, Bagby could show that her business was an established part of the public order and, then, marshal the legal system to put things aright, if need be.[16]

There is no evidence that Elizabeth Bagby ever had to use her memoranda in court. But if she had, the case would have joined others in an authoritative body of law that played an outsize role in people's lives, but left faint traces in the documentary record and does not bear the markings of law, as it is so often characterized in the historiography. Officials did not aim at the kind of consistency that they pursued in property cases, where their job was to uphold rights, regardless of the context of their lives. Public law had consistency of a different kind, one that was all about people and the context of their lives. Its point was to mete out justice on a case-by-case basis to right specific wrongs in particular places. One person's experience did not necessarily transfer to another person of similar status or predict any other case's outcome. That might seem like the opposite of a body of law. But officials consistently followed the logic of public law: righting wrongs, diffusing conflicts, and putting everyone and everything back where they belonged, which meant attending to the various complaints of the various people who made up the public order.[17]

Not only were these practices difficult to transfer elsewhere, but they also tended to affirm the rigid hierarchies of the time. These kinds of legal actions did not necessarily challenge or even change the social order, because the point was to uphold existing practice. After all, this was the body of law that inflicted horrific punishments on those, particularly enslaved African Americans, who did not fulfill their subordinate roles. Race, class, gender, and ethnicity mattered in public matters, as did credit—or reputation and standing—in the community. To the extent that anyone of subordinate status had credibility, it was because of the social ties that defined their subordination. The wives and daughters of

16. The analysis here relies on research for my new book project, "Only the Clothes on Her Back: Textiles, Law, and Commerce in the Nineteenth Century United States." For elements of the analysis, see Edwards, "Sarah Allingham's Sheet" and Edwards, "Textiles: Popular Culture and the Law," *Buffalo Law Review* 64 (2015): 193–214. See Edwards, *The People and Their Peace*, for the operation of public law.

17. Edwards, *The People and Their Peace*.

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respectable, white men fared well. So did women known for attention to their families and their neighbors. Poor white, free black, and enslaved men as well as women could maneuver in this area of law, although it could be difficult. It was always easier if they had stellar reputations and connections to powerful people—which often meant conforming to the rigid hierarchies of the time. The outcomes then affirmed those hierarchies. Husbands convicted of domestic violence, for instance, were disciplined because they had abused their authority, not because patriarchal authority itself was problematic. Even Elizabeth Bagby's claims to property kept existing inequalities in place, resting as they did on the coerced labor of slavery, which allowed her to devote her own time to the manufacture of cloth to which she had legal claims, instead of other forms of domestic production, the value of which belonged to her husband.[18]

Even so, the public law offered options not available elsewhere in the legal system. Not only did it recognize practices that people without the full range of rights worked hard to establish and maintain, but it also had the capacity to incorporate a wide range of ideas about what constituted a just public order. Within this body of law, people could imagine themselves as part of a legal system in which both conflict and change were possible. That situation does not mean that those on society's margins had the same status or power as white men with the full array of rights. They could not act as individuals with rights that government was bound to recognize, and the results of their complaints rarely made it into the documentary record, which hid them from later historians and made them more tenuous and contingent than government action memorialized in writing.

That context—both the limitations and the possibilities *within* the legal order of the nineteenth-century United States—recasts the importance of "Discerning a Dignitary Offense." Limitations in the practice of public law underscored the importance of rights, as is evident in the strategies of those who challenged slavery and racial inequality in the first half of the nineteenth century. In the mobile world of the nineteenth century, the possession of rights—which were durable and transferable, at least in theory—was increasingly valuable. Rights were necessary to participate in the economy. They also allowed people to maintain their status and their connections to jurisdictions—local, state, and federal—that we now associated with citizenship. By contrast, the kinds of individual accommodations that were possible in public law were fragile: they might be taken away at any time and could not be transferred from one person to another

18. For the importance of credit, which tied people to the hierarchies of their communities, see Edwards, *The People and Their Peace*, particularly ch. 4. Also see Welch, *Black Litigants*, ch. 2.

or moved from place to place. That quality produced uncertainty not just for people of African descent, but for the vast majority of people in the United States, who could not claim the full range of rights and, hence, could not depend on their legal status or take it with them. It is no coincidence that, as Martha S. Jones has argued, free blacks not only advocated for birthright citizenship, but also linked rights to their conceptions of citizenship. It is also no coincidence that activists challenging slavery and racial inequality sought a federal solution, which would eliminate the jurisdictional differences that allowed slavery in some states and not others. Although the activists in "Discerning a Dignitary Offense" reached outside the jurisdictional bounds of the United States for inspiration, they were part of a long tradition of activists who worked within the jurisdictional bounds of the United States, using the legal practices available there to overcome the limitations of public law.[19]

The possibilities of public law figured into this dynamic as well. Free blacks and others on the legal margins pushed a wide range of claims under the rubric of rights, significantly expanding the conception of what rights could accomplish. As Kate Masur has shown in her book, *An Example for All the Land*, people of African descent made claims to access public transportation during the Civil War in Washington D.C. that paralleled those made by the activists in "Discerning a Dignitary Offense." They initially asserted those claims as practice, in the forms common in public law: they climbed aboard streetcars and insisted on staying. Other rights claims of this period echoed the kinds of claims to social justice that were common in public law before the Civil War: to keep families together, to be receive wages for work, to live without the threat of violence, to have access to education, and to assemble freely. The framework of rights, however, promised to move those claims from specific individuals and communities to subordinated groups in the population more generally. The activists in "Discerning a Dignitary Offense" may have drawn on French law, but they were working within a broader, decidedly American tradition as well, one that made it possible for people to imagine change—and justice—within the legal order.[20]

19. Jones, *Birthright Citizens*. Also see Gronningsater, "'Expressly Recognized by Our Election Laws'"; Masur, "State Sovereignty and Migration before Reconstruction"; and James Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (New York: Norton, 2013).

20. Masur, *An Example for All the Land*. For the movement of the kind of claims made in public law to the rubric of rights, see Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015); and Edwards "The Reconstruction of Rights."