

Birthright Citizens

Birthright Citizens tells how African American activists transformed the terms of citizenship for all Americans. Before the Civil War, colonization schemes and raced-based laws threatened to deport former slaves born in United States. *Birthright Citizens* recovers the story of how African American activists remade national belonging through battles in legislatures, conventions, and courthouses. They faced formidable opposition, most notoriously from the US Supreme Court decision in *Dred Scott*. Still, Martha Jones explains, no single case defined their status. Former slaves studied law, secured allies, and conducted themselves like citizens, establishing their status through local, everyday claims. All along they argued that birth guaranteed their rights. With fresh archival sources and an ambitious reframing of constitutional lawmaking before the Civil War, Jones shows how, when the Fourteenth Amendment constitutionalized the birthright principle, black Americans' aspirations were realized.

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Birthright Citizens

A History of Race and Rights in Antebellum America

MARTHA S. JONES
Johns Hopkins University



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To Jean Hébrard, and to Baltimore

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Preface

First the Streets, Then the Archives

My thinking about this book began during my years as a public interest lawyer. Even then, my questions were about race and rights, although my research was conducted not in the reading rooms of ivied law libraries but in the soot-covered structures of lower Manhattan's halls of justice. It was the 1980s, and a radical legal culture focused on civil rights and the War on Poverty was being displaced. New social categories drove the dynamics of New York's trial courts: the homeless, the deinstitutionalized mentally ill, and people living with AIDS. Those men and women were also my neighbors, colleagues, and clients. Our lives and the litigation they generated tested the outer limits of law's capacity to dispense justice. My job was to press those limits, insisting that even those relegated to the margins had fundamental rights.

Scores of New York's public interest lawyers worked in just this way, many of us coming out of community-based legal services and legal aid programs. Our expertise was in the gritty fisticuffs of legal culture's trenches. We inhabited the lowest courts, venues with ghettoized jurisdictions, such as housing and family courts. Ours was a practice wrought from a potent mix of constitutional claims, rules of civil procedure, and gamesmanship. We didn't always give a lot of thought to the past, particularly if it didn't involve a relevant precedent. History was invoked instrumentally, as a highly selective measure of advocacy.¹ Most days, our sights were on the present and the future – winning a case, reforming the law, and changing the world, or at least a small piece of it.² Hours spent in the courthouse meant hours spent observing New York's disproportionately black and brown poor people navigate legal culture, often without the assistance of counsel. From security screenings to the clerk's counter, and from lengthy calendar calls to fraught hallway negotiations, they told their stories. Theirs were everyday problems that rarely rose to the level of high jurisprudential consequence.³ Still, this was where many people encountered law – battling for heat and hot water, custody and care of their children, or public benefits.



FIGURE P.1 Home of New York County’s Housing Court. Manhattan’s Housing Court is located in the borough’s Civil Court Building, depicted here, at 111 Centre Street. When originally installed, the chain-link perimeter fence displaced an encampment of homeless people who had taken up residence against the building’s façade. In 2012, renovation of the adjacent Collect Pond Park exposed foundation remnants from the nineteenth-century Tombs. Image courtesy of Martha S. Jones.

In the local courthouse, race met rights in the lives of people that class-action litigation and appellate courts rarely reached. Still, they were complex proceedings in which interests converged. Individual litigants asserted claims for personal and familial well-being.⁴ For judges, opinions penned led to intellectual distinction, engagements with appellate courts, and expanding reputations. Lawyers worked toward numerous aims: law and public policy reform, a larger client base, or an appointment to the bench.⁵ The social world was also present. Rent strikers, parents’ associations, and welfare rights activists viewed court proceedings as an extension of their work in communities, in legislatures, and in the streets.⁶

At some moments the courthouse and the social world appeared to collide. For many months in the late 1980s, I encountered each morning an encampment of homeless people tucked up against the Housing Court’s south façade – cardboard boxes, plastic bags, and the detritus of urban life assembled into shelter.⁷ I knew about my city’s economy and politics – gentrification and deinstitutionalization were thrusting thousands of New Yorkers onto the streets.⁸ Still, I asked, why here, in a place seemingly far from family, neighborhood, and community services? How had *homeless* people come to take shelter in the shadow of the city’s *housing* court? There was an intimacy on display: an edifice built to ensure tenants’ rights and safe shelter locked in an

awkward embrace with people who lived beyond the reach of legal rights and reason.⁹

I scrutinized constitutions, pored over state and federal statutes, and studied policy and regulation. Finally, it was history that rendered this scene fully legible. The Housing Court building, at first glance, appeared to be no more than one part of an endless grid of modern courthouses and administrative buildings. It was a monument to transparency and order. Still, as I hurried to nearby coffee shops for lunch, another landscape came into view. There, I walked narrow, curved, nineteenth-century streets with names like Mulberry, Mott, Bayard, and Pell. These were signs of an older neighborhood on top of which the modern courthouse had been built.

Pre-Civil War America's most notorious neighborhood was New York's Five Points. Irish immigrants lived alongside newly emancipated slaves; anti-abolitionist riots sometimes targeted black businesses; a burgeoning vice trade catered to white men of all classes; and complicit, affluent landlords knew that vice always paid the rent. Charles Dickens in his *American Notes* derided the neighborhood's "squalid streets," "wretched beds," "fevered brains," and "heaps of negro women," who forced the "rats to move away in search of better lodgings." Dance halls greeted patrons with a gaiety that promised drink, bawdiness, and intimacy across lines of color and class.¹⁰

Nineteenth-century reformers deemed Five Points a place in need of disciplining. Reform came about by way of razing the neighborhood, a process that began in 1838. By the time it was done, a new jail and courthouse building replaced saloons and brothels: The Tombs.¹¹ By the century's end all that remained were a few crooked streets, as law's edifices dominated the landscape. Most residents were displaced to the Lower East Side. But some returned. Poverty and vice were their tickets home, and their new hosts were sheriffs and judges rather than madams and barkeeps. They returned not to dank basement rooms but overcrowded jail cells. This crossroads of lower Manhattan – the Five Points turned courthouse cluster – still pulsed to the beat of violence and vice. But in The Tombs, cages, locked doors, and the movement of bodies by jailers and bailiffs regulated such interactions.

By the 1960s, the courthouse neighborhood I would come to know was in place. Major court reform beckoned another generation of the New York's marginalized to Five Points.¹² New venues, such as the housing and family courts, promised due process and justice to the city's poor and working people. The old Tombs complex was razed to make way for modern structures with windows, waiting rooms, and pro se clerks to guide the uninitiated through legal culture's maze. Dockets swelled and, with a jurisdiction that stretched from one end of Manhattan to the other, the Housing Court became one of the most complex crossroads in New York. Lawyers and court personnel worked side by side with the city's black and brown working poor and jobless. In hallways and anterooms, stories were told and retold.¹³ The social world

pressed in, and the courthouse pressed back. I still recall the week that metal detectors were installed.¹⁴

But what of the people in the encampment just outside? How had the homeless come to make their home at the Housing Court? In a historical sense, they had always been there. Call them Five Points hustlers, inmates of The Tombs, or litigants making claims to housing rights, New York's most marginalized residents had always occupied this place. All the efforts to erase them were betrayed by the presence of packing boxes, trash bags, and Five Points' newest residents, the homeless.

Finally, court administrators installed a six-foot-high chain-link fence around the building, displacing the homeless encampment. In that act, the past and the present became entwined in what Joseph Roach has termed surrogation.¹⁵ In such encounters law's social processes of memory and forgetting produce culture. Collective, highly selective shared memories are constructed, in part, by public acts of forgetting or erasure – the renaming of a courthouse, the razing of a structure, the transfer of a deed, or the termination of a lease. Roach presses us to see in these acts a long history of law's rituals and practices – its theaters of courthouse squares and courtroom wells. Even as we enact these rituals of forgetting, we retain an imperfectly deferred sort of memory.

Our work as legal historians is to understand those sites where history's unspeakable, inexpressible past still lives. Roach gently chides us to go beyond the archives, to “spend more time in the streets.” He might very well have had the image of homeless people at the Housing Court in mind.¹⁶ We might cringe, furrow our brow, and avert our gaze from that homeless encampment. Or we might pause to ask how the sight of human beings huddled in cardboard boxes is a sign of the past. Then we can return to the archives, where we learn how the dynamics of race, power, and inequality have always lived there.

Acknowledgments

Out my window, just to the south, I can see the near corner of the Baltimore courthouse. It sits just a few short blocks away from my home. I could not know when I began this book that I would put on its finishing touches as a resident of Baltimore. I have long been a historian of this city, having walked its streets and alleys, scavenged in its cemeteries and historic sites, and gotten blissfully lost in its archives. But today the rhythms of my daily life play out in the very place that was a key site for early American struggles over race and rights. This book is an effort to bring that story to light, to take us beyond stark narratives about a city's progress and decline or about journeys from injustice to justice, to reveal the dynamics of quotidian struggles that in turn reveal battles that are epic if not eternal. Citizenship – the thorny problem of who belongs and by what terms – is one such problem.

It is only right that I should now recognize that this book is first and foremost dedicated to the city of Baltimore and its people, those living there today, along with those of 1868. It has always been the streets of today's city and the lives that make their way along them that have driven this history. How else might we understand the twenty-first century's entrenched indignity, inequality, and injustice if we do not explore that which is at its root. How might we find the spirit and the necessity of struggle if we do not know that it has always been this way. My history of Baltimore offers no easy or sure answers, but it does affirm that there has always been struggle here. Thank you to this city for giving me, the lapsed radical lawyer, a place in which to strive like a historian for the justice that comes from setting aside despair and cynicism and telling a truth, as best I can.

This book is also dedicated to my husband, historian Jean Hébrard, a constant and true companion on all my journeys, epic and otherwise. Jean has always supported how my work aims to extend justice to those who have been historically deprived of making their own record, often violently so. He has

done those things that only a devoted historian-partner might do: he has made archive road trips, read draft chapters, and posed new challenges during the question-and-answer period. Jean has set aside his own demanding projects time and again to help me push through another barrier, be it the close reading of a document or the refinement of an insight or interpretation. And now he too has made Baltimore home, all the while reveling in its complexity and encouraging me to find my purpose in this place.

I have been accompanied by fellow travelers, writers who also have taken Baltimore as their subject matter, with the trouble of racism as a central concern. Their work has pushed me to recognize the power of the everyday to reveal much more than daily happenings. Readers will be most familiar with the writings of Frederick Douglass, who was awed by the city even before he laid eyes upon it. Douglass would go on to wring from Baltimore's structured injustice a way toward freedom of mind and of body. William Watkins, writing as "A Colored Baltimorean," devotedly chronicled events in the antebellum city, making its life and times a subject relevant to a wide audience. Baptist minister Noah Davis published a narrative that permitted me to peer inside the establishment of black religious communities, with all their meaningful wranglings.

Contemporary authors have kept my thinking focused on the resonances between Baltimore's nineteenth-century past and its present. Literary historian Lawrence Jackson and journalist Ta-Nehisi Coates both have related their coming-of-age narratives set in Baltimore, teaching us about the city as a setting for life stories that are epic and even transcendent. What better affirmation might there be for my enduring sense that in this city's quotidian happenings are events of great consequence? The *Baltimore Sun's* Justin Fenton offered me insight into life on the ground in Baltimore, long before I called the city home. His coverage of legal culture writ large, from the courthouse to the streets, is a model for a historian wrestling with how to craft a relationship between the two.

The lessons of Sherrilyn Ifill's book *On the Courthouse Lawn* have never been far from my thinking. History matters, and Ifill explains how one legacy of lynching in Maryland has been the suppression of African American voting across generations. History matters because the effects of past injustices endure through memory, lore, and fragmentary retellings. Today, Ifill continues to guide my understanding of how racism perverts justice as she fills the shoes of another towering Baltimorean, Thurgood Marshall, in her role as president and director-counsel of the NAACP Legal Defense and Education Fund. Tiya Miles offered me a most moving formulation of how historical writing fits with the work of such lawyers. Beyond explaining the past, our studies are their own acts of justice, the correction of a historical record that otherwise left too much distorted, unsaid, and shrouded in myth.

This book began as an essay, one dedicated to my advisor, mentor, and friend, Eric Foner. Eric has always quietly believed in my capacity to tell

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law's stories with a grounding in the social and political history of black Americans. I presented work from this book in 2004 at a celebration of Eric's career. When it appeared in print three years later, a rereading persuaded me that Baltimore and its rich archives had more to offer those of us longing to understand better the history of race, rights, and citizenship. Eric has been a devoted teacher through all our years together, one of the best fortunes of my professional life.

This book has benefited immensely from exchanges at conferences, workshops, and seminars in the United State and Europe. Thank you to the hosts, commentators, and participants at the American Bar Foundation; American Historical Association; Association for the Study of African American Life and History; American Society for Legal History; Baltimore Bar Library; Brown University Center for the Study of Slavery and Justice; Le Centre International de Recherches sur les Esclavages et les Post-esclavages (CIRES); City University of New York (CUNY) Graduate Center; Duke University School of Law; École des Hautes Études en Sciences Sociale; Emory University Department of History; Henry Ford Museum; Johns Hopkins University Department of History; Law and Society Association; National Humanities Center; New York University Department of History; Organization of American Historians; Penn State University Department of History; Princeton University Department of Religion and Center for African American Studies; Rice University Department of History; Rutgers-Newark Law School; Sorbonne Paris Cité Project on Writing History from the Margins; Statuts, "Race" et Couleurs dans l'Atlantique de l'Antiquité à nos jours (STARACO); Triangle Legal History Seminar; United States Attorney's Office for the Eastern District of Michigan; University of Detroit–Mercy Department of History; University of Maryland Center for Global Migration Studies; University of Miami Law School; University of Michigan Eisenberg Institute for Historical Studies, Law School, and Legal History Workshop; University of North Carolina Law School; University of Pennsylvania Law School, History Department, and McNeil Center for Early American Studies; University of Southern California Law School and Department of History; University of Virginia Law School; Washington University in Saint Louis School of Law; University of Wisconsin Law School; and Yale University.

I came to legal history late in my training, and despite having spent lots of time in local courthouses, I needed a new tool kit with which to tackle the archives. From the outset, the work of Ariela Gross captured the spirit of what I hoped to say, and still today I turn to her ideas for inspiration and guidance. She does not recall the first time we met, but I do. And from that day, Ariela has been a teacher, mentor, model, and friend. Her insistence on scholarly excellence along with a generousness of spirit have transformed my work, while her unflinching commitment to justice has set a high bar for the work of writing history. Kate Masur has been my most generous and most challenging reader, and a model of fierce collegiality and friendship.

Kate shared her own important work on the history of the antebellum culture of rights to lend a critical eye to this book, and this work is much better for it.

Many of the ideas here were developed in an exacting community of legal historians. At the University of Michigan Law School, Susanna Blumenthal, Tom Green, Bill Novak, and Rebecca Scott welcomed me, often seeing the best in my work before I did. In the circles of the American Society for Legal History I found opportunities to test my ideas and make them speak to broader audiences. ASLH also introduced me to the remarkable Sarah Barringer Gordon, a devoted mentor, sharp interlocutor, and an unparalleled series editor. To Sally I owe a debt for her commitment to this book that cannot be easily repaid. I promise to try. My legal history community has also included the generous collaborators associated with the Legal History Consortium, in particular Jane Dailey, Sally Gordon, Dan Hamilton, Bill Novak, Richard Ross, and Barbara Welke.

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In 1845, Frederick Douglass described his feelings upon seeing Baltimore for the first time:

“I had the strongest desire to see Baltimore. Cousin Tom, though not fluent in speech, had inspired me with that desire by his eloquent description of the place. I could never point out any thing at the Great House, no matter how beautiful or powerful, but that he had seen something at Baltimore far exceeding, both in beauty and strength, the object which I pointed out to him.”

I think I know that of which Douglass wrote. Thank you, Baltimore, for your beauty and strength.

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Abbreviations

The following abbreviations are used for archives frequently referenced in the endnotes.

- BCA Baltimore City Archives, Baltimore, MD
MHS Maryland Historical Society, Baltimore, MD
MSA Maryland State Archives, Annapolis, MD
NARA National Archives and Records Administration, Washington, DC

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