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Racializing American “Egyptians”: Shifting Legal Discourse, 1690s–1860s

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Ann Ostendorf is an historian of colonial North America and the early United States and the author of *Sounds American: National Identity and the Music Cultures of the Lower Mississippi River Valley, 1800–1860*. Her recent work has been to investigate the lives of diverse Romani people who lived on the North American continent from the late seventeenth through early nineteenth centuries. She is especially interested in their experiences related to racial formation and the imperial and national state.



Critical
Romani Studies

Abstract

This article situates the historical “Egyptian,” more commonly referred to as “Gypsy,” into the increasingly racist legal structures formed in the British North American colonies and the early United States, between the 1690s and 1860s. It simultaneously considers how those who considered themselves, or were considered by others, as “Egyptians” or “Gypsies” navigated life in the new realities created by such laws. Despite the limitations of state-produced sources from each era under study, inferences about these people’s experiences remain significant to building a more accurate and inclusive history of the United States. The following history narrates the lives of Joan Scott, her descendants, and other nineteenth-century Americans influenced by legal racial categories related to “Egyptians” and “Gypsies.” This is interwoven with the relevant historical contexts from American legal discourses that confirm the racialization of such categories over the centuries.

Keywords

- Race
- Law
- Gypsy
- Egyptian
- United States history

Introduction

Joan Scott arrived in Henrico County, Virginia, in 1674 as part of the wave of laborers who were necessary to claim, control, and make profitable this remote region for the English colonial project. Though Scott's racial identity is not mentioned in the patent book that records her arrival, the Henrico County Court in 1695 referred to Scott as "an Egiptian," the contemporary legal term used to refer to one commonly called "a Gypsy." Though Scott's life can only be roughly sketched, examining it in conjunction with the experiences of her descendants, and the continued, if rare, use of "Egyptian" as a category of identity in colonial and early United States legal records, reveals the changing, hardening, and yet still flexible constructions of race being created. To explore American constructions of race, I employ legal records whose rationales and conclusions hinged upon conceptions of "Egyptianness" from two distinct eras of American history (1690s to 1750s, and 1840s to 1860s). Though created by men intent on the continued subjugation of non-white people, these same sources can be more carefully considered to reveal the disruptive attempts by "Egyptians" to problematize the boundaries of racialized American law.

Because most scholarship about European Romani populations operates from the frame of anti-Gypsyism particularly, rather than racism more generally, it remains of limited applicability in helping us understand these "Egyptians" in an American context. This is certainly not to argue that racism and anti-Gypsyism are mutually exclusive, but rather to note that the inner logics of each found resonance because of certain local circumstances that were dependent upon geographically based historical realities. European colonies, having been built with enslaved African laborers on Native American lands, and then developing into white supremacist nations, were ensured a distinctly racial frame in which "Egyptians" in the Americas would be considered. Yet, as we will see, specifically anti-Gypsy rhetoric could also be used in American political discourse, especially in moments of heightened racial anxieties.^[1]

Instead, reading these documents made about "Egyptians" alongside a consideration of the fundamental role of the state in shaping the discourses about and experiences of race in North America reveals the centrality of race (and specifically of white supremacy) within American governance. Theorizing white supremacy itself as a political system, rather than the background against which all other structures function, can help explain the prevalence of race-defining statutes and legal debates over the course of colonial and American history (Mills 1997, 1–3). American governments required racial clarity, especially clarity regarding whiteness, initiating the ongoing "process of sorting out the bodies" (Omi and Winant 2015, 78). Though "states made race" (Marx 1998, 2), race-making functioned dialectally with the very populations being classified. The gap between official and personal criteria of group membership, as well as the fluidity of group definitions and individual positionings within available conceptual categories over time, reveals the historical contingencies of race at both membership levels. The result is a "messy" and dynamic socio-political order in which "racial and ethnic categories are often the effects of political interpretation and struggle." These same "categories in turn have political effects" (Omi 1997, 23). The distinctive legal treatment of "Egyptians" across the centuries helps clarify this process.

1 For a good introduction to the theory and scholarship of anti-Gypsyism, see Sabrina Tosi Cambini and Guiseppe Beluschi Fabeni, "Antiziganisms: Ethnographic Engagements in Europe," *Anuac* 6 (June 2017): 99–117.

These American “Egyptians” also provide an added dimension to the well-documented social consequences of North America’s racialized legal culture. Scott’s experiences with the colonial Virginia court of the 1690s, when she was accused of interracial fornication and then successfully pled an exemption based on her lack of Christianity, show how laws written to construct and segregate by race remained negotiable. Scott’s eighteenth-century descendants provide insight into the increasingly restricted lives of free Black Virginians, the racial category within which they became assigned. In the nineteenth century other Americans of ambiguous heritages used “Egyptian” identity in state courts in attempts to prevent their categorization outside of whiteness. Their experiences show how those of heritages that did not fit neatly into the legal categories of Black and white challenged the firm strictures of nineteenth-century American race law. As historian Bruce Dain (2003, vii–viii) notes, “racial concepts did not move tidily from a shallow Enlightenment environmentalism to a deep biology; nor were the two positions mutually exclusive ... ideas on race did not fall into neat, self-contained, racially determined categories.” The presence of “Egyptians” in colonial and early U.S. legal discussions of and decisions about race illustrates this messy transition.

Juxtaposing Scott’s experience in the Virginia courts of 1695 with those of William Johnson and Thomas Miller in 1842 South Carolina contrasts these two eras’ divergent ideas about both “Egyptians” and racial difference. While Scott was able to claim a legal victory by positioning herself between laws intended to separate white from Black, Johnson and Miller no longer could. By the 1840s the legal culture no longer allowed for the space “in between” white and Black. Soon after, though, as the expansion of United States citizenship with the end of slavery in 1865 reopened discussions about how to classify new immigrant arrivals, “Gypsies” became touchstones in national conversations about racial fitness and the rights of citizenship that would continue into the twentieth century. Specifically, the presence of “Gypsies” challenged the degree of expansiveness of the legal category of whiteness. Could they lay claim to whiteness, a category nineteenth-century Americans measured by performative cultural criteria as much as biology and genealogy? Some claimed they could not by using particularly anti-Gypsy rhetoric that was unusual before this point in North American history. The presence of “Egyptians” and “Gypsies” in discussions about race during these two distinct eras reveal divergent legal cultures reacting to contemporary social situations largely of the law’s own creation. What began as a way to secure the labor force of an early modern outpost had become a legal culture concerned with fitness for citizenship. Despite these differences, Americans of both eras struggled to consistently and clearly maintain racial boundaries, as the presence of “Egyptians” in the legal discourse reveal.^[2]

2 For a consideration of race and “Gypsies” between these two eras, see Ann Ostendorf, “Contextualizing American Gypsies: Experiencing Criminality in the Colonial Chesapeake,” *Maryland Historical Magazine* 113 (fall/winter 2018): 192–222. For some discussion of racial classification and the law of these two eras, see Rebecca Anne Goetz, “Rethinking the ‘Unthinking Decision’: Old Questions and New Problems in the History of Slavery and Race in the Colonial South,” *Journal of Southern History* 75 (August 2009): 599–612; Jack D. Forbes, *Africans and Native Americans: The Language of Race and the Evolution of Red-Black Peoples*, 2nd ed. (Urbana, IL: University of Illinois Press, 1993); Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America* (Chapel Hill, NC: University of North Carolina Press, 2001); Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill, NC: University of North Carolina Press, 1996); Bruce Dain, *A Hideous Monster of the Mind: American Race Theory in the Early Republic* (Cambridge, MA: Harvard University Press, 2003); Daniel J. Sharfstein, “Crossing the Color Line: Racial Migration and the One-drop Rule, 1600–1860,” *Minnesota Law Review* 91 (2007): 592–656; Michael A. Elliot, “Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy,” *Law and Social Inquiry* 24 (summer 1999): 611–136; Ariela

The first colonial North American laws defining race and the legal culture at the time surrounding issues of identity differed drastically from the situation in the United States in the mid-nineteenth century. The first laws sorting people by race built the boundaries around racial categories and did so primarily in the context of sex, especially sex between white women and Black men. Virginia's General Assembly in 1662 created specific punishments for cases of interracial fornication, and in 1691 it removed the legal ability to marry across the color line it had constructed. The timing of these statutes shows that attempts to define and segregate by race developed along with the growth of slave labor. The racialized nature of American slavery, and the commitment to white supremacy and Black degradation that it required, led to concerns that sex between Blacks and whites could undermine the racial hierarchy, the foundation on which the labor system rested. Statutory laws to first create and then uphold a social order bolstered and then justified the dominance of the white male creators of those laws. It is no surprise that the words "Black" and "white" first appeared as nouns denoting people in the 1670s. In three Virginia counties near where Scott lived, this attention to the maintenance of racial boundaries resulted in a tripling of actions against white women who bore children with non-white men between 1680 and 1709. Though hostility to interracial sex between white women and Black men grew, these laws did not stop it.^[3]

Yet in the seventeenth century, this process of building a Black-white divide remained incomplete, as Scott's religious exemption highlights. Our modern categories of identity tend to obscure the degree to which, according to Colin Kidd (2004, 262), "identity was first and foremost a theological issue." Primarily religious ways of thinking about difference faded, though did not disappear, with Enlightenment notions of biology. Rather, old and new theories coexisted, coalesced, and only later morphed to fit new social conditions. Thus, regulating sex was about defining and controlling the linked lineages of religion and race. That Christianity was at least partially understood as heritable allowed Scott, "noe Xtian woman," to maneuver within these novel colonial statutes to her own benefit. Scott lived in an era when Anglo-Virginians not only "reimagine[d] what it meant to be Christian but they also invented an entirely new

J. Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108 (1998): 109–188; Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008); David R. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class*, rev. ed. (London: Verso, 1999); David R. Roediger, "The Pursuit of Whiteness: Property, Terror, and Expansion, 1790–1860," in *Race and the Early Republic: Racial Consciousness and Nation-Building in the Early Republic*, eds. Michael A. Morrison and James Brewer Stewart (New York: Rowman and Littlefield, 2002), 5–26; and Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, MA: Harvard University Press, 1998).

3 For the role of sex in constructing race, see Martha Hodes, ed., *Sex, Love, Race: Crossing Boundaries in North American History* (New York: New York University Press, 1999), 1; Peter W. Bardaglio, "'Shamefull Matches': The Regulation of Interracial Sex and Marriage in the South before 1900," in *Sex, Love, Race*, ed. Hodes, 112–13, 115; Catherine Clinton and Michele Gillespie, eds., *The Devil's Lane: Sex and Race in the Early South* (New York: Oxford University Press, 1997), xiv–xvi; Paul Finkelman, "Crimes of Love, Misdemeanors of Passion: The Regulation of Race and Sex in the Colonial South," in *The Devil's Lane*, eds. Clinton and Gillespie, 124–53; Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009), 19–21; Roxann Wheeler, *The Complexion of Race: Categories of Difference in Eighteenth-Century British Culture* (Philadelphia, PA: University of Pennsylvania Press, 2000), 98; Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race and Power in Colonial Virginia* (Chapel Hill, NC: University of North Carolina Press, 1996), 199; Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry* (Chapel Hill, NC: University of North Carolina Press, 1997), 8–16; and Morris, *Southern Slavery and the Law*, 22–4.

concept – what it meant to be ‘white’” (Goetz 2012, 2). The colonial Virginia legal culture with which she engaged looked forward while glancing back.^[4]

The situation was much changed by the 1840s, the decade of Johnson’s and Miller’s trials of racial determinacy. By then the legal culture was primarily concerned with ensuring that people were sorted “correctly” into the racial category in which they “belonged.” Concerns about national stability heightened the stakes of “accurately” determining a person’s race. Racial attributes determined whether or not one could responsibly exercise the rights of citizenship, according to theories of the day. Criteria used to judge racial membership included physical characteristics and genealogy, as well as performative acts. As a result, claims to an Egyptian ancestor could only partially aid defendants. One’s appearance as judged by a jury and one’s social activities were as important as the category of identity in which one’s ancestors claimed membership (Gross 2008, 48).

The experiences of Scott, Johnson, Miller, and their families allow for a distinctive consideration of the idea of race. The use of “Egyptian” identity in the courts reveals Americans navigating a world in which new ideas about, and more limiting definitions of, race were failing to account for the full array of personal identities. Appearances of “Egyptian” in court records also expose the inchoate nature of North American racial categorization. Those with ambiguous heritages used that uncertainty to try to contest the increasingly reified legal structures. Individuals could at times even capitalize on the nebulous and strained logic of race-based laws to skirt the worst effects. An examination of “Egyptians” in southern North American courts and laws between the late seventeenth and mid-nineteenth centuries provides evidence of the dramatic changes that ideas about race underwent as scientific scrutiny overlay more fluid cultural considerations. New, unyielding categories of race made them more difficult to contest, to the detriment of those who fell outside whiteness.

1. Joan Scott, “An Egiptian and noe Xtian woman”

Only a handful of references ever mention Joan Scott by name, though from these we can construct a brief sketch of her life. She arrived in Henrico County, Virginia, in the fall of 1674, along with ten other people – five men and five women – whose passage one Nicholas Perkins had paid, and for which he gained 537 acres of land in Henrico County (Patent Book No. 6, 1666–79, 529–30). This record provides no other information about Scott; it does not mention her age, race, nativity, status, or terms of servitude. Presumably Perkins did not consider Scott of African descent or she would have been labeled as such, as “Scipio Negro,” one of the men recorded alongside Scott in Perkin’s land grant, had been. Though we do not know why Scott came to the colony, if she had been like many immigrants at the time, she likely arrived young, single, and indentured. It is also possible she had been shipped to Virginia against her will.

4 For the role of religion in these processes, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (New York: Verso, 1991), 11–12; Wheeler, *The Complexion of Race*, 28, 39; and Katherine Gerbner, *Christian Slavery: Conversion and Race in the Protestant Atlantic World* (Philadelphia, PA: University of Pennsylvania Press, 2018), 11, 74, 86–9.

Though not a common practice until the following century, both English and Scottish courts exiled “undesirables,” including “gipsies,” to the colonies.^[5]

At some point in the two decades following her arrival, Scott moved across the James River to live at the property of Henry Lound.^[6] During this residence, she appeared in 1695 in the Henrico County Court to answer to the charge of fornication, which had stemmed from her bearing an illegitimate child (Henrico County Virginia Record Book, No. 3, 73, 81, 88; and Henrico County Record Book, No. 5, 580). Scott’s experience – as an unmarried mother, leading to her court appearance – is consistent with the lives of many other women from the region at this time (Norton 1996, 336; Horn 1994, 210). But the totality of Scott’s situation did not fall neatly in line with the experiences of these other women. Scott appeared in court to claim an *exemption* from this fornication charge – an exemption that the court affirmed.

The final piece of information known about Scott comes from the statement of her acquittal. As recorded by the court: “Joane Scott^[7] is discharged from the presentment of the Grand Jury it being the opinion of this Court that the Act against fornication does not touch her (She being an Egiptian and noe Xtian woman)” (Henrico County Record Book, No. 3, 88). Because the Virginia fornication law that explicitly stated its application to Christians (and which was presumably the one the court ruled on, in calling Scott “noe Xtian woman”) concerned itself only with cases of *interracial* fornication, the wording of this acquittal strongly suggests that the father of Scott’s children was considered to be a “Negro” under the law.

This 1662 law punished with a heavy fine “any Christian [who] shall commit fornication with a Negro man or woman” (Hening 1823, 114, 170). This law was part of the relatively recent but ongoing anti-miscegenation efforts in Virginia and other English colonies that codified the concept of “hereditary heathenism,” which was predicated on the assumption that “English people were Christian; people of African descent were not” (Goetz 2012, 3, 79). Such efforts remained relatively unsuccessful at this time, as women whom the law eventually referred to as “white” continued to form sexual unions with

5 For a fuller treatment of the court records and historical context related to Scott, see Ann Marguerite Ostendorf, “An Egiptian and noe Xtian Woman: Gypsy Identity and Race Law in Early America,” *Journal of Gypsy Studies* 1 (2017): 5–15. For more on indentured servant arrivals, see Anna Suranyi, “Indenture, Transportation, and Spiriting: Seventeenth Century English Penal Policy and ‘Superfluous’ Populations,” in John Donoghue and Evelyn P. Jennings, eds., *Building the Atlantic Empires: Unfree Labor and Imperial States in the Political Economy of Capitalism, ca. 1500–1914* (Boston, MA: Brill, 2015), 133–4; and Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (New York: Cambridge University Press, 2010), 593–5. For exile to the colonies, see Gwenda Morgan and Peter Rushton, *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* (New York: Palgrave Macmillan, 2004), 9–15; Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (New York: Bloomsbury Academic, 2013), 28, 70; “America and West Indies: August 1664,” in W. Noel Sainsbury, ed., *Calendar of State Papers Colonial, America and West Indies* (45 vols.; London: Her Majesty’s Stationery Office, 1880), 5: 222–31, available at British History Online, <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol5/pp222-231>, accessed 19 March 2019; David Dobson, *Directory of Scots Banished to the American Plantations* (Baltimore, MA: Genealogical Publishing Company, 1984), 6–7, 71, 76, 188; and J. A. Fairley, *Extracts from the Records of the Old Tolbooth of Edinburgh, 1657–1686* (n.p., 1923), 221.

6 To reconstruct the location of Perkins’ and Lound’s properties, see Bert Mayes and Selena Mayes Du Lac, *Henrico County Virginia Land Patent Abstracts with Some Plat Maps* (Lake Havasu, VA: n.p., 2004), 22, 49, 53, 57, 72.

7 “Joan,” “Joane,” and “Jone” were all used in the records as various spellings of her name.

men whom it referred to as “negro” or “mulatto.” Community members appear to have viewed sex between these women and men more as a moral defect on the part of the Christian/white woman than as a threat to the social order. This changed gradually over time, and especially in situations when these partnerships resulted in children. It was usually only with children that women were taken to court for transgressing this law. This reveals the concern that such children provoked among those monitoring the developing social order. Free children with both European and African ancestry exposed the flaws in the biracial legal code and the race-based labor system the code intended to maintain. By labeling Scott not only as “noe Xtian,” but also as “Egypitian,” the court marked her with an identity not frequently used, though seemingly available for use, to explain how a woman in the English colonies neither of Native nor African descent could reasonably claim a lack of Christianity, and thus deny the applicability of the law to her circumstance.^[8]

These court records, which allow us to construct this history, were created to preserve the state’s authority, not the agency of Joan Scott. Yet, power operates on and through multiple vectors at individual, local, and imperial levels. Imperial power was exercised on bodies as part of larger colonial projects, though space in which to subvert this power remained (McDonnell 2009, 162). The categories of identity that were most meaningful to the executors of local institutional structures when determining Scott’s fate in court included her position as a woman, an English colonist, a single mother, a non-Christian, an “Egyptian,” and someone who was not a “Negro.” Which of these identity markers she would have personally found most meaningful is impossible to access from the extant historical record. Extrapolations from archival fragments can help counteract the limitations inherent in sources that were constructed and retained to buttress the authority of self-empowered state actors. Nonetheless, historians remain limited in their ability to recover the internal landscapes of those whose historical imprints consist of the frayed edges absent an attached cloth (Fuentes 2016, 4–8).

Also lacking are Scott’s impressions about these men who exercised authority over her. An equivalent list of her perceptions of their positions never made it into Henrico County records. The court’s gendered, familial, religious, and heritage-defining words are surely rough estimates based on perception and contingent upon geographical and temporal factors. As historian Tara Zahra (2017, 705) notes, “using them can be like trying to capture water in a sandcastle, as both sand and water constantly change form through their interactions.” Scholars nonetheless must attempt to historicize the ideas intended by these words, in order to uncover the experiences of people like Scott.

2. Scott Descendants in the New Racial Order

Assuming Virginia law recognized the father of Scott’s children, and hence the children themselves, as non-white (once whiteness became an exclusive legal category reserved only for those with no African

8 For more on these circumstances, see Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 2003), 327–37; Brown, *Good Wives*, 187–211; A. Leon Higgenbotham and Barbara K. Kopytoff, “Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia,” *Georgetown Law Journal* 77 (1989): 1,967–8; and Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven, CT: Yale University Press, 1997), 7, 24–5, 31.

or Indian ancestry in 1705), and given that the status of all children followed the condition of the mother (Brown 1996, 215–16), to understand the lives of Scott's descendants, we must understand the structures bounding the lives of Virginia's eighteenth-century free Black community. According to historian Edmund Morgan (2003, 337), Virginia's nascent free Black community was "consolidated in a single pariah group, regardless of ancestry, language, religion, or native genius." Anti-miscegenation laws and laws preventing further slave emancipation contained the growth of this community. Their exclusion from the right to vote, hold office, or testify in court, as well as their having to pay extra taxes, limited their rights and opportunities. Despite such strictures, free Black families in Henrico County continued to live autonomous lives. By 1790, 581 free people of color resided there, making up nearly 10 per cent of the total free population of the county. Many of these people had descended from Scott (Heinegg 2005, 7, 1,030–40).

As Scott is known to have given birth to at least one child, identifying this child can help us learn more about not just Scott, but also the legal racial categories at work that shaped her and her children's lives. Genealogical work connects Scott to two land-owning Henrico County sisters, Ann and Jane Scott, almost certainly her daughters. Ann and Jane had inherited land adjacent to each other by 1735, according to a record detailing a gift of fifty acres by Ann to her son Benjamin. Ann had previously given another fifty acres of adjacent land to her son John. These Scott properties were situated directly between Nicholas Perkins' and Henry Lound's original land grants, the two men attached to Joan Scott in the records (Henrico County Miscellaneous, 963; Henrico County Deed Book, 331–4; Foley 1974, 47, 174). Though no records ever definitively mark Ann or Jane with a race, they do so for their children – defined as "mulattos." Over the course of the eighteenth century, at least eleven different Scotts marked as "mulatto" in the records owned land in Henrico County (Heinegg 2005, 1,030–40).

Like her mother before her, Jane Scott used the court to her favor, such as when she successfully sued for damages to her horse after a group of boys chased it away. She also suffered by the court's justice, seen through her one-month jail term and hefty fine for trading with slaves from a nearby plantation. At other times, Scott tried to avoid court orders, as when she failed to list herself as tithable, a legal requirement of all men and African-descended women (Henrico County Court Minute Book, 7, 27, 102). As the law put it, "negro women," though free, were "not to be admitted to a full fruition of the exemptions and immunities of the English" (Hening 1823, 267). Five other Scott women named along with Jane had also failed to list themselves on the tax register in 1752. Jane alone was acquitted, but only "after being heard" (Henrico County Court Minute Book, 19).

What she told the court that led them to this decision is not known. Perhaps her age or an illness or disability proved to the court her unproductivity, all reasons the court granted tax exemptions, since the original law declaring African-descended women as "tithables" did so on the grounds that they performed taxable labor. But she may also have pointed to her heritage. Depending on how the court perceived her race, they may have found a claim to "Egyptian" heritage compelling enough to decide that she was not a "negro woman," and thus not taxable. By the 1750s, colonial Virginia laws regulating race had expanded. Slave unrest had prompted the Virginia General Assembly in 1723 to further limit the social, sexual, economic, and legal rights of free Black people (Brown 1996, 108, 116–26, 217–22). Scott thus faced greater pressures than her mother had to retain control over her and her family members' lives.

It would have been logical for her to use her identity to the extent that those enforcing such strictures would allow. The list of tithable Scott women stands in sharp contrast to the rest of those named, all of whom were men accused of not registering their “mulatto” wives. That these Scott women appeared alone suggests they occupied an all-female household (Henrico County Court Minute Book, 19).

Joan Scott’s descendants continued to appear in local Virginia courts, as Joan had previously. Unlike in Scott’s experience, however, these eighteenth-century courts more confidently asserted the degree of rights and responsibilities applicable to those now categorized as free Blacks under the law. Yet, evidence from nineteenth-century United States courts also suggests that such confident assertions continued to meet with challenges – challenges at times made by “Egyptians.”

3. “Egyptians” in Nineteenth-Century Courts

To fully understand the role of “Egyptians” in early nineteenth-century United States race law, we first need to understand how this terminology had been applied in England and its colonies. A consideration of this term also reveals the extent of the racialized American state and the space for negotiation within it. This era, which witnessed a legal culture increasingly bifurcated by race, also saw changes in the discourse about “Egyptians.” In seventeenth- and eighteenth-century English legal writing, the word “Egyptian” remained the term of choice to denote the people often referred to in common speech as “Gypsies.” Historian David Cressy (2016, 48) notes that though the words had been used interchangeably, “the label ‘Egyptian’ became embedded in English law, while popular parlance preferred to speak of ‘Gypsies.’” The first use of the word “Gypsy” in an English law did not appear until 1713, though that law used the traditional term “Egyptian” as well; all prior statutes from as far back as the sixteenth century had only referred to “Egyptians” (Fraser 1992, 136; Eccles 2012, 11).⁹

The 1736 Virginia version of this 1713 act never used the word “Gypsy,” but only referred to “Egyptians,” who if found “wandering, or pretending to tell fortunes,” could be whipped and banished from the colony (Webb 1736, 349). Not until 1792 did Virginia repeal this and several other anti-“Egyptian” laws. The wording of the repeal explicitly separated “Egyptians or Gypsies” from free people of color by noting that although “Egyptians or Gypsies” were no longer forbidden in the state, “the migration of free negroes and mulattoes” remained illegal (Tucker 1803, 33, 165–6). In the same year, *A Collection of the Statutes of the Parliament of England in Force in the State of North Carolina* included an early sixteenth-century “Act concerning outlandish People calling themselves Egyptians.” Why the state of North Carolina included this act, and its later revision from 1554, in its code of law instead of more contemporary English legislation remains unclear (Martin 1792, 193–4, 280–2, 315–16).

This legal discourse shows racialized states being constituted under consideration of both African-descended and “Egyptian” or “Gypsy” people. Such evidence also shows that when English speakers wrote of “Egyptians” in their colonial North American law codes, they were referring to people more

9 For one contemporary definition, see Samuel Johnson, *Dictionary of the English Language*, 2 vols. (London, 1755), s.v. “Gipsy.”

popularly called “Gypsies.” Yet even in the nineteenth century, “Egyptians” continued to appear in U.S. state courts. Legal debates reveal the continued relevance of this categorical marker.

As U.S. states established racially defining laws, those claiming Egyptian heritage retained the potential for securing the benefits of whiteness. In one case from South Carolina nearly 150 years after Scott’s hearing, the court attempted to try William Johnson as a “free person of color,” though he claimed “the status of a free white man.” During the course of this 1842 trial, Johnson provided a detailed account of his lineage back four generations. According to the testimony, Johnson’s great grandmother “Elizabeth Tan was a colored woman, with thick skin and long hair; and from what came out in another case, she was originally from North Carolina, and claimed to be an Egyptian.” The proceedings were discontinued just as the jury was about to announce its verdict, “which from some cause the counsel suspected was unfavorable to his client” (*Johnson v. Basquere*, 329–330). Dropping the case mid-trial prevented the legal confirmation of his place outside the privileges the law guaranteed to whiteness. As a result, the court never decided on the racial status of Johnson, the great grandson of Elizabeth Tan, “an Egyptian.”

In a second case from the same year, Thomas Miller, cousin to William Johnson and also a descendant of Elizabeth Tan, protested being subjected to a tax “imposed on free persons of color, of African origin and taint.” To make this case, his council used as precedent a decision from 1836 in which one Isaac Winningham had claimed that he, his wife Rachel, and their descendants “were not subject to be taxed as free persons of African origin, but that they were exempt from such a tax, as the descendants of Egyptians.” Miller’s lawyer proved him to be one of these Winningham descendants, which should have protected him from taxes assigned to free persons of color on the grounds of his “Egyptian” heritage. Yet when Miller was called into court, “and his appearance was that of a mulatto,” his lawyer discontinued the proceedings, “rather than to trust his client’s color before the jury” (*Johnson v. Basquere*, 330–1). Once again, the ability to legally prove whiteness based on an “Egyptian” heritage in the antebellum South Carolina courts remained unfulfilled.

Miller argued that he had been “received in society and was regarded as a free white man” because he had volunteered for the militia and voted, acts reserved for white men (*Johnson v. Basquere*, 329–30). In addition, Miller, like Johnson and Winningham before him, presumed that an Egyptian ancestor would prove no hurdle to claiming the full spectrum of rights guaranteed to white South Carolinians. Yet neither his performance of whiteness nor his claimed genealogy provided enough confidence to a jury that was also judging his appearance. Such unyielding racial categories, now “proved” by one’s appearance as judged by the white jury, stands in sharp contrast to Scott’s religious exemption 150 years earlier. By the time Miller and Johnson appeared in court, race had shifted from being a category of “documented ancestry” to an “essential identity.” The increasing number of free Blacks moving around the nation in the 1830s, a decade ushered in by Nat Turner’s Rebellion and of heightened abolitionist sentiment, increased white southerners’ anxiety about race. “Common sense” physical evidence worn on the body became a more powerful “proof” in such circumstances than one’s community relations and genealogical descent (Gross 2008, 27).^[10]

10 For more on these cases, see Sharfstein, “Crossing the Color Line,” 636–40; Christopher J. Bryant, “Without Representation, No Taxation: Free Blacks, Taxes and Tax Exemptions Between the Revolutionary and Civil Wars,” *Michigan Journal of Race and Law* 21 (2015): 111fn123; and *Johnson v. Boone* in *Reports of Cases at Law Argued and Determined in the Court of Appeals and the Court of Errors of South Carolina*, Vol. 1., edited by R. H. Speers (Columbia, SC: n.p.), 268–71.

What Elizabeth Tan meant when she “claimed to be an Egyptian” is impossible to know. It is also unclear whether or not the courts considered the “Egyptian” heritage that Johnson, Miller, and Winningham claimed as an exemption, based on a known “Gypsy” ancestor or an ancestor from Egypt. It is of course also possible that they claimed a fabricated identity and tried to take advantage of a system that increasingly regulated rights based on race, but which found it difficult to place all people into the neat categories now required by law. Yet, the logic expressed in the court cases, that they “were not subject to be taxed as free persons of African origin, but that they were exempt from such a tax, as the descendants of Egyptians” (*Johnson v. Basquere*, 330), seems geographically problematic, considering all parties surely recognized Egypt as part of the African continent, even if Egyptian racial distinctiveness in contrast to sub-Saharan Africans had been a given at the time (Ripley and Dana 1859, 34). Others, whose physical characteristics left them vulnerable to a non-white legal status, protested for and protected their whiteness in court by claims of Portuguese, Turkish, Mexican, and Indian ancestry, oftentimes to great effect (Sharfstein 2007, 625). So why choose Egyptian?

One answer is that a family narrative of Egyptian (Gypsy) heritage had become, over the generations, Egyptian (from Egypt) heritage, as the word “Gypsy” itself had slowly begun to replace “Egyptian” during the seventeenth and eighteenth centuries. In the early nineteenth century, American ideas about Egypt may have amplified this shift in meaning. During the 1820s and 1830s especially, interest in ancient Egypt exploded in the U.S. among whites and Blacks alike. This Egyptian vogue found special resonance with African Americans who were arguing for Black rights and against slavery. The magnificence of ancient Egypt as the world’s first civilization could counter claims of degenerative Africanness, an appealing message that could be applied to personal heritage as needed (Dain 2003, 76–77, 117–119, 124–8, 135–6, 200–1). This development enhanced the visibility and desirability of “Egyptianness,” creating motives and options for refashioning an identity along these more desirable lines. In doing so, it might be possible for self-ascribed identities to overwrite extant state-imposed ones.

It is also possible that all parties involved in these suits unambiguously understood this “Egyptian” claim to be decisively a claim of “Gypsy” heritage. This was true in a Louisiana land claim case from the 1850s in which a woman who was referred to as “an Egyptian” (Testimony of Bret Lacour, 1851) had previously been called “Bohemian” by various French colonial administrators (Letters from Layssard, 1772, 1775), and had a sister who had been called “Gitana” by Spanish ones (Criminal Prosecution of Cesario, 1777). If the same holds true regarding the Tan cases, then they were squarely about how antebellum South Carolinians understood “Gypsies” within their legal categories of race. Such a claim to “Egyptian” heritage being made in southern state courts could have stemmed from a family understanding of “Gypsy” ancestry that had been used for many generations to explain to curious outsiders, or even to themselves, particular physical characteristics – characteristics that increasingly became questionable with the entrenchment of legal categories that required that race be perceivable via a physical body. As most early U.S. trials to determine a person’s legal racial category required detailed accounts of ancestry as well as the court’s perception of the defendant’s race based on physical characteristics and reputation, most successful claims to whiteness required a strategy dealing with all these lines of racial reasoning (Forbes 1993, 196–8, 251–7; Zackodnik 2001, 422–5). Being “Egyptian” could have satisfied each.

The laws these “Egyptians” challenged had been created to define people as belonging to groups, but such categories of classification became naturalized and repurposed by the very people the categorization had

mean to control. Many nineteenth-century Americans straddled such clearly demarcated divisions and thus exposed the arbitrary logic of these categories, thus threatening the reasoning exercised by the laws' defenders. Yet, as Ann Laura Stoler reminds us, racism gains force from its "internal malleability," not "the fixity of its essentialisms" (2002, 144). Thus, using one's identity in an instrumental manner proved logical to those bound in systems intent on solidifying permanent control over them. As historians, we need to "respect the flexibility and historicity of racial categories" if we are to understand Johnson's and Miller's experiences with race as a historical category "normalized through biological discourses" (Perry 2001, 5). "Whites" were not always easily identifiable nor a discreet entity, as the experiences of these "Egyptians" reveal. States reacted to the racialized strategies of these "Egyptians" with responses of their own.

4. "Egyptian" Legal Legacies

Litigants claimed whiteness using "Egyptian" heritage with enough frequency in the antebellum South Carolina courts that in 1858 the South Carolina House of Representatives passed a resolution asking its Committee on the Colored Population "to inquire into the propriety of imposing the same capitation tax on all Egyptians and Indians as is now enforced on all Free Persons of Color, Mulattoes and Mestizos." Unfortunately for historians, they, like the courts of the prior decades, never made a final judgment on how these "Egyptians" fit into their perception of race; nor did they record any discussion that might clarify how they perceived the identity of these "Egyptians." This committee asked to be discharged from considering this request on the grounds that "references to taxation" were "not properly belonging to this committee" (Report Regarding Capitation Tax, 1858). No other committee appears to have taken up the consideration of this resolution and no other state seems to have discussed a similar expansion to their racial taxation laws or discussed "Egyptians" as a legal category of identity in this era.

From immediately after the U.S. Civil War in 1866, however, the interestingly phrased "people called Gypsies" appear in discussions about defining American legal privileges by race. In the Congressional debates leading to the Fourteenth Amendment to the U.S. Constitution, "Gypsies" are explicitly discussed alongside the Chinese and anyone of African descent. "It is understood they are distinct people," argued Senator Edgar Cowan from Pennsylvania, "they never intermingle with any other." Those congressmen debating the rights of federal citizenship who hoped to stoke anxieties among their colleagues for whom the potential of free Black citizenship raised few concerns, added "Gypsies," Indians, and Chinese to the Reconstruction citizenship discussion. But they did so also out of the concern that unwanted people beyond just free Blacks might grow to menacing proportions. Cowan argued against the birthright citizenship being debated, on account of the "Gypsies" who "infest society" and "wander in gangs in my state." He refused to give up the right of:

expelling a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct independent government of their own – an *imperium in imperio*; who pay no taxes; who never perform military service; who do nothing in fact, which becomes the citizen, and perform none of the duties which devolve upon him, but, on the other hand, have no homes, pretend to own no land, live nowhere, settle as trespassers wherever they go, and whose sole merit is a universal swindle; who delight in it, who boast of it, and whose adroitness and

cunning is of such a transcendent character that no skill can serve to correct it or punish it; I mean the Gypsies (*Congressional Globe* 1866, 2,891).

In discussions among congressmen of the racial boundaries of postwar American membership, “Gypsies” proved a useful point of comparison for those attempting to highlight other people who they regarded as being unfit for citizenship. To these men, “Gypsy’s” fitness for citizenship clearly fell short due to their race; they spoke of them not as white or Black, but as a distinct race defined by genealogically and biologically fixed performative criteria.

In the context of 1866, when several hundred thousand slaves had just been guaranteed their freedom, Cowan’s concern can be read metaphorically as being about the threat of free Blacks. But the presence of people in the United States identified as “Gypsies” no doubt contributed to his belief that such scare tactics might prove effective. Beginning in 1851, newspapers across the country began regularly reporting on the presence of “Gypsies.” The flurry of reprints that followed anytime an editor ran a story ensured national exposure to the image of the “Gypsy” that was far beyond their numerical presence. Beyond recounting their movements around the countryside, these stories most frequently commented on people’s physical and character traits to provide evidence that these people belonged to a “Gypsy race.” An 1851 account of families camped in New Jersey, published in an Ohio newspaper, calls them “the first of this singular race of people that ever visited Chester County – if not the United States” (*Gallipolis Journal*, 18 December 1851). These same journalistic tendencies are illustrated the following year: “The Rochester papers announce the arrival in that vicinity of a tribe of real gypsies. They are distinguished by that wild freedom which has characterized the race and their tents and primitive style of living are studies for the curious” (*Portage Sentinel* [Ravenna, Ohio], 28 June 1852, and *Jefferson Republican* [Stroudsburg, Pennsylvania], 8 July 1852). Reprints out of Washington, DC, and New Lisbon, Ohio, described them as being from the north of England, “and though a majority are light haired, and otherwise obviously of Anglo-Saxon material, there is evidence enough in the remainder, and in the manners of all, that they have a right to the title accorded them” (*Weekly National Intelligencer*, 11 December 1852, and *Anti-Slavery Bugle*, 1 January 1853). Other more “scientific” newspaper accounts, such as that published in the Vermont *Caledonian*, cited Robert Knox’s *Races of Men*, and categorized “Gypsies” as “the early oriental negro” and “plainly belong[ing] to the dark races.” It continued in a particularly disparaging tone: “probably no race is really so low in the scale of degradation” as this “vagrant race” (21 February 1852). Another Vermont editor summed up his thoughts by writing: “Their race is a peculiar one ... Pariah in habits and principles – repulsive in color and appearances” (*Middlebury Register*, 3 September 1851). Such descriptions show how these writers used both behavioral and physiological criteria on which to judge “the Gypsy race” (Knox 1850, 103). These antebellum cultural currents help explain the “Gypsy” presence in U.S. debates about citizenship and race in the immediate postwar years.^[11]

11 An earlier newspaper article implied, unlike the positions from the 1850s, that immigrant “Gypsies” who arrived with problematic racial characteristics could be improved in the United States. The writer describes them as “an idle vagabond race, without settled homes, living by theft, beggary, and fortune telling, and the mending of pots and kettles.” However, once in America, they “appear to have thrown off their hereditary characteristics ... are industrious, orderly in their habits, and retain nothing of their ancestry except the name” *Native American* (Washington, DC), 10 March 1838.

In President Johnson's veto message of the Civil Rights Act of 1866, just months prior to these Congressional debates, he spelled out his understanding of who the Act would grant citizenship to and why he would not sign it into law: "This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as Blacks, people of color, negroes, mulattoes, and persons of African blood. Every individual of these races, born in the United States, is by the bill made a citizen of the United States" (United States Senate 1866). In the minds of these politicians attempting to legislate rights by race, "Gypsies" stood as an autonomous category under distinctive deliberation. These new ideas of race under consideration during postwar Reconstruction in the United States reveal the extent to which the nation constructed race, and race (re)constructed the nation. The newly empowered and ascendant federal government employed ethnographic "science" to national considerations of citizenship, parsing categories and sorting people into further constituent parts. Their decisions affected the lives of Americans and new immigrants for generations to come. By the turn of the twentieth century, "Gypsy" had become a distinct legal category in the United States, though grouped among the "races" of the world (Dillingham 1911, 5, 71–3).^[12]

Conclusion

From the late nineteenth through early twentieth centuries, the United States federal government confidently deployed these hardened "scientific" racial categories in ways that shaped national development as well individual American experiences. Work remains to be done on how twentieth-century ideas of race shaped Romani lives in the United States. However, when contrasting this era to those prior to it, we should remember how the experiences of earlier American "Egyptians" and "Gypsies" differed in distinctive ways, dependent upon the context of the time in which they lived. The racialization of these categories, and thus people's experiences of race, was neither universal nor consistent. Rather, the distinctive North American circumstances, which informed the shifting criteria of race as they evolved over the centuries, provided the context within which American "Gypsies" and "Egyptians" navigated their own positions.

Situating Joan Scott, William Johnson, Thomas Miller, and their families into the history of the developing North American legal categories of race refines our understanding of the changing racial ideologies over the course of American history. Claiming an identity outside of the Black/white divide, which was built to buttress the slave labor system, provided possibilities, albeit increasingly limited ones, for those desirous of exerting an identity that was incompatible to this dichotomy. The stories of these previously silenced Americans expose in a unique way the processes of racial codification, experiences of being "raced," and the approaches used to navigate such positioning.

Scott's savvy courtroom strategy of claiming an "Egyptian" identity and non-Christian religion led to her exemption from the fornication law that bound white Christian Virginia women. Though racialized

12 For more on the twentieth-century legacies of these decisions, see Jacobson, *Whiteness of a Different Color*; Ian Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 2006); and Pascoe, *What Comes Naturally*.

categories constrained the lives of her descendants, some of them continued to own land and retain a modicum of freedom. An “Egyptian” identity also provided people living in the nineteenth century a potential means of negotiating strict definitions of race. Though colonial and U.S. laws moved to clarify racial difference, this process was never complete, due in part to the employment of the law by those demanding justice, a demand that only whiteness could fulfill. The fate of “Egyptians” in American legal discourse reveals the effect of the law on the lives of individual Americans. It also shows how these same Americans used the courts to build the law itself. Although an official deployment of the categories of “Egyptian” and “Gypsy” served to reinforce control over people, people could use these same categories of identity to secure their own standing within the increasingly racialized state.

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