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PATENT LAW'S HIDDEN FIGURES: RACE, MEMORY AND
INVENTION OF A SLAVE

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Patent Law's Hidden Figures: Race, Memory, and *Invention of a Slave*

Abstract: In 1858, the United States Attorney General issued an opinion, *Invention of a Slave*. Relying on the Supreme Court's recent declaration in *Dred Scott v. Sandford* that African Americans were not citizens, he created a formal racial barrier to the patent system, declaring inventions by all African Americans, enslaved and free, unpatentable. Within a few years, legal changes that overruled *Dred Scott* and abolished the law of slavery rendered the opinion obsolete. This brief opinion became, as far as lawyers and legal scholars were concerned, forgotten. Unlike many overruled opinions dropped from the legal canon, however, *Invention of a Slave* and the associated story of an enslaved blacksmith who invented an innovative plow have been continuously remembered. Women and men committed to fighting the legacy of slavery maintained both in the collective memory of those seeking full civil rights for African Americans. Our legal forgetting was an act of persistent blindness to their efforts and publications. This Essay excavates the generations of African American writers and activists who have worked to remember the opinion and argues that legal forgetting has carried a cost. Their remembering was not casual storytelling but rather deliberate, strategic, and political. I offer *Invention of the Slave* as a case study of race and selective legal memory, tracing an unacknowledged color line that demarcates legal memory and the costs of that line. Because of our forgetting, the opinion appears as an obscure part of the antebellum past. When we understand their remembering as a political act, we can see what they have always seen: there is a connection between the patent system and the legal and social definition of citizenship. At a time when the boundaries of citizenship and the contours of who is worthy to be considered an American are hotly contested in ways related to race and ancestry, learning from those who remembered *Invention of a Slave* as we in law forgot offers lessons that link this piece of the past to our present and future, with implications both for the patent system and for our on-going conversation about race, equality, citizenship and the laws that affect them.

**Patent Law's Hidden Figures:
Race, Memory, and *Invention of a Slave***

I. <i>INVENTION OF A SLAVE: THE STORY</i>	6
II. REMEMBERING THE STORYTELLERS	13
A. <i>At the Nadir</i>	13
B. <i>In the Civil Rights Era</i>	20
III. THE STAKES OF REMEMBERING	25
A. <i>The Significance of Ned</i>	26
B. <i>The Significance of Jeremiah</i>	27
C. <i>The Significance of Oscar</i>	28
IV. THE COSTS OF FORGETTING	31
A. <i>Tracing the Costs</i>	31
B. <i>Mitigating the Costs</i>	35

In 1858, Attorney General Jeremiah S. Black issued an official opinion on the patentability of a “new and useful machine invented by a slave.”¹ He needed only three sentences to explain that an invention by an enslaved inventor could not be patented. The Attorney General relied on the Supreme Court’s holding the previous year in *Dred Scott v. Sandford* that African Americans were not citizens, whether free or enslaved.² Without the ability to swear an oath of citizenship, enslaved persons could not apply for patents. This reasoning placed even free African Americans outside the bounds of patent law, as neither citizens nor aliens.³ Further, the Attorney General declared that the owner of an enslaved inventor could not patent the invention, barred by the statutory requirement that only the “original and first inventor” could receive a patent.⁴ His opinion, *Invention of a Slave*, created a formal racial barrier to the United States patent system which had previously been

¹ “Invention of a Slave,” 9 Op. Att’y Gen. 171 (1858).

² *Id.* at 171-72; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³ 9 Op. Att’y Gen. at 171 (adopting reasoning of patent commissioner). For the reasoning of patent commissioner see Letter from Joseph Holt, Comm’r of Patents, to Oscar J. E. Stuart, Nov. 24, 1857, and Letter from Joseph Holt, Comm’r of Patents to Secretary of State Jacob Thompson, Dec. 12, 1857, both excerpted at Brian L. Frye, *Invention of a Slave*, 68 SYRACUSE L. REV. 181, 194-95 (2018). As a comprehensive article on the opinion, *Invention of a Slave* is an invaluable resource. My purpose in this Essay is to not to repeat Frye’s research but rather to ask a different set of questions by interrogating the forgotten writers whose efforts allow us to remember the opinion.

⁴ Patent Act of 1836, Ch. 357, 5 Stat. 117 (July 4, 1836), §6.

accessed by free blacks.⁵

Both enslavers and anti-slavery advocates expressed outrage about the opinion, but amid the national tumult over slavery that *Dred Scott* singularly failed to resolve, the controversy was soon overtaken by events in Bleeding Kansas, the presidential election of 1860, secession, and ultimately, the Civil War (1861-65). Within a few years, the law changed. *Dred Scott* was overruled and the law of slavery abolished, rendering the opinion obsolete.⁶ As lawyers, we have a collective memory, curated by law reviews, as well as by published cases, treatises, and the content of law school classes, a memory both continuous and changeable.⁷ *Invention of a Slave* was dropped from that memory, uncited in case law and infrequently discussed even in patent law scholarship.⁸ As legal scholar Brian Frye explained when analyzing the opinion as “a forgotten IP case,” it had been forgotten for “the best reason.”⁹ The formal racial barrier to patents it had erected was swept away, never to return.

As lawyers, there are sound reasons why we do not continue to cite and discuss obsolete rulings, although, of course, there are exceptions. The national controversy that prompted *Dred Scott*, the heated debates about the opinion after it issued, and the bloody war and constitutional changes that rendered it obsolete have kept that opinion in the pantheon of significant cases we continue to teach and discuss.¹⁰ *Invention of a Slave* appears to be a mere

⁵ This racial barrier was only erected against African Americans. A citizen of another country, including African countries, could access the system by swearing an oath declaring “of what country he is a citizen.” Patent Act of 1836, §6.

⁶ The legal changes include: “Citizenship,” 10 Op. Atty’s Gen. 382 (1862), US. Const. amend. XIII (1865); amend. XIV (1868), amend. XV (1870), and the Civil Rights Act of 1866, 14 Stat. 27-30 (Apr. 9, 1866).

⁷ Shubha Ghosh, *A Duty to Remember*, 68 SYRACUSE L. REV. 1, 3-5 (2018); LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1992-93); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990).

⁸ For a rare exception to this legal forgetting, see Chas. E. Tullar, *Parties in General*, 1 J. PATENT OFFICE SOC’Y 131, 132 (1918). Other examples are discussed *infra* at notes /29-30/ and /56/.

⁹ *Invention of a Slave*, *supra* note /3/ at 182; *A Duty to Remember*, *supra* note /7/, at 8 (introducing symposium issue on forgotten IP cases and defining “case” broadly to include this opinion).

¹⁰ For a few examples, see Justin Buckley Dyer, *The Substance of Dred Scott and Roe v. Wade*, 16 Geo. J. L. Pub. Pol’y 421 (2018); Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott*, 39 Pepp. L. Rev. 13 (2011-13) and Paul Finkelman, *Coming to Terms with Dred Scott: A Response to Daniel A. Farber*, 39 Pepp. L. Rev. 49 (2011-13)(both in symposium “Supreme Mistakes”); Jennifer M. Chacon, *Citizenship and Family: Revisiting Dred Scott*, 29 Immig. & Nat’lity Rev. 633 (2008); Lea Vander Velde and Sandhya Subramanian, *Mrs. Dred Scott*, 106 Yale L.J. 1033 (1996-97); *Slavery in the Canon*, *supra* note /7/, at 1088. See

footnote to that significant opinion. The epic saga of Dred and Harriett Scott and their multiple legal battles became a matter of national import as their fight for freedom ended up in the Supreme Court. The brief attorney general opinion, in contrast, echoes the same “struggle over the ideology of slavery” within the “microcosm” of the patent office, a minor bureau of the antebellum government.¹¹

Even as a small-scale story of slavery in the antebellum United States, *Invention of a Slave* provides a poignant example of the contradictions between humanity and property that challenged and distorted American law in a slave society.¹² It forces us to acknowledge that the ideology of slavery reached into the technical bureaucracy of the patent office, an area of law and of the administrative state frequently considered outside politics.¹³ The dry lines of the opinion expose the breathtaking claim by an enslaver to the mental labor of another person, an ultimate claim of whiteness as intellectual property, and another frontier in the “myriad and nefarious uses of slave property.”¹⁴ These features make *Invention of a Slave* a story worth remembering.¹⁵

One of history’s projects is the recovery of missing stories and this goal has always been urgently foregrounded in African American history, a corrective to the whitewashed narrative of the United States that dominated professionalized history from its late-nineteenth-century inception.¹⁶ *Invention of a Slave*, however, has never been a “forgotten” or missing

also Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 380, 380 (2011)(arguing that *Dred Scott* and other opinions are remembered due to “historical happenstance”).

¹¹ *Invention of a Slave*, *supra* note /3/ at 229.

¹² For an in-depth discussion of these contradictions, see Ariela J. Gross, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA (1997); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

¹³ For challenges to this view, see scholarship cited at Anjali Vats and Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 740 (2018); Kara W. Swanson, *Intellectual Property and Gender: Reflections on Accomplishments and Methodology*, 24 AM. U. J. GENDER, SOC. POL’Y & L. 175, 182, 185-86 (2015); SHOBITA PARTHASARATHY, PATENT POLITICS: LIFE FORMS, MARKETS, AND THE PUBLIC INTEREST IN THE UNITED STATES AND EUROPE 3-5, and *passim* (2017).

¹⁴ *Critical Race IP*, *supra* note /13/, at 758; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); HARTMAN, *supra* note /12/, at 24.

¹⁵ *Invention of a Slave*, *supra* note /3/ (facilitating remembering).

¹⁶ John Hope Franklin, *George Washington Williams and the Beginnings of Afro-American Historiography*, 4 CRIT. INQUIRY 657, 658 (1978). For an influential early example of corrective history, see W.E.B. DuBois, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 (1935).

story.¹⁷ For over one hundred and fifty years, African American activists have remembered and written about the opinion in many venues excluded from our collective legal memory.¹⁸ Their remembering was not casual storytelling but rather deliberate, strategic, and political. Understanding the purpose of their efforts reveals the opinion's continuing relevance to our collective efforts to understand what the law is, how it is working, and how it might be changed in the service of justice. I offer *Invention of a Slave* as a case study of race and selective legal memory, tracing an unacknowledged color line that demarcates legal memory and the costs of that line.

I begin with my own first encounters with *Invention of a Slave* and the story of the opinion and its backstory I have now learned from African American "sites of memory" created over 150 years.¹⁹ I then foreground the nineteenth- and twentieth-century storytellers, previously consigned to law review footnotes, to understand by whom and in what places the opinion was remembered while we in law forgot. With an appreciation of the opinion as a remembered story, I can then ask why? What were the stakes that drove African American activists and leaders to tell and retell the story of the enslaved inventor and his exclusion from the patent system? I argue that this memory work was performed in support of fights for the full civil rights that signal and accompany inclusion, the "rights of belonging."²⁰ Between the formal lines of the opinion, these activists read an unintended message that patents could be political tools used to oppose racism and racist laws. They mobilized patents as government certifications that their possessors had a prized mental ability, inventiveness, to undercut the logic of racism in its shifting guises, including scientific racism, white supremacy, and the "soft bigotry" of low expectations.

This labor resulted in publications that remained on the other side of a color line. I then argue that there have been costs to our selective legal memory, as we in law have failed to appreciate and participate in what was

¹⁷ This Essay is thus distinct from the valuable genre of articles reminding legal scholars of the significance of cases excluded from the canon, instead asking us to consider *Invention of a Slave* as a *remembered* opinion. See, e.g., Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295 (2000); DAVID FONTANA, A CASE FOR THE TWENTY-FIRST CENTURY CONSTITUTIONAL CANON: *SCHIMEDERMAN V. UNITED STATES*, CONN. L. REV. 37n.8 (2002)(collecting articles arguing for recognition of forgotten cases); Samuel Brenner, "Airbrushed Out of the Constitutional Canon": *The Evolving Understanding of Giles v. Harris, 1903-1925*," 107 MICH. L. REV. 853 (2009)(tracing gradual legal forgetting).

¹⁸ See, e.g., *Invention of a Slave*, *supra* note /3/, at 182 n. 3 & n.8, 187 n.55 & n.57 (citing the publications discussed further below).

¹⁹ *Critical Race IP*, *supra* note /13/ at 768 (citing earlier scholarship drawing upon African American literature as a "site of memory").

²⁰ Rebecca Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L REV. 945, 946 (2005).

always in part a *legal* effort, even though it occurred outside formal legal publications. These storytellers, by telling one of law's stories, were seeking legal change. Our legal erasure of both opinion and storytellers has allowed us to encounter a well-remembered story as "forgotten" and remain blind to its relevance. With our new perspective, *Invention of a Slave* becomes transformed from an often-overlooked piece in the vast mosaic of law and slavery in the antebellum United States into part of the post-Emancipation history of race and law in the United States, a history characterized by never-ending always-changing campaigns to fulfill the formal promises of the Reconstruction Amendments, passed to overturn *Dred Scott* and bring African Americans into law and society as citizens. This history has not ended, but continues to our present, as we continue to hotly debate what Barbara Welke has memorably called the "borders of belonging," that is, the contours of citizenship and Americanness as shaped in law and society.²¹

In exposing the costs of selective legal memory in this instance, this Essay joins the project of Critical Race IP, telling and listening to stories as a means of "remaking [] intellectual property" to "heal the wounds of racism" at a time when intellectual property is ever more important in the economy and law.²² I argue that appreciating the long-standing connection between invention and civil rights adds new urgency to current discussions about severe racial disparities in patent rates. Further, as a case study of selective legal memory, the history of remembering and forgetting *Invention of a Slave* suggests the virtues of looking for and listening to law's stories as told by communities of color as we remember that the borders of belonging are not just shaped at physical borders and in immigration courts, but in all places law acts.

I. *INVENTION OF A SLAVE*: THE STORY

As a former patent attorney turned legal scholar, I first encountered *Invention of a Slave* as a appropriately forgotten opinion. I saw no relevance to my former practice or to teaching patent law. I thought of it as a minor piece of patent lore, remaining firmly within my legal mindset of sorting precedents into "good" vs. "bad" law. Nothing in my background as a white American, trained in science, law, and history in majority-white institutions, led me to see it differently. Even as I researched the history of the patent system and began to consider the history of black inventors, this mindset affected my reading of a pamphlet published in 1913, *The Colored Inventor: A Record of Fifty Years*.²³ I knew that its author, Henry E. Baker, was an

²¹ BARBARA WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH-CENTURY UNITED STATES (2010).

²² *Critical Race IP*, *supra* note /13/, at 11, 31-32, 56.

²³ HENRY E. BAKER, THE COLORED INVENTOR: A RECORD OF FIFTY YEARS (1913).

African American lawyer and patent office employee, and I appreciated that the pamphlet contained one of the earliest lists of African Americans who had received US patents. I am embarrassed to admit how long I had that pamphlet in my research collection and how often I had referred to its contents before I paid much attention to Baker's discussion of *Invention of a Slave* in the essay introducing his list or bothered to ask myself why Baker had gone to the trouble to write the pamphlet, so convenient for 21st-century historians researching black inventors, and why it was considered worth publishing. Staring me in the face, once I chose to look, was the information that the pamphlet was printed to commemorate the fiftieth anniversary of Emancipation by *The Crisis*, the publishing arm of the newly-formed National Association for the Advancement of Colored People ("NAACP").²⁴ This fledgling civil rights organization had devoted some of its limited resources to publicizing this overruled opinion and black inventors. Why? This question led me to the storytellers who are the focus of this Essay, including Baker.

As Baker, who earned his law degree from Howard University, well knew, *Invention of a Slave* has always been remembered in law in the sense that it, like all attorney general opinions, was published as an official government document.²⁵ In those pages, we, like Baker a century ago, can read the opinion, one amid the many issued by Jeremiah Black in his three years serving as attorney general in the administration of President James Buchanan.²⁶

I fully concur with the Commissioner of Patents in the opinion he has given on the application of Mr. O.T.E. Stewart, of Mississippi. For the reasons given by the Commissioner, I think as he does, that a machine invented by a slave, though it be new and useful, cannot, in the present state of the law, be patented. I may add that if such a patent were issued to the

²⁴ *Id.* PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* (2009). Why did I eventually notice, long after I first read the pamphlet? I was typing a citation to the pamphlet, following the conventions of the history discipline, which requires inclusion of the publisher.

²⁵ *Henry E. Baker*, in DANIEL WALLACE CULP, JR., ED., *TWENTIETH CENTURY NEGRO LITERATURE; OR, A CYCLOPEDIA OF THOUGHT ON THE VITAL TOPICS RELATING TO THE AMERICAN NEGRO, BY ONE HUNDRED OF AMERICA'S GREATEST NEGROES* 400 (1902), unpaginated biography between pages 398-99; *Henry E. Baker, Negro as an Inventor*, in CULP, 399-405, at 400.

²⁶ Jeremiah, a white Pennsylvania attorney, loyal Democrat, and former judge, served as Attorney General from March 6, 1857 until Dec. 20, 1860, when he became Secretary of State for the remaining two and one-half months of the Buchanan administration. Francis Newton Thorpe, *Jeremiah S. Black*, 50 *THE PENNSYLVANIA MAGAZINE OF HISTORY & BIOGRAPHY*, 117, 117 n.1 (1926).

master, it would not protect him in the courts against persons who might infringe it.²⁷

There is much more to the story of *Invention of a Slave*, however, than these three sentences. While the law and practice of the nineteenth-century patent office kept pending applications secret, the applicant in this case publicized his application widely, leaving an ample paper trail about the invention, the enslaved inventor, and his enslaver. The applicant, white Mississippi farmer, slaveowner, and lawyer Oscar J.E. Stuart (misspelled as “Stewart” in the opinion and with incorrect initial), corresponded about the application with two Mississippi senators, the patent commissioner, and the secretary of interior.²⁸ It is only through Oscar’s words that we learn a few facts about the inventor, an enslaved man named Ned who worked as a blacksmith. Oscar’s correspondence and the custom of slavery denied Ned any known second name. To avoid replicating that mark of subordination, I refer to the other men in this story by their first names as well.

Despite the rapid legal forgetting of *Invention of a Slave*, these letters have not lain untouched and forgotten in dusty archives. Beginning soon after the Civil War, African American writers and the occasional white historian referenced and republished Jeremiah’s opinion and used the other sources to reconstruct the story of Oscar and Ned, publishing summaries and even full transcriptions of the original handwritten manuscripts.²⁹ Tracing the multiple strands of this remembering takes us outside the largely white world of legal publishing, with its focus on precedent and tools for practicing lawyers, and into the world of African American thought and activism.³⁰

This is the story, which I am recounting not based on my own archival research, but from this remembering.³¹

²⁷ Op. Att’y Gen. at 171-72.

²⁸ Dorothy Cowser Yancy, *The Stuart Double Plow and Double Scraper: The Invention of a Slave*, 69 J. NEGRO HIST. 48-52, 48-49 (1984); Norman O. Forness, *The Master, the Slave and the Patent Laws: A Vignette of the 1850s*, 12 PROLOGUE 23 (1980)(discussing the relevant materials in the National Archives).

²⁹ See, e.g., John Boyle, *Patents and Civil Rights in 1857-8*, 42 J. PATENT OFFICE SOC’Y 789, 789-94 (1960); *The Master, the Slave*, *supra* note /27/ at 26-27; *Stuart Double Plow*, *supra* note /28/; PORTIA P. JAMES, *THE REAL MCCOY: AFRICAN-AMERICAN INVENTION AND INNOVATION, 1619-1930* 49 (1989).

³⁰ One rare early exception of remembering “Invention of a Slave” in the legal literature is Joseph Rossman, *The Negro Inventor*, 12 J. PATENT OFF. SOC’Y 549, 551-53 (1930). Written by white patent examiner Joseph Rossman, the article is in large part a reprint of portions of an essay by African American patent examiner Henry E. Baker, *The Negro as an Inventor*, *supra* note /25/.

³¹ The most complete recent account of *Invention of a Slave* is provided in *Invention of a Slave*, *supra* note /3/ at 189-209, which is based on archival work. While I occasionally refer to that article for details of the story not well-developed in earlier tellings, whenever

Sometime before August 25, 1857, in or near Holmesville, then the county seat of Pike County in southwestern Mississippi, an enslaved African American man named Ned invented an improved “double Cotton Scraper, and two plows.” The novel machine could “Scrape both Sides of the Cotton ridge at the same time, and plough out the middles or Spaces between the ridges,” leaving the ridges ready for hoeing.³² This description is provided by Oscar. Ned’s voice is not heard in the sources, and we do not know when and how his story began, or how it ended. Ned was described by Oscar as a “Smith,” a skilled artisan who worked as a blacksmith, fixing and making tools.³³ As an artisan, Ned might have been able to exercise some control over his labor. Perhaps he, like other skilled enslaved persons, was earning money through self-hire hoping to buy his own freedom or that of family members, although in a rural area, his opportunities would have been more limited than in a city.³⁴ Pike County had an agricultural economy, dependent on “King Cotton” and the labor of enslaved persons.³⁵ As a plantation owner, Oscar relied both on his real property, land, and his chattel property, the African American people whose lives he claimed. To Oscar, Ned was part of the “Estate of my deceased wife.”³⁶

Oscar saw commercial opportunity in Ned’s double plow and scraper. He therefore sought a patent, a federal grant of exclusive rights that would allow him to monetize Ned’s idea beyond his own farm, protecting his investment if he or his licensees were to make and sell it by allowing Oscar to sue imitators for infringement.³⁷ The simplest approach, and undoubtedly one taken by repeatedly by other enslavers since the United States patent system

possible I cite to earlier publications to demonstrate the scope of remembering.

³² Letter of Oscar Stuart to Senator John A. Quitman, Aug. 29, 1857, as published in *Stuart Double Plow*, *supra* note /28/, at 49.

³³ Letter of Oscar Stuart to Sec’y of Interior Jacob Thompson, Aug. 25, 1857, as published in *Patents and Civil Rights*, *supra* note /29/, at 790.

³⁴ CATHERINE W. BISHER, *CRAFTING LIVES: AFRICAN AMERICAN ARTISANS IN NEW BERN, NORTH CAROLINA, 1770-1900* 6-7 (2013).

³⁵ MARTIN J. HARDEMAN, *THE STRUCTURE OF TIME: PIKE COUNTY, MISSISSIPPI, 1815-1912* 3, 8 (1999).

³⁶ Letter of Oscar Stuart to Sec’y of Interior Jacob Thompson, Aug. 25, 1857, as published in *Patents and Civil Rights*, *supra* note /29/, at 790.

³⁷ Patent Act of 1836, ch. 357, 5 Stat. 117. Note that before he formally applied to a patent, Oscar wrote both the secretary of interior and Mississippi Senator Quitman asking whether “the Master of a slave, can procure a patent, for a useful invention discovered by his slave,” worried that the new commissioner of patents might not be “a Southern man . . . exempt from all the Prejudices, which might cloud the understanding of a man from a different latitude.” *Invention of a Slave*, *supra* note /3/ at 189, 191 (quoting Letter of Oscar Stuart to Sec’y of Interior Jacob Thompson, Aug. 25, 1857 and Letter of Oscar Stuart to Senator John A. Quitman, Aug. 29, 1857). Oscar formally applied for a patent on Nov. 15, 1857, as described in the Letter of Attorney General Jeremiah Black to Sec’y of Interior Jacob Thompson, Dec. 12, 1857 (as cited in *Invention of a Slave*, *supra* note /3/ at 194n.91).

began in 1790, would have been for Oscar to apply for the patent in his own name, swearing that he was the “original inventor” as the law required.³⁸ Had he done so, he almost certainly would have obtained a patent. And while such a patent would have been technically invalid because Oscar was not the inventor, who would have been in a position to challenge his claim?³⁹ Not Ned. Oscar threatened to “correct” Ned “according to our Southern usage” should he dare contact the patent office himself.⁴⁰ Oscar, however, sought to establish a precedent on what he thought was an unresolved legal question: “whether the master who has a property . . . in the fruits of the mind . . . of his slave . . . can obtain a patent when the invention is made by [the slave].”⁴¹ He therefore submitted an application in which he swore he was Ned’s legal owner and that Ned had invented the described invention, even including an affidavit purportedly by Ned himself, stating, in Oscar’s words, “that he is the original inventor . . . and my slave.”⁴²

Oscar’s effort to obtain a legal ruling confirming his broad view of property rights was no doubt motivated by his strong commitment to the racial ideology of the pro-slavery South. In pressing his claim, Oscar juxtaposed what he called “the Serville race” with the “Political” race to explain that the patent laws were written to benefit the “Political to the exclusion of the Serville race,” that is, whites to the exclusion of blacks, and therefore, he should obtain a patent to Ned’s invention.⁴³ Otherwise, he argued, he was being unfairly deprived of his full ability to exploit his property, limited to stealing Ned’s labor and ideas but unable to exclude others from copying Ned’s innovation.

Like many other enslavers who sought to apply the law of property to people, Oscar was caught in a contradiction. He was seeking to exploit the valuable “fruit of the mind” of a man that he was simultaneously claiming to own because Ned was, in Oscar’s worldview, a member of a distinct and inferior race characterized by “general Stupidity.”⁴⁴ Acknowledging Ned’s abilities through the grant of a patent to his invention, even if the patent were granted to Oscar, would undermine the fragile construct of white supremacy

³⁸ Patent Act of 1836, ch. 357, 5 Stat. at 119.

³⁹ 9 Op. Atty Gen. at 172 (noting invalidity).

⁴⁰ Letter of Oscar Stuart to Sec’y of Interior Jacob Thompson, Dec. 18, 1857, as published in *Patents and Civil Rights*, *supra* note /29/, at 793-94 and quoted in JAMES, *supra* note /29/, at 49 (1989).

⁴¹ Letter of Oscar Stuart to Sec’y of Interior Jacob Thompson, Dec. 18, 1857, as published in *Patents and Civil Rights*, *supra* note /29/, at 793 (calling this a question “upon which there is a diversity of opinion among men learned in the law”).

⁴² *Patents and Civil Rights*, *supra* note /29/, at 792-93.

⁴³ Letter of Oscar Stuart to Senator John A. Quitman, Aug. 29, 1857, as published in *Stuart Double Plow*, *supra* note /28/, at 49.

⁴⁴ *Id.*

by recognizing that Ned had conceived and created a novel machine that no white man had previously devised. Yet Oscar left no sign that this contradiction troubled him or that Ned's ingenuity altered his racial views. Instead, he claimed that "the benign institution of slavery" and the "ameliorating influence of the Christian religion" were "gradually effacing that mental stupidity and sloth" that otherwise characterized all enslaved persons of African descent.⁴⁵ Oscar believed that Mississippi Senator John Quitman, a "militant secessionist," would share his views about both race and patents, as would the Secretary of Interior Jacob Thompson, a "Southern man."⁴⁶ To him, chattel slavery meant ownership alike of the labor of the hands and the fruit of the mind, which necessarily must include patent rights.

By his application, Oscar not only exposed a fallacy at the heart of the ideology of slavery, but he also created a clash between the law of slavery and the law of patents. The law of slavery attempted to severely limit the legal personhood of those whom the law categorized as human chattel and the law of patents prioritized the human act of creation, limiting these federal grants to the "original inventor" only, who was required to swear an oath of inventorship and citizenship and to whom a patent would be issued.⁴⁷ The patent commissioner returned Oscar's application as unprocessable because it did not contain an oath of the inventor, Ned. The commissioner further believed that Ned as an enslaved person was "incompetent" to take the oath, leaving Ned's invention unpatentable by anyone.⁴⁸ An enslaved inventor was legally noncognizable and patent law did not allow anyone, even the inventor's owner, to claim a patent in their stead. Oscar was not disturbed by Ned's lack of legal status, but he found the refusal of the patent commissioner to issue the requested patent "monstrous." He complained to the secretary of interior, to whom the commissioner reported, and the secretary referred the question to Jeremiah.⁴⁹ Jeremiah, serving a president who supported the *Dred Scott* decision, had no difficulty affirming the commissioner's ruling that Ned's invention was unpatentable, due to the lack of the "original inventor's"

⁴⁵ Petition of Stuart to Congress, Dec. 18, 1857, reprinted at CONG. GLOBE, 35th Cong., 2d Sess. at 47, and as also in *Invention of a Slave*, *supra* note /3/, at 202-05.

⁴⁶ HARDEMAN, *supra* note /35/, at 20; Letter of Oscar Stuart to Senator John Quitman, Aug. 29, 1857, as published in *Stuart Double Plow*, *supra* note /27/, at 49. For the background of Secretary of Interior Jacob Thompson, who resigned from the Buchanan administration on Jan. 8, 1861 and became Inspector General of the Confederate Army, see *Invention of a Slave*, *supra* note /3/ at 193.

⁴⁷ Patent Act of 1836, ch. 357, 5 Stat. at 119.

⁴⁸ Letter of Joseph Holt to Sec'y of Interior Jacob Thompson, Dec. 12, 1857; Letter of Joseph Holt to Oscar Stuart, Nov. 24, 1857, both excerpted at *Invention of a Slave*, *supra* note /3/ at 194-95.

⁴⁹ Letter of Joseph Holt to Oscar Stuart, Nov. 24, 1857, *Invention of a Slave*, *supra* note /3/ at 194-95.

ability to swear an oath of inventorship.⁵⁰

Oscar, after failing to sway the patent office, twice petitioned Congress to amend the patent law, and again failed.⁵¹ Despite those setbacks, he proceeded with his commercialization plans, offering what he called the “Stuart Double Plow and Scraper” for sale.⁵² Other enslavers also found their plans stymied by this ruling in the late 1850s and 1860s.⁵³ The African Americans who remembered and retold the story of *Invention of a Slave* often also retold the story of Joseph Davis, another Mississippi planter who claimed ownership of the inventive capacities of a skilled enslaved African American, Benjamin Montgomery. Joseph unsuccessfully sought a patent to the invention of his slave through his brother, then-Senator Jefferson Davis, the future president of the Confederacy.⁵⁴ Yet soon the inventor Benjamin Montgomery and both Davis brothers, as well as Oscar, Ned and Jeremiah, had more pressing issues of war and freedom to occupy them.⁵⁵

⁵⁰ Paul Finkelman, *The Dred Scott Case, Slavery, and the Politics of Law*, 20 HAMLINE L. REV. 1, 32-33 (1996-97).

⁵¹ Letter from Oscar Stuart to Congress, Dec. 18, 1857, and Dec. 13, 1858 petition printed at Cong. Globe, 35th Cong., 2d Sess. at 47 (1858), as reprinted at *Invention of a Slave*, *supra* note /3/, at 202-205. A bill to allow enslavers to patent the inventions of the people they enslaved was introduced (S. 548, 35th Cong. (1859), reprinted at *Invention of a Slave*, *supra* note /3/, at 206-07), but despite the efforts of Mississippi Senator Albert Gallatin Brown, failed to advance. *Id.* at 207. In 1861, Massachusetts Senator Charles Sumner, a prominent white abolitionist, offered a resolution suggesting that the law be amended to restore the right to receive patents to free African Americans, which also led nowhere. “Denial of Patents to Colored Inventors,” Dec. 16, 1861, THE WORKS OF CHARLES SUMNER, vol. 6, at 144 (1880); *Invention of a Slave*, *supra* note /3/, 224-25 (citing *Congressional Globe*).

⁵² *Stuart Double Plough*, *supra* note /28/ at 50; JAMES, *supra* note /29/, at 51-52.

⁵³ *The Master, The Slave*, *supra* note /28/ at 24 (citing ANNUAL REPORT OF THE PATENT OFFICE FOR 1857 at 8-9).

⁵⁴ Henry E. Baker, *The Negro in the Field of Invention*, 2 J. NEGRO HIST. 21, 24 (1917); JAMES, *supra* note /29/, at 52-53. In correspondence with Baker, Isaiah Montgomery related that his father sought a patent in his own name once he was no longer enslaved, but failed to receive one, and that his efforts to commercialize his novel boat propeller were also largely unsuccessful. *Id.* When the pro-slavery politicians of the new Confederate States of America drafted its patent law, they included a provision that allowed enslavers to patent inventions of enslaved persons. Act of May 21, 1861, ch. 46, Pub. Laws, Provisional Cong., 2d Sess., reprinted in JAMES M. MATTHEWS, ED., THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 1, 148 (1864). Note that there is no evidence that Oscar, after Mississippi joined the Confederacy, took advantage of this law to obtain a patent. H. JACKSON KNIGHT, CONFEDERATE INVENTION: THE STORY OF THE CONFEDERATE STATES PATENT OFFICE AND ITS INVENTORS 318, 320 (2012). *Negro in the Field of Invention*, at 24.

⁵⁵ Benjamin Montgomery became an African American leader in Mississippi during and after the war. For detailed histories of Joseph Davis and the postwar experiment by Benjamin Montgomery to establish an African American community at Joseph’s former plantation, Davis Bend, see JANET SHARP HERMANN, JOSEPH DAVIS: PIONEER PATRIARCH (1990) and

After the Civil War, *Invention of a Slave* sat on law library shelves, uncited in the legal literature.⁵⁶ But as proven by the recitation I just provided, it was being continuously remembered through other networks of publication.⁵⁷ Henry Edwin Baker, who has been called “the Father of Black Inventor Research,” can help us understand the stakes of that remembering and the costs of our selective legal memory.⁵⁸

II. REMEMBERING THE STORYTELLERS

A. *At the Nadir*

When Baker published his pamphlet in 1913, he was a second assistant patent examiner, one of the first African American white-collar employees of the patent office.⁵⁹ At the turn of the twentieth century, Washington, D.C.

THE PURSUIT OF A DREAM (1981).

⁵⁶ While a search in legal databases uncovers few citations to “Invention of a Slave,” in addition to the twentieth-century exceptions provided *supra* notes /8/, /28/ and /29/, in the last decade it has been remembered by a handful of legal scholars. Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law*, 40 UC DAVIS L. REV. 717, 743 (2007); KALI MURRAY, A POLITICS OF PATENT LAW: CRAFTING THE PARTICIPATORY PATENT BARGAIN 28-29 (2013); Shontavia Johnson, *The U.S. Has Always Had Black Inventors – Who Haven’t Always Had Patents*, THE CONVERSATION, Feb. 14, 2017 <https://theconversation.com/americas-always-had-black-inventors-even-when-the-patent-system-explicitly-excluded-them-72619> (last viewed July 26, 2019).

⁵⁷ Legal scholars are not alone in seeing “Invention of a Slave” through a narrow lens that limits its significance to the antebellum period and in failing to look outside their preferred literature. Norman O. Forness, a historian researching the history of the Department of Interior, dubbed the episode a “vignette of the 1850s” presumably because it was a side note to his main interest in presidential politics and administration. Like Frye (*Invention of a Slave*, *supra* note /3/) three decades later, Forness emphasized the affair as an example of the “stark incongruity” between the slavery system and the patent law. Forness did not cite Baker’s discussions of the opinion, Yancy’s previous article, nor Boyle’s publication of the same letters, all of which are discussed in text accompanying notes // - // . *The Master, the Slave and the Patent Laws*, *supra* note /28/, at title, 27. See also HARDEMAN, *supra* note /35/ at 13 (remembering Ned as part of the history of the Pike County antebellum community); LUKE WARD CONERLY, PIKE COUNTY, MISSISSIPPI, 1798-1876: PIONEER FAMILIES AND CONFEDERATE SOLDIERS RECONSTRUCTION AND REDEMPTION, Dedication, 126 (1909)(recounting the story as part of reminiscences of the white community as “patriotic and devoted women and Confederate soldiers”); and JOHN HEBRON MOORE, AGRICULTURE IN ANTE-BELLUM MISSISSIPPI (1958) (remembering Ned’s invention in the context of understanding plows used on antebellum cotton farms in Mississippi).

⁵⁸ KEITH C. HOLMES, BLACK INVENTORS: CRAFTING OVER 200 YEARS OF SUCCESS 14 (2008). Holmes considered himself to be continuing Baker’s work. Just as Baker worked for years to identify African American patentees, Holmes spent twenty years collecting the information in his book. *Id.* at 13.

⁵⁹ *Henry E. Baker*, *supra* note /25/. Patricia Carter Sluby identifies Allen Bland as the first black patent examiner, serving from 1870-74 and Anthony Bowen as the first African

was home to a vibrant community of well-educated African Americans, many who had moved there to pursue opportunities after the Civil War.⁶⁰ Baker was one of these. The federal government offered possibilities of white-collar employment unavailable to African Americans in other sectors.

Baker had been born in Lowndes County, Mississippi in 1857, the year Ned invented his plow.⁶¹ While the brief biography of Baker published during his lifetime does not specify whether he was born free or enslaved, it is likely that he, like Ned, was enslaved.⁶² Coming of age after Emancipation, however, Baker had more opportunity to profit from his own mental labor. After the war, he attended school in Columbus, Mississippi and in 1874 became the third African American to enter the United States Naval Academy in Annapolis, Maryland. The Academy offered not only a rigorous college education with attention to technical subjects, but also a pathway to becoming a naval officer, a position from which African Americans had been excluded. Baker, like the two earlier black cadets, endured relentless and severe harassment from his white classmates. While he remained “proud and defiant” in the face of the abuse, he, like the two before him, left before graduation.⁶³ After Baker, no African Americans entered the Academy until 1936, an example of how the opportunities of Reconstruction were quickly stripped from African Americans.⁶⁴

When he left the Academy in 1877, Baker began at the patent office as a copyist, a clerical position, while also finishing his degree at the Ben-Hyde Benton School of Technology. He earned his law degree in 1881. Using his training, Baker was able to work his way into the examining corps by 1902. Examiners investigate each patent application to determine whether the

American clerk in the 1840s, based on oral history. PATRICIA CARTER SLUBY, *THE INVENTIVE SPIRIT OF AFRICAN AMERICANS: PATENTED INGENUITY* xxxiii (2004). Rayvon Fouché identifies Baker as the first African American patent examiner. RAYVON FOUCHÉ, *BLACK INVENTORS IN THE AGE OF SEGREGATION: GRANVILLE T. WOODS, LEWIS H. LATIMER & SHELBY J. DAVIDSON* 9 (2003). *See also* KENNETH W. DOBYNS, *THE PATENT OFFICE PONY: A HISTORY OF THE EARLY PATENT OFFICE* 234 (2016[1994])(discussing evidence that Bland was clerk in patent office while attending law school at Howard University, but lack of documentary evidence that he served as examiner).

⁶⁰ Elizabeth Dowling Taylor, *THE ORIGINAL BLACK ELITE: DANIEL MURRAY AND THE STORY OF A FORGOTTEN ERA* (2018).

⁶¹ The details of Baker’s life described in this paragraph are taken from *Henry E. Baker*, *supra* note /25/ and ROBERT J. SCHNELLER, JR., *BREAKING THE COLOR BARRIER: THE U.S. NAVAL ACADEMY’S FIRST BLACK MIDSHIPMAN AND THE STRUGGLE FOR RACIAL EQUALITY* 34-41, 45 (2005).

⁶² In 1850, the census recorded only 28 free blacks in Lowndes County, along with over 12,000 enslaved persons. *THE SEVENTH CENSUS OF THE UNITED STATES: 1850* 447 (1853).

⁶³ SCHNELLER, JR., *supra* note /61/, 34-41, 45.

⁶⁴ The cadet who entered in 1936 was also unsuccessful in the face of harassment. Wesley Brown became the first black graduate of the Academy in 1949, graduating in the same class as future President Jimmy Carter. *Id.* at ix-x, 85.

claimed invention meets the legal criteria of patentability, in part by comparing the described invention to the previous state of the technology. Although he was never promoted above second assistant, evidence of a glass ceiling, he became, according to an admiring contemporary, one of the “most useful” of the “educated colored men” in D.C.⁶⁵

In addition to his federal employment, Baker served as an officer in multiple organizations within the black community, including his church and a bank. In fact, he was “connected with almost every well-directed movement in this city . . . looking to the betterment of the condition of his race.”⁶⁶ Baker used his position in the patent office to support these movements by remembering *Invention of a Slave* and identifying as many African Americans as possible who overcame barriers to patent inventions.

This self-imposed task was not simple. Successful patent applicants did not leave paper trails like the one Oscar had created. And the patent office records did not mention the race of inventors, with one exception: in 1834 and 1836, in the lists of granted patents, Baker found that the office had designated patentee Henry Blair of Maryland as “colored.”⁶⁷ Unable to find in the records any other “hint whatever that of the thousands of mechanical inventions for which patents are granted annually by the government, any patent has ever been granted to a Negro,” Baker turned to memory.⁶⁸ Baker attempted to contact everyone who might have information about black inventors. He asked patent office employees and patent agents and attorneys to share any information they could recall about black inventors and patentees, matching their remembrances to the official records.

By 1886, he had identified about 45 patents granted to African Americans.⁶⁹ Slowly, Baker added to his list, and as he did so, the list circulated among other African Americans seeking “the betterment of the condition of [the] race.” For example, Representative George Washington Murray, the sole African American in Congress in 1894 and himself both formerly enslaved and a patentee, inserted the list into the congressional record. He did so in support of his speech advocating federal funding for the Atlanta Cotton States Exposition of 1895, arguing that American blacks deserved the chance to display their inventive accomplishments to white America as a means of overturning racial stereotypes.⁷⁰

In 1902, Baker published his list as it then existed in an ambitious volume,

⁶⁵ Henry E. Baker, *supra* note /25/.

⁶⁶ *Id.*

⁶⁷ *Negro as an Inventor*, *supra* note /25/ at 399-400.

⁶⁸ *Id.* at 399.

⁶⁹ R.R. Wright, *The Negro as Inventor*, 2 AFRICAN METHODIST EPISCOPAL CHURCH REV. 397, 409-10 (1886)(printing Baker’s list).

⁷⁰ JOHN F. MARSZALEK, A BLACK CONGRESSMAN IN THE AGE OF JIM CROW: SOUTH CAROLINA’S GEORGE WASHINGTON MURRAY 51, 75 (2006); *A Partial List of Patents*

*Twentieth Century Negro Literature, or, A Cyclopaedia of Thought on the Vital Topics Relating to the American Negro.*⁷¹ Its editor, Dr. Daniel W. Culp, solicited “one hundred of America’s greatest Negroes” to write on these “vital topics” and dedicated his book “to all persons of whatever race” interested in the “elevation of the Negro,” “with the ardent hope” that before the twentieth century ended “the Negro . . . shall reach that point in the American civilization, where he will be recognized and treated as any other American citizen.”⁷² Culp, an African American physician living in Florida, knew well that despite the Reconstruction Amendments, the African American was not “treated as any other American citizen.” At the turn of the twentieth century, in what historian Rayford Logan has called the “nadir” of American race relations, African Americans faced disenfranchisement, broad exclusion from all aspects of government, employment discrimination, segregation, and an epidemic of lynching.⁷³ To reach his objective, Culp sought to “enlighten the uninformed white people on the intellectual ability of the Negro.”⁷⁴

Baker contributed both his list and an accompanying essay, “The Negro as an Inventor.”⁷⁵ Baker explained how his on-going project supported the commitment he shared with Culp and other activists to racial betterment and the quest for full citizenship. “An individual,” he argued, “is measured by the contribution he makes to the well being of the community in which he lives.” The community of African Americans was the United States, and the United States, Baker claimed, was “at the front rank of the enlightened nations of the world” because of the “inventive skill” of its people. To be “measured” as equals and treated like “any other American citizen[s],” African Americans needed to show their contribution “to the inventive skill of this country.”⁷⁶ Hence the list, making at least partially visible what the patent office had long allowed to remain obscure.

As he did in his later pamphlet, Baker sought to make readers, both white and black, remember *Invention of a Slave*. Baker realized that his dependence on memory allowed him to identify only recent African American patentees. Aside from the two patents granted to “colored” inventor Blair, his list in 1902 contained only one patent from the antebellum period.⁷⁷ He told his readers

Granted by the United States for Inventions by Afro-Americans, 26 Cong. Rec. 8382-83 (Aug. 10, 1894). For another example of Baker’s list publicized by an African American activist, see *Negro as Inventor*, *supra* note /69/.

⁷¹ CULP, *supra* note /25/.

⁷² *Dedication*, CULP, *supra* note /25/, unpaginated.

⁷³ RAYFORD LOGAN, *THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877-1901* (1954).

⁷⁴ *Preface*, CULP, *supra* note /25/, at 5.

⁷⁵ *Negro as an Inventor*, *supra* note /25/, at 399-405.

⁷⁶ *Id.* at 399.

⁷⁷ *Id.* at 407.

that it was impossible to “identify many hundreds of valuable inventions . . . patented by Negro inventors.”⁷⁸ Further, he explained enslaved inventors like Ned were not on his list, since “the government seemed committed to the theory that ‘a slave could not take out a patent for his invention.’”⁷⁹ Baker referred his readers to the volume and page within the *Opinions of the Attorneys-General, United States* so that they could read *Invention of a Slave* themselves.⁸⁰ *Invention of a Slave* might be unread by lawyers, but the African American community and its white allies were encouraged to take a look, if they needed further proof to understand why so few African Americans had patented inventions before Reconstruction.

Baker continued to work on his list until his death in 1928. His only stand-alone publication, an updated version of the essay he had published in Culp’s volume, was the pamphlet printed and advertised by the NAACP.⁸¹ W.E.B DuBois, already a national leader for African American rights and a NAACP founder, was Director of Research and Publications in 1913, editing the organization’s magazine, *The Crisis*.⁸² Trained as a historian and committed to using NAACP publications to support “earnest and persistent attempts to gain . . . rights,” DuBois believed in using “history as a weapon,” fighting against “white distortion” of the past and empowering African Americans by preserving their historical memory.⁸³ Like Culp and Baker, DuBois believed that the push for civil rights would be aided by remembering African American inventors and the inventiveness of enslaved persons, like Ned, whose inventions had gone unpatented.⁸⁴

Carter Woodson agreed. Woodson, who was the second African American (following DuBois) to obtain a doctorate in history from Harvard University, formed the Association for the Study of Negro Life and History in 1915, and almost immediately launched the *Journal of Negro History*.⁸⁵

⁷⁸ *Id.* at 401.

⁷⁹ *Id.* at 400.

⁸⁰ *Id.*

⁸¹ *The Crisis* included a page listing NAACP publications for sale, including THE COLORED INVENTOR: A RECORD OF FIFTY YEARS. See, e.g., *Suitable Gift Books, The Crisis* (Dec. 1913)(unpaginated advertisement).

⁸² Gerald Horne, *Preface*, in A.H. KIRSCHKE & PHILLIP L. SINIETIERE, EDS., PROTEST AND PROPAGANDA: W.E.B. DUBOIS, THE CRISIS AND AMERICAN HISTORY ix (2014); Shawn Leigh Alexander, *Introduction*, in KIRSCHKE & SINIETIERE 2.

⁸³ W.E.B. DuBois, “The Crisis,” *The Crisis*, Nov. 1910, 10, as quoted in *Introduction*, *supra* note /82/, at 2-3; Amy Helene Kirschke and Philip Luke Sinitiere, *W.E.B. DuBois as Print Propagandist*, in KIRSCHKE & SINIETIERE, *supra* note /82/, at 36-37.

⁸⁴ BAKER, *supra* note /23/, at 4 (in this publication, Baker did not provide a specific reference to *Invention of a Slave*, but simply noted the legal bar to patents on inventions of slaves).

⁸⁵ The association is now called the Association for the Study of African American Life and History, and the journal is now the *Journal of African American History*. Corey Bowers

The *Journal* was intended to promote scholarship on African American history, addressing the exclusion of the African American experience and perspective from US history and providing a forum to publish scholarship contrary to the dominant historiography of the early 20th-century, which blamed African Americans for the failure of Reconstruction.⁸⁶ In 1917, Woodson published an article by Baker on African American inventors in the second volume of the *Journal*.⁸⁷ In this scholarly forum, Baker again referenced *Invention of a Slave* with full citation information, keeping its memory alive in the growing community of those writing African American history.⁸⁸

Even those who disagreed with the strategy and tactics of the NAACP agreed that remembering *Invention of a Slave* should be part of African American advocacy. Booker T. Washington, another national African American leader, was known for a conciliatory, gradualist approach to African American civil rights, advocating self-help for African Americans through industrial education and small business development, and disavowing public demands for equality.⁸⁹ Booker T. Washington had founded the Tuskegee Institute (now Tuskegee University) in 1881 to educate African Americans, and remained its principal until his death in 1915.⁹⁰ Tuskegee published the *Negro Year Book*, employing African American sociologist Monroe Work as its first editor.⁹¹ These successful volumes, intended to be an “encyclopedia” providing up-to-date information in all areas of African American life, could be found on classroom shelves and in homes, and became “the standard book of reference” on race relations for many social

Brown, *Carter G. Woodson*, <https://asalh.org/about-us/our-history/> (last viewed July 29, 2019). Note that while I focus on publications excluded from legal memory, Woodson was deliberately using history writing to create a shared African American memory, part of community building. See PERO GAGLO DAGBOVIE, *THE EARLY BLACK HISTORY MOVEMENT*, CARTER G. WOODSON, AND LORENZO JOHNSTON GREENE 3 (2007); JACQUELINE GOGGIN, *CARTER G. WOODSON: A LIFE IN BLACK HISTORY* 33 (1993); *Carter G. Woodson as Entrepreneur: Laying the Foundation of a Historical Specialty*, in AUGUST MEIER AND ELLIOTT RUDWICK, *BLACK HISTORY AND THE HISTORICAL PROFESSION, 1915-1980* 1-71 (1986).

⁸⁶ Jacqueline Goggin, *Countering White Racist Scholarship: Carter G. Woodson and the Journal of Negro History*, 68 *J. NEGRO HIST.* 355 (1983).

⁸⁷ *Negro in the Field of Invention*, *supra* note /54/.

⁸⁸ *Id.* at 24 & n.2.

⁸⁹ SULLIVAN, *supra* note /24/; MABEL O. WILSON, *NEGRO BUILDING: BLACK AMERICANS IN THE WORLD OF FAIRS AND MUSEUMS* 40-42, 88, 138-39 (2012).

⁹⁰ LOUIS R. HARLAN, *BOOKER T. WASHINGTON: THE WIZARD OF TUSKEGEE, 1901-1915* (1983).

⁹¹ Mark Tucker, *'You Can't Argue with Facts': Monroe Nathan Work as Information Officer, Editor, and Bibliographer*, 26 *LIBRARIES AND CULTURE* 151, 162 (1991).

scientists.⁹²

In the first eight editions, readers could learn that in 1858, the Attorney General of the United States ruled that an enslaved inventor could not receive a patent.⁹³ In several editions, the editor reprinted the full text of Massachusetts Senator Charles Sumner's resolution in 1861, urging that the committee on patents amend the law to clarify the right of African Americans to secure patents.⁹⁴ In the 1920s, the editor also added the text of the Confederate patent law that specifically allowed slaveholders to patent the inventions of their slaves.⁹⁵ Work also invited readers to contribute to Baker's project by sending him information on African American inventors, and in later editions, the *Year Book* continued to publish lists of recent African American inventors.⁹⁶

If students failed to encounter *Invention of a Slave* in the *Year Book*, they might find it in their high school history text. The same year the NAACP published Baker's pamphlet, Benjamin Brawley, dean and professor of English at Atlanta Baptist College (now Morehouse College), published the first edition of *A Short History of the American Negro*.⁹⁷ He relied on Henry Baker for evidence of "Negro achievement" in invention, informing countless students about "the queer situation" of inventions by enslaved persons, unpatentable by either master or the inventor.⁹⁸ Brawley published four

⁹² The subtitle was "an annual encyclopedia of the Negro." *You Can't Argue with Facts*, *supra* note /91/, at 162-63. For a description of the 1952 edition, see *Review of 1952 Negro Year Book*, 22 J. NEGRO EDUC. 500-01 (1953). *The Crisis* was one of the few publications that reviewed the *Year Book* somewhat critically. *You Can't Argue with Facts*, *supra* note /91/ at 162-63.

⁹³ Despite its name, the *Negro Year Book* was not published annually. Work edited the first nine of eleven editions between 1912 and 1937. Jessie Parker Guzman edited two more editions, published in 1947 and 1952. *Id.* at 162-63; LINDA O. MCMURRAY, RECORDER OF THE BLACK EXPERIENCE: A BIOGRAPHY OF MONROE NATHAN WORK 76 (1985). The references to "Invention of a Slave" are: 1911-12 edition, 164; 1913 edition, 207; 1914-15 edition, 283; 1916-17 edition, 301; 1918-19 edition, 342; 1921-22 edition, 318-19; 1925-26 edition, 366; 1931-32 edition, 166-67.

⁹⁴ 1914-15 edition, 283; 1916-17 edition, 301; 1918-19 edition, 342; 1921-22 edition, 318-19; 1931-32 edition, 166.

⁹⁵ 1921-22 edition, 318-19; 1925-26, 366; 1931-32 edition, 166. Baker had provided the text of this statute together with full citation information in *Negro in the Field of Invention*, *supra* note /54/, at 24.

⁹⁶ *The 1914-1915 Negro Year Book*, unpaginated Publisher's Introduction, MONROE N. WORK, ED., THE NEGRO YEAR BOOK (1914). 1937-38 edition, inventions from 1932-35, 12-14; 1941-47 edition, inventions from 1936-46, 26-31.

⁹⁷ BENJAMIN GRIFFITH BRAWLEY, A SHORT HISTORY OF THE AMERICAN NEGRO (1913). The scope and content of the book is described in a review of the final edition by the prominent African American sociologist E. Franklin Frazier, *Review*, 46 AM. J. SOCIOLOGY 766 (1941). For Brawley's life, see John W. Parker, *Phylon Profile, XLIX: Benjamin Brawley – Teacher and Scholar*, 10 PHYLON 15-24 (1949).

⁹⁸ BRAWLEY, *supra* note /97/, at ix, 230.

editions of his history, and the fourth edition remained in use as a textbook into the 1950s.⁹⁹

Whether Americans, white or black, preferred to support the message of self-sufficiency of the Tuskegee Institute or the more militant policies of the NAACP, they were given repeated opportunities throughout the first half of the twentieth century to learn about *Invention of a Slave*. This cascade of publications that continued long after Baker's death kept Ned and other African American inventors within a collective African American memory. Lawyers might never read, cite, or study *Invention of a Slave*, but high school or college students might encounter it in the classroom or library. Teachers or parents might read about it in the *Negro Year Book* or the *Negro History Bulletin*, another Woodson publication dedicated to engaging, easy-to-read articles about African American history for educators and the black working class.¹⁰⁰ Those working in black history would learn about it in the *Journal of Negro History*. Those researching the status of African Americans and race relations would find it in the pages of the *Negro Year Book*.¹⁰¹

Baker had begun this process as a man profoundly shaped by the racial politics of the Civil War and Reconstruction and committed to the improvement of the status of African Americans. Those who publicized his work shared the goal Culp had articulated in 1902: to build a nation in which the African American was “recognized and treated as any other American citizen.” They were remembering a legal story in support of legal change.¹⁰²

B. *In the Civil Rights Era*

While lacking digital access to Baker's *The Colored Inventor*, those interested in African American invention in the late twentieth century were not limited to crumbling copies of the original pamphlet.¹⁰³ In 1969, it was reprinted as part of a series to recover and preserve African American history and literature.¹⁰⁴ Just as Jeremiah's opinion had been remembered by

⁹⁹ BENJAMIN GRIFFITH BRAWLEY, A SHORT HISTORY OF THE AMERICAN NEGRO, 4TH ED. (1952[1939]).

¹⁰⁰ *The American Negro as Inventor*, NEGRO HISTORY BULLETIN 83 (March 1940); DAGBOVIE, *supra* note /85/, at 4.

¹⁰¹ *You Can't Argue with Facts*, *supra* note /91/, at 162-63.

¹⁰² This remembering is also part of the politics of racial uplift, a complicated strand in African American activism and intellectual history that has been critically examined by KEVIN KELLY GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY (1996). See also BRITTANY COOPER, BEYOND RESPECTABILITY: THE INTELLECTUAL THOUGHT OF RACE WOMEN 32 (2017)(noting use of “listing” to create “intellectual, political, and/or cultural legitimacy”).

¹⁰³ <https://babel.hathitrust.org/cgi/pt?id=emu.010000667530&view=1up&seq=1>

¹⁰⁴ BAKER, *supra* note /23/, as reprinted by Arno Press, 1969. Arthur L. Smith, *Review*, 3 J. BLACK STUD. 117-9 (1972) (describing reprint series, “The American Negro: His History

activists seeking change during the height of Jim Crow violence, those who continued to work for inclusion in the context of the post-World War II civil rights movement also understood that remembering Ned and Oscar remained a political act. Like Baker, the women and men who researched and wrote about Ned and other African American inventors did so in the context of their own experiences as pioneers in their fields, drawing upon their personal knowledge of the civil rights movement, black nationalism, affirmative action, and new laws to combat *de jure* and *de facto* discrimination.

Black inventor McKinley Burt Jr., a man dedicated to promoting black entrepreneurship and education, published his own pamphlet in 1969, geared toward students: *The Black Inventor in America*. Burt reprinted Baker's list and his reminder that enslaved persons had been prohibited from receiving patents.¹⁰⁵ He wanted students to think about black inventors in the context of "black capitalism," approvingly describing current efforts to create black-owned businesses as a form of "Black power," and setting them in the context of slavery, Reconstruction, and the virulent backlash against African Americans that had pushed them out of skilled trades.¹⁰⁶ For Burt and his intended readers, remembering *Invention of a Slave* was a reminder of barriers to black capitalism and to black skill, and of the potential for the commercialization of invention as a foundation for "Black power," a slogan used in multiple contexts to describe parts of the civil rights movement of the late 1960s and early 1970s.¹⁰⁷

Just as the NAACP and Tuskegee had incorporated reminders of Ned and black inventors into their activism, so did African American organizations of this era. A non-profit community service organization in Chicago, the Institute for Positive Education, founded in 1969 to promote African-centered education, published a pamphlet, *Black Inventors*, in 1975.¹⁰⁸ Its author,

and Literature").

¹⁰⁵ MCKINLEY BURT, JR., *THE BLACK INVENTOR IN AMERICA* (1989 [1969]), at 2, 7, 119, 121, 136-48. *See also id.* at 5 (discussing Baker). A description of Burt's inventions is provided in unpaginated endpiece. *Id.* Note that like Brawley's textbook, Burt's pamphlet circulated for decades and was reprinted in 1989.

¹⁰⁶ *Id.* at 117-22.

¹⁰⁷ ASHLEY D. FARMER, *REMAKING BLACK POWER: HOW BLACK WOMEN TRANSFORMED AN ERA* (2017) (noting that "the Black Power movement of the late 1960s and 1970s was widespread and multifaceted" and included exponents of socialism as well as of capitalism).

¹⁰⁸ IRENE DIGGS, *BLACK INVENTORS* (1975). For the Institute of Positive Education, *see* <http://www.ipeclc.org/about.html>; Haki Madhubuti, *Storm Coming: Memoir and History (Reminiscence)*, in JOHN H. BRACEY, SONIA SANCHEZ, AND JAMES SMETHURST, EDs., *SOS – CALLING ALL BLACK PEOPLE: A BLACK ARTS MOVEMENT READER* (2014), 254-262 at 261-62 (describing work of IPE in 1970s in context of Black national and African liberation movements); Haki R. Madhubuti and Don L. Lee. *HAKI R. MADHUBUTI (DON L. LEE): Prescriptive Revolution*, in *HEROISM IN THE NEW BLACK POETRY: INTRODUCTIONS AND*

pioneering African American anthropologist Dr. Irene Diggs, Morgan State College professor and former research assistant to DuBois, relied on those earlier publications about *Invention of a Slave* and black inventors to tell Ned's story and republish Baker's list.¹⁰⁹ In retelling that history for a new generation, she used the strategy I echo here, providing the details of Baker's life and his struggles to uncover these forgotten inventors when attorneys "regarded[ed] the whole subject as a joke."¹¹⁰ Ned's story had been so forgotten in law that the very idea of an African American inventor could seem laughable to some patent attorneys Baker contacted to ask for help in identifying black patentees.

In these same decades, these popular sources, designed to reach students and general audiences, were supplemented by scholarly writing within the African American history community created by Woodson. Dr. Dorothy Cowser Yancy began writing about *Invention of a Slave* as one of the few African American faculty at the historically white George Institute of Technology (later becoming the first tenured African American full professor at the institution). Yancy had grown up in northern Alabama and as a college student at the historically black Johnson C. Smith University in Charlotte, North Carolina in the early 1960s she had joined sit-in protests against racial segregation.¹¹¹ She described the "Stuart Double Plow and Scraper" in the *Negro History Bulletin* in 1976 as part of an article profiling four more recent African American patentees.¹¹² Researching African American inventors of the twentieth century was no easier than it had been in the nineteenth century. Yancy found it "a tedious and time-consuming task" to uncover these hidden accomplishments.¹¹³ Like Baker, however, Yancy found the effort

INTERVIEWS, BY D. H. MELHEM (1990), pp. 85–131; Carol D. Lee, *Profile of an Independent Black Institution: African-Centered Education at Work*, 61 J. NEGRO EDUCATION 160-77 (1992), at 162.

¹⁰⁹ Lynn A. Bolles, *Ellen Irene Diggs: Coming of Age in Atlanta, Havana, and Baltimore* in IRA E. HARRISON AND FAYE V. HARRISON, EDS., *AFRICAN-AMERICAN PIONEERS IN ANTHROPOLOGY* 154-167 (1999).

¹¹⁰ DIGGS, *supra* note /108/, at 4, 19n13.

¹¹¹ In subsequent decades, Yancy published in many other areas of African American studies and became the first African American woman to lead two different universities, her alma mater Johnson C. Smith and Shaw University. *Dorothy Cowser Yancy Biography*, The HistoryMakers, Interview date 6/20/2007 <http://www.thehistorymakers.org/biography/dorothy-cowser-yancy-41>; Historical Note, Finding Aid, Dr. Dorothy Cowser Yancy's Collection, Office of the President, The Inez Moore Parker Archives and Research Center, James B. Duke Memorial Library, Charlotte, NC.

¹¹² Dorothy Cowser Yancy, *Four Black Inventors with Patents*, 39 NEGRO HISTORY BULLETIN 574, 576n.4 (Apr. 1, 1976)(citing MOORE, *supra* note /56/ for quotation from Letter from Oscar Stuart to Senator John Quitman, Aug. 29, 1857 (mistakenly referenced as 1957)).

¹¹³ *Four Black Inventors*, *supra* note /112/, at 574. In addition to relying on Burt's book, Yancy also cited Baker. *Id.* at 576n.2-3 & 6-11 (mistakenly identifying Baker as "Blair").

worthwhile, publishing about African American inventors in multiple venues, focusing on keeping the story of Ned and others within the collective memory of African Americans. In addition to the *Negro History Bulletin* article, she contributed a survey of twentieth-century black patentees to a National Afro-American History Kit, a project designed to support educators with classroom content for what had become Black History Month.¹¹⁴ She also, in 1984, authored an academic article in the *Journal of Negro History* about the Ned's invention, using primary sources from Mississippi archives to provide more details than had Baker about Ned's double plow, Oscar's attempt to patent and commercialize it, and Jeremiah's opinion.¹¹⁵

While Burt and Diggs introduced new audiences to Baker's list, and Yancy expanded Ned's story for popular and academic audiences in African American history, Patricia Carter Sluby has done more than anyone since Baker to continue his project of identifying all African American patentees. Since the 1980s Sluby has collected and distributed information about individual African American inventors, both patentees and those, like Ned, who were unable to obtain a patent. An African American chemist turned patent examiner, Sluby was driven to learn about inventors who looked like herself, much like Baker had been one hundred years earlier when he joined the patent office.¹¹⁶ Sluby has published three books on African American patentees, in addition to numerous articles in many venues.¹¹⁷ Through these publications, Sluby continued the remembering of *Invention of a Slave*, discussing the details of Ned's invention and the controversy, and reprinting the entire text of the opinion.¹¹⁸ If Baker is the "Father of Black Inventor

¹¹⁴ Dorothy Cowser Yancy, "Twentieth Century Patentees – A Survey," in J.R. PICOTT, ED., NATIONAL AFRO-AMERICAN HISTORY KIT (1979), as cited in Patricia Carter Ives (later Sluby), *Patent and Trademark Innovations of Black Americans and Women*, 62 J. PAT. OFF. SOC'Y 108, 117-18 (1980)(Appendix I)(also see citation to *The Black Man in Inventions and Discoveries*, J. RUPERT PICOTT, ED., GIFTS TO AMERICAN EVERYDAY LIFE, History Kit of ASAALH (1977)); Carol F. Karpinski, *J. Rupert Picott*, in FENWICK W. ENGLISH, ED., ENCYCLOPEDIA OF EDUCATIONAL LEADERSHIP AND ADMINISTRATION 761 (2006).

¹¹⁵ *Stuart Double Plow*, *supra* note /28/ at 48-51. Excerpts from the Quitman letter had been published in MOORE, *supra* note /57/, at 187-89 (also publishing two testimonials from the Mississippi archives). Note that Moore identifies several other double plows and scrapers invented and patented by Mississippians during this era. *Id.* at 185-87.

¹¹⁶ SLUBY, *supra* note /59/ at xxvii, xxxi.

¹¹⁷ PATRICIA CARTER SLUBY, CREATIVITY AND INVENTIONS: THE GENIUS OF AFRO-AMERICANS AND WOMEN IN THE UNITED STATES AND THEIR PATENTS (1987); INVENTIVE SPIRIT, *supra* note /59/; THE ENTREPRENEURIAL SPIRIT OF AFRICAN AMERICAN INVENTORS (2011); *African American Brilliance*, 46 TAR HEEL JUNIOR HISTORIAN 1-2 (Fall 2006); Patricia Carter Sluby, May 24, 2002, MiSciNet Shero, <https://www.sciencemag.org/careers/2002/05/miscinet-shero-patricia-carter-ives-sluby>.

¹¹⁸ SLUBY, *supra* note /59/, at 31-32.

Research,” Sluby is its mother.

Although much of her writing has been motivated by the goal of having the “*world at large* learn of African American problem solvers who beat the odds and turn obstacles into opportunities,” Sluby’s article, “Patent and Trademark Innovations of Black Americans and Women,” accomplished something different.¹¹⁹ She published it in 1980 in the *Journal of the Patent Office Society*, bringing these stories into the majority-white world of legal publishing and the searchable databases of legal memory.¹²⁰ This journal, begun in 1918, was designed as a forum for communication about the patent system for employees of the patent office and interested others, such as the patent bar.¹²¹ Through its pages, Sluby informed an audience of lawyers, inventors, and patent examiners about the accomplishments of African Americans and women by making what was invisible in office records, that is, race and sex, visible. She included updated lists of African American and women inventors and provided a bibliography that directed readers to the writings of Baker, Burt, and Yancy, among others.¹²² Further, Sluby introduced her readers to the long tradition of remembering black inventors in the context of enslaved inventors like Ned by explaining *Invention of a Slave*.¹²³ Although the *Journal*, from its first issue, had published articles about patent history, it never published Baker’s work while he was employed in the patent office, and had largely ignored African Americans and *Invention of a Slave*.¹²⁴

While Sluby was introducing the late-twentieth-century patent office to

¹¹⁹ Personal correspondence with the author, Feb. 25, 2019 (emphasis original); *Patent and Trademark Innovations*, *supra* note /114/.

¹²⁰ Today, under its current title, the *Journal of the Patent and Trademark Society*, the *Journal* is included in legal databases along with other law periodicals, with issues from the last few decades searchable and accessible by legal practitioners. Back issues are available on Westlaw from 1994; the full run of the *Journal* is available in HeinOnline.

¹²¹ *Editorial*, 1 J. PATENT OFFICE SOC’Y 1, 1 (1918-19). For a description of the patent office society at its founding, see *The Patent Office Society*, 1 J. PATENT OFFICE SOC’Y 3, 3-5 (1918-19).

¹²² *Patent and Trademark Innovations*, *supra* note /114/, at 117-18 (Appendix I); 119-23 (Appendix III).

¹²³ *Id.* at 110.

¹²⁴ Wm. I. Wyman, *Thomas Jefferson and the Patent System*, 1 J. PATENT OFFICE SOC’Y 5 (1918-19). For example, two articles about the Confederate patent office failed to mention that the Confederacy had specifically provided for the ability of enslavers to patent inventions of enslaved persons they owned: Max W. Tucker, *The Patent Office of the Confederacy*, 3 J. PATENT OFFICE SOC’Y 296 (1920-21); Jane Elizabeth Newton, *A Forgotten Chapter of Confederate History*, 12 J. PATENT OFFICE SOC’Y 248 (1930). Baker’s writing was not published in the *Journal of the Patent Office Society* until after his death, when a white patent examiner reprinted long excerpts from Baker’s work. *The Negro Inventor*, *supra* note /30/ at 551-53 (excerpting *The Negro as an Inventor*, *supra* note /25/). Before Sluby’s article, the sole mention of Ned in the pages of the *Journal* was by John C. Boyle in 1960, *Patents*

the work of its former employee, Portia James was doing the same with respect to Baker's other community, the African American population of Washington, D.C. James made Ned and other African American inventors visible in a new way, through a museum exhibition. James was a historian and curator at the Anacostia Community Museum in Washington, D.C., an addition in 1967 to the Smithsonian Institute that itself was a response to civil rights activism, part of the national African American museum movement.¹²⁵ In 1989, James curated an exhibition entitled "The Real McCoy: African-American Innovation and Invention, 1619-1930," and authored the accompanying catalogue.¹²⁶ In both the exhibition and the catalogue, James told the public about Ned, his plow, and Oscar's fruitless quest to patent it, a story sufficiently intriguing to earn mention in a review of the exhibition published in Los Angeles.¹²⁷ The text of the opinion *Invention of a Slave* was made into an artefact, taken from the pages of law books and reproduced in the exhibition catalogue, along with a printed advertisement for the double cotton scraper and double plow as manufactured by Oscar.¹²⁸

Through popular accounts, public history, exhibits, educational efforts, and traditional scholarship, *Invention of a Slave* was remembered in every decade of the twentieth century, and in the twenty-first century, has continued

and Civil Rights, *supra* note /29/ at 789-94. Boyle, a white lawyer, had begun his career as a patent examiner from 1903 to 1919, when Baker was also working as a patent examiner. John Boyle, *Government Lawyer*, 93 *Washington Post*, June 2, 1971 (obituary); John Boyle, *Long Delay in Granting Patents*, 46 *J. PAT. OFF. SOC'Y* 175n.* (1964)(author biography); Draft Registration Card for John Boyle, Jr., Sept. 6, 191X (date incomplete)(giving race and occupation), copy on file with author. His article was a combination of transcription and summary of Oscar's correspondence with the Secretary of Interior. The article is frustratingly silent on what caused him to turn to this topic as a white lawyer working in Washington, D.C. during the civil rights movement, leaving only its title to suggest a connection between the content of the letters he transcribed and the racial politics of 1960.

¹²⁵ "In Memoriam," Anacostia Community Museum, 2015; http://anacostia.si.edu/Content/img/Home/Portia_James.pdf. <http://anacostia.si.edu/About/History>. WILSON, *supra* note /89/, at 245-296, 297, 307-10. <https://nmaahc.si.edu/about/museum>.

¹²⁶ JAMES, *supra* note /29/; John R. Kinard, *Foreword*, *id.* at 9. James also relied on personal assistance from Sluby. *Id.* at 7.

¹²⁷ "Exhibit Fetes Genius of America's Black Inventors," *Los Angeles Sentinel*, May 25, 1989 (AP story); JAMES, *supra* note /28/, at 48-49.

¹²⁸ JAMES, *supra* note /29/, at 50-51. James also contributed an essay to an edited scholarly collection. Portia P. James, *Invention and Innovation, 1619-1930*, BRUCE SINCLAIR, ED. *TECHNOLOGY AND THE AFRICAN-AMERICAN EXPERIENCE: NEEDS AND OPPORTUNITIES FOR STUDY*, 49, 50-51 (2004). This edited collection followed the first book-length academic investigation of African American inventors, which also used Baker's publications and *Invention of a Slave* to place African American inventors within the history of African Americans seeking to be treated "like every other American citizen." FOUCHÉ, *supra* note /59/, 11-12, 192.

to be.¹²⁹ Because of persistent efforts by those dedicated to the “betterment of [their] race,” it is not, and never has been, a forgotten opinion or a lost story. To encounter it as if it were, as I did, is the result of blindness, a failure to see one of law’s stories because of the places in which it was told and the people who were telling it.

III. THE STAKES OF REMEMBERING

Understanding these storytellers has allowed me to recognize why *Invention of a Slave* is not simply a piece of forgotten patent lore but instead is relevant to our focus of inquiry as legal scholars, that is, the contours and development of law. So many thoughtful women and men found this “tedious” work worthwhile because of the relationship between *Invention of a Slave* and their claims for full legal personhood for African Americans. They understood that *Invention of a Slave* and its backstory highlighted the significance of the patent system in fundamental debates over citizenship and ability. Keeping its memory alive in every era – including our own – has been a reminder of the political significance of patents, and their potency as tools in support of the goals of the shifting and multifaceted civil rights movement.

A. *The Significance of Ned*

Henry Baker first created the linkage between remembering *Invention of a Slave* and the project of identifying African American inventors that has continued to the present. By prefacing each publication of his list of African American patentees with the story of Ned and the ways that Oscar and Jeremiah kept his accomplishments unrewarded, Baker used the opinion as evidence of two key points: uncountable numbers of African American inventors never received patents and African Americans, even under conditions of enslavement, have always participated in invention.

Ned, an inventor denied a patent by the Attorney General of the United States, stands for all unknown African Americans, both enslaved and free, who were unable to obtain patents and who may have had others take credit for their inventions, never to appear on any version of Baker’s list. Ned is both known and unknown in what history has left us. The details about him, drawn from Oscar’s words, are frustratingly few. They hint at a man who

¹²⁹ In addition to the work of writers discussed in the text, this remembering includes the publications listed in the Appendix prepared by Sluby in 1988, *Patent and Trademark Innovations*, *supra* note /114/, her bibliography in *INVENTIVE SPIRIT*, *supra* note /59/, at 291-301; LOUIS HABER, *BLACK PIONEERS OF SCIENCE AND INVENTION* (1991); C.R. GIBBS, *BLACK INVENTORS: FROM AFRICA TO AMERICA, TWO MILLION YEARS OF INVENTION AND INNOVATION* (1995); HOLMES, *supra* note /58/.

took pride in his work and was thoughtful and creative, coming up with an improvement to the tools he probably was given to mend. What Ned thought about Oscar's assumption that Ned's creativity belonged to Oscar and about being claimed as property by a man who considered all African Americans to be a "Serville race" marked by "general Stupidity," we can only guess.¹³⁰ Although 1857 was tantalizingly close to Emancipation, we do not know whether Ned survived the war to build a life as a free man. As a Black History Month story recounted in an African American newspaper in 1996, "No one knows what happened to Ned."¹³¹

Those unknown inventors who never obtained patents include other enslaved women and men as well as free blacks in the time of slavery who lacked the resources to use the patent system. They also include African Americans from every decade after Emancipation who faced barriers in the form of constrained access to education, capital, and employment opportunities, as well as threats to their health and security. Even without formal racial barriers to the patent office, racism in law and society created *de facto* barriers to patents that only some have been able to overcome, both in the past and today.¹³²

In remembering Ned, however, we also remember that African Americans have always participated in the development and improvement of technology. His accomplishment swells the too-thin ranks of *known* African American inventors, particularly from the time of slavery when both legal and social barriers to invention and patents were extraordinarily high.¹³³ Baker's list,

¹³⁰ Letter of Oscar Stuart to Senator John A. Quitman, Aug. 29, 1857, as published in *Stuart Double Plow*, *supra* note /28/, at 49. This question can never be answered, but letters from another enslaved blacksmith in Mississippi, written in 1844 to his owner, newly elected President James Polk, provides interesting context. Adam Rothman, 'My Dear Master': *An Enslaved Blacksmith's Letters to President*, Insights blog, Feb. 5, 2019, <https://blogs.loc.gov/kluge/2019/02/my-dear-master-an-enslaved-blacksmiths-letters-to-a-president/>.

¹³¹ Michael Dabney, *The African American Contribution to Science and Technology*, PHILADELPHIA TRIBUNE (Feb. 13, 1996). This article is illustrative of the continuing remembrance of "Invention of a Slave" in popular venues, showing the success of efforts by Woodson, Yancy, Sluby and others to make the opinion and the history of the African American inventor part of popular history.

¹³² Sarada, Michael J. Andrews, and Nicolas L. Ziebarth, *The Demographics of Inventors in the Historical United States*, NBER Research Paper, Jan. 10, 2016 at 2 (blacks consistently underrepresented in patents through 1940); Lisa D. Cook, *Inventing Social Capital: Evidence from African American Inventors, 1843-1930*, 48 EXPLORATIONS IN ECON. HIST. 507 (2011); Lisa D. Cook, *Violence and Economic Activity: Evidence from African American Patents, 1870-1940*, 19 J. ECON. GROWTH 221 (2014); Lisa D. Cook and Chaleampong Kongcharoen, *The Idea Gap in Pink and Black*, NBER Working Paper 16331, Sept. 2010 at 39 (patent rates for African Americans 1976-2003).

¹³³ JAMES, *supra* note /29/, at 31-42; SLUBY, *supra* note /59/ at 11-36. *See also Invention of a Slave*, *supra* note /3/, at 185.

and the work of all those who have republished and extended it, uses the records of the patent office as evidence to support this historical fact. Remembering *Invention of a Slave* in the context of the on-going process of identifying black inventors thus has a two-fold message: African American contribution to invention has been continuous and for every black patentee identified, uncountable numbers of other African American inventors existed, making list-making both worthwhile and an insufficient measure to show “what contribution [they have] made to the inventive skill of this country.”

B. The Significance of Jeremiah

The political import of this dual message was clear to the antebellum free black community at the time Jeremiah denied Oscar and Ned a patent, applying the logic of *Dred Scott*. By 1858, when Jeremiah shut the door of the patent office to all African American inventors, patents had already been linked to citizenship by the free black community. In the decades before *Dred Scott*, the anti-slavery press publicized the rare instances of patents granted to black men as evidence both of African American ability, and as government documents that recognized the citizenship of their recipients.¹³⁴ As Jeremiah noted, patent applicants had to take an oath of citizenship. These antebellum patents were evidence disproving Chief Justice Roger Taney’s claim in *Dred Scott* that African Americans had never been recognized as US citizens.¹³⁵

Frederick Douglass, the nationally known African American orator, author, and activist, used his anti-slavery newspaper to highlight the link between patents and citizenship in 1859, when the patent office considered itself bound by Jeremiah’s opinion to reject applications from African Americans. He published a lengthy obituary for Thomas Jennings of New York City, “one of that large class of earnest, upright colored men who dwell in our large cities.”¹³⁶ Jennings, like Douglass, was an activist, founding the

¹³⁴ See, e.g., “A Colored Inventor,” *Frederick Douglass’ Paper*, July 29, 1853 (reprinted from the *Brooklyn (NY) Sun*). See also F. Murrow, Brush Handle, USPN 8,911, issued April 27, 1852; “Invention by a Negro,” *The Liberator*, May 14, 1836 (reprinted from the *National Intelligencer*) (publicizing Henry Blair’s patents in abolitionist newspaper edited by white northerner William Lloyd Garrison). As of yet, no female African American patentees have been identified in the antebellum period, which does not prove that none existed. The earliest known female black inventor is Judy W. Reed of Washington, D.C, who received a patent in 1884. SLUBY, *supra* note /59/, at 126.

¹³⁵ *Dred Scott*, 60 U.S. at 404-05.

¹³⁶ *Thomas L. Jennings*, 1 *ANGLO-AFRICAN* 126-28 (April 1859) (reprinted from *Frederick Douglass’ Paper*) (and as cited by SLUBY, *supra* note /59/ at 282n14 and *Invention and Innovation*, *supra* note /128/, at 53n.15). The *Anglo-African*, a monthly magazine which reprinted the obituary, was itself an African American publication. JAMES P. DANKY & MAUREEN E. HADY, EDS., *AFRICAN-AMERICAN NEWSPAPERS AND PERIODICALS: A NATIONAL BIBLIOGRAPHY* 44 (1998).

Legal Rights' Association and suing the city for discrimination after municipal employees ejected his daughter from a streetcar. He also was a skilled tailor and operated his own business. His patent, obtained in 1821, was for a method of dry-cleaning clothing.¹³⁷ The newspaper reported that Jennings kept his patent framed above his bed, as evidence that he was a "citizen of the United States."¹³⁸

Remembering Jeremiah's opinion as a change from previous patent office practice thus falsified the reasoning of *Dred Scott*, and emphasized the value of black patentees, who, Jeremiah was implicitly agreeing, had received patents as citizens.

C. The Significance of Oscar

Patents, as legal historian Martha Jones has pointed out, were only one of multiple types of government documents used to support African American claims to citizenship in the antebellum period.¹³⁹ They had a unique role, however. As Baker noted, they proved "inventive skill." Inventiveness was a prized mental ability. Patents not only indicated citizenship *status*, but in ways that continued to have relevance after the overruling of *Dred Scott* and the demise of the law of slavery, demonstrated the *capacity* of their holders to perform citizenship duties. This additional political meaning was apparent to the free black community at the time *Invention of a Slave* was written, and its persistence can be understood as we remember Oscar.

Six weeks after Jeremiah's opinion issued, the free black community of Massachusetts met as the Convention of the Colored Citizens to discuss and defend their legal status. The delegates listened to a call to defy "every living man who stood against them," "never forgetting Judge Taney."¹⁴⁰ *Dred Scott* was the outrageous new legal opinion that needed to be fought, as well as the dangerous and hated Fugitive Slave Act of 1850.¹⁴¹ Amid their discussions of these threats to the black community, the attendees also passed resolutions noting "facts" to "silence the assertions of the pro-slavery traducers" – the facts being the recent inventions of two men, in fire-fighting and steam railways, as "colored American Inventors."¹⁴² African American inventors

¹³⁷ USPN 3306X (March 3, 1821). For details of Jennings' life, *Thomas L. Jennings*, *supra* note /136/.

¹³⁸ *Id.* at 127.

¹³⁹ MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 12, 43 (2018).

¹⁴⁰ *Minutes of 1858 Convention of the Colored Citizens of Massachusetts, August 1, 1858*, PHILIP S. FONER AND GEORGE E. WALKER, EDS., THE PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865 2:1-2 (1979).

¹⁴¹ 9 Stat. 462 (Sept. 18, 1850).

¹⁴² *Id.* at 7 (as cited by James in *Invention and Innovation*, *supra* note /128/, at 55).

in the age of slavery were political facts, even when the pathway to patenting was blocked. These facts, the delegates asserted, had the power to silence “pro-slavery traducers,” like Oscar.

Oscar had casually emphasized the “general Stupidity” of the “Serville race,” a characterization he believed his powerful white correspondents, including men who supervised the patent system, shared. The delegates offered “colored American Inventors” to counteract that assumption underlying the ideology of slavery, hoping that others would see the contradiction between Oscar’s biologically grounded racism and African American inventiveness, even though Oscar did not.

Oscar helps us to understand why this antebellum strategy of using black inventors as political facts continued to be necessary long after the end of slavery, and why not just inventors, but patents held such significance that Baker and others would devote so much effort to developing comprehensive lists of African American patentees. While no one knows what happened to Ned, we do know a bit about Oscar’s subsequent history, thanks to Yancy. Mississippi seceded from the Union in January 1861 and Oscar served as a colonel in the Confederate Army during the Civil War.¹⁴³ After the war, he moved to Kentucky, perhaps driven by his opposition to Reconstruction, with its policies that brought African Americans into the social and political life of Mississippi.¹⁴⁴ It is likely that the collapse of slave society did not change his mind about white supremacy any more than had the evidence of Ned’s inventive ability.

Although slavery was abolished, and the Constitution amended to include African Americans within its guarantees to citizens, Oscar and many other white Americans in the North and South continued to believe that only white people, what Oscar had called the “Political” race, were fit to rule and participate in democratic self-government. Led by some of the most educated men of the day, white Americans persisted in the powerful and pernicious belief that there were distinct biological races and that there was a natural hierarchy of races, with whites the most superior and blacks the most inferior in many abilities. “Scientific racism” conveniently explained the need to keep African Americans from political, social and economic participation.¹⁴⁵

One significant argument was that persons of African descent were limited in mental capacity such that they could only imitate and were unable to originate new creations or technologies. Patents were government grants issued only to originators, and a limited class of originators at that.¹⁴⁶ By the

¹⁴³ *Stuart Double Plow*, *supra* note /28/, at 51; HARDEMAN, *supra* note /34/, at 18.

¹⁴⁴ *Stuart Double Plow*, *supra* note /28/, at 51-52.

¹⁴⁵ MCMURRAY, *supra* note /90/, at 2-3. *See also* WILLIAM STANTON, *THE LEOPARD’S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815-1859* (1960).

¹⁴⁶ There are three doctrinal aspects of patent law, unique to the early US patent system,

mid-nineteenth century, United States patent law placed heavy emphasis through doctrines of novelty and priority on identifying “first and true” inventors, seeking to deny patents to imitators. Further, the inventiveness doctrine limited patents to those whose ideas were truly inventive, as distinguished from the obvious technical improvements that might occur to any “ordinary mechanic.”¹⁴⁷ These doctrines gave patents their continued political potency. A failure to earn patents was a failure to demonstrate the ability to originate. Conversely, each patent grant to an African American was yet another fact that a member of that group had such ability. Baker’s list thus became evidence of collective ability that refuted accusations of collective disability. These were the stakes of remembering, motivating that “tedious” work.

IV. THE COSTS OF FORGETTING

In addition to the stakes of remembering, Ned, Jeremiah, and Oscar teach the costs of our selective legal memory. As my own experience proves, despite the storytellers’ efforts, white America and legal America forgot their story. These costs were obvious as early as 1913 when the founders of the NAACP published and promoted Baker’s pamphlet *The Colored Inventor* and remain relevant today when anti-black racism and implicit bias continue to shape law and society with implications for the patent system and citizenship debates.

A. Tracing the Costs

In 1913, Baker noted that although his list of nearly 400 African American patentees then sat in a book on the shelves of the Library of Congress (referencing his essay in Culp’s volume), a candidate for Congress in Maryland, fighting a “hotly contested election,” had recently asserted “that the colored race should be denied the right to vote because . . . ‘no one of the

that promoted this distinction between imitation and origination: a refusal to allow patents of importation, the “invention doctrine” (now called obviousness), and novelty rules that sought to grant patents to the earliest inventor, rather than the first to file a patent application. For the early development of these doctrines, in the patent acts and in judicial opinions, see EDWARD C. WALTERSCHEID, *TO PROMOTE THE PROGRESS OF USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION, 1787-1836* 14 (1998); B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920* 49-56, (2005); OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909* 220, 221 (2016); Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a “First-to-Invent” Patent System*, 23 *AIPLA Q.J.* 263 (1995).

¹⁴⁷ *Hotchkiss v. Greenwood*, 52 U.S. 248, 267 (1850).

race had ever yet reached the dignity of an inventor.”¹⁴⁸

This syllogism that African Americans could not invent and therefore should not be permitted to vote rested on two pillars: white forgetting and the political meaning of patents. It was only by forgetting *Invention of a Slave*, Ned, and the uncounted others who invented and patented that the Maryland politician and his white audiences could believe there was no such person as a black inventor. That forgetting permitted white leaders seeking to maintain, expand, and justify white supremacy in American law and society to make the repeated assertion that African Americans could not invent as an example of black inferiority. That assertion had political power because of the political meaning of patents as certification of inventive ability, that is, the ability to originate and not just imitate.

This claim became a favorite of politicians seeking to limit or nullify the Reconstruction Amendments and construct a Jim Crow society, complete with race-based franchise exclusions, because the ability to think independently had long been identified as a crucial ability in a democratic republic that required its citizens to self-govern through the franchise and other civic acts, like jury service and elected office. In American political thought, espoused by many of the Founders, those who only imitated were dangerous to the polity, because they merely copied opinions and actions. Such persons would be too easily swayed by demagogues, the argument ran. Democratic republicanism required independent thinkers. Initially, independence of thought was protected by limiting suffrage to the propertied.¹⁴⁹ By the mid-nineteenth-century, however, states had loosened property limits on white male suffrage.¹⁵⁰ Instead, identity became the means of distinguishing those able to exercise the franchise, based on presumed innate ability. Even after the Reconstruction Amendments guaranteed citizenship and black male suffrage, free African Americans joined women, Native Americans, children and the insane as those excluded from full legal personhood as presumptively disabled.¹⁵¹

Patents as certification of inventive ability and a proxy for independence of thought were thus facts relevant to the boundaries of citizenship as established in law and society. By the time the newly-formed NAACP used its resources to publish *The Colored Inventor*, the assertion that African Americans had never received patents or invented had become persuasive evidence that the tightening legal strictures constraining black citizenship in

¹⁴⁸ BAKER, *supra* note /23/ at 3.

¹⁴⁹ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5-25 (2000).

¹⁵⁰ *Id.* at 52.

¹⁵¹ Welke, *supra* note /21/, 7-9; LAURA FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA* 11-32 (2015).

Jim Crow America were justified. In 1886, one of the first African American activists to publish Baker's list, the Reverend Richard W. Wright, warned that it was neither "prudent nor sagacious" to ignore the repeated claims he saw in Southern newspapers of black inventive inability. Wright claimed that "six out of seven men" would consider it a "scientific fact" that "Negroes have no faculty for invention."¹⁵²

If, as six out of seven white Americans believed, African Americans could not invent and were limited to imitation, they lacked this ability crucial to democratic self-governance. That belief rested on forgetting the lessons of *Invention of a Slave*. The costs of that forgetting were and are *legal* costs that reached far beyond the patent office. The costs were paid in the continuing strength of legal and social racial hierarchies.

It is noteworthy that during decades when federal courts and legislators permitted states to pass and enforce Jim Crow laws, the patent office was a rare locus where rights could be asserted and secured in ways that were both formally and practically race-blind. States control many of the "rights of belonging," such as the right to vote, to serve on juries, to attend public schools, and to get business permits and gun licenses, but they do not control any aspect of the patent system. While Baker noted that should an African American inventor come "to the Patent Office to look after his invention," "it rarely leaves anything to the imagination," such appearances were rare and are not required by the law.¹⁵³ There was no legal requirement or practical necessity for black inventors to submit themselves to the racial categorization of white America in order to receive a patent. African Americans could and did originate and invent, and despite persistent and serious social, financial and educational hurdles to patenting, some did so. Those patents represented not only the innovation and ambitions of each patentee to commercialize an invention, but a collective political resource to combat the costs of *de jure* and *de facto* racial inequality.

Even as legal changes dismantled the first Jim Crow legal regime in the second half of the twentieth century, African Americans such as Burt, Diggs, Yancy, Sluby, and James continued to recognize and use the political power of patents, knowing that their community was continuing to pay these costs.¹⁵⁴ The arguments of "pro-slavery traducers" did not disappear with the

¹⁵² *The Negro as an Inventor*, *supra* note /69/ at 398-99.

¹⁵³ BAKER, *supra* note /23/ at 4, 6. Note that patent examiners, historically and at present, are not free from implicit biases that affect their examination of patent applications. Kyle Jensen, Balazs Kovacs and Olav Sorenson, *Gender Differences in Obtaining and Maintaining Patent Rights*, 36 NATURE BIOTECHNOLOGY 307-09 (2018)(suggesting the perceived gender of an inventor as indicated by first name can influence patent office outcomes).

¹⁵⁴ Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241)(July 2, 1964). Scholars have been identifying current legal regimes as a "new Jim Crow," referring to what I am calling

surrender of the Confederacy, nor with the passage of the Civil Rights Act of 1964, but continued as part of the ideology of white supremacy, an ideology on display in 2019 when African American leaders are told by those in power that they do not belong in the United States.¹⁵⁵

Remembering Ned, Oscar, and Jeremiah thus remains part of the project of altering law and society, in Daniel Culp's aspirational words of 1902, to "reach that point in the American civilization, where [the African American] will be recognized and treated as any other American citizen." These stakes did not dissolve when *Invention of a Slave* ceased to be persuasive legal authority, but rather remain relevant in the twenty-first century.

B. Mitigating the Costs

Recognizing the connection between patents as political facts and civil rights is one step toward mitigating the costs of forgetting. Once we appreciate how a color line surrounding our curated legal memory kept an opinion worth remembering and evidence of black participation in the patent system hidden in plain sight, we can draw further lessons from this case study in race and selective legal memory.

As a starting point, I have recognized, too slowly, that our selective legal memory has allowed me to be repeatedly surprised by Ned's accomplishment and those of the many other African American inventors, free and enslaved, who have been a part of our history at least since Africans landed in Jamestown in 1619. That surprise perpetuates the racism of low expectations that motivated Baker and the NAACP in 1913 to publish his pamphlet, feeding implicit biases and explicit racism. Exclaiming with wonder at the tale of an inventive blacksmith, a black railroad engineer, or an African American beauty entrepreneur, we imply that there is reason to be surprised, as if a designated subset of our citizens is not expected to invent.¹⁵⁶ By

the first Jim Crow as "old Jim Crow." MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 21 (2012).

¹⁵⁵ Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241)(July 2, 1964); Katie Rogers and Nicholas Fandos, "Trump Tells Congresswomen to 'Go Back' to the Countries They Came From," *New York Times*, July 14, 2019; Michael Barbaro, "Donald Trump Clung to 'Birther' Lie for Years, and Still Isn't Apologetic," *New York Times*, Sept. 16, 2016.

¹⁵⁶ Elijah McCoy (1843-1929) obtained at least 50 patents for his steam engine inventions. Portia P. James, *Elijah McCoy, American National Biography* (1999). <https://doi-org.ezproxy.neu.edu/10.1093/anb/9780198606697.article.1301093> Madam C.J. Walker (Sarah Breedlove)(1867-1919) used her business acumen to turn her hair care products into a business empire without the aid of patents, becoming the wealthiest self-made woman in the United States. A'LELIA BUNDLES, *ON HER OWN GROUND: THE LIFE AND TIMES OF MADAM C.J. WALKER* (2001).

moving beyond surprise to recognize that the history of African American inventiveness is co-extensive with the history of American inventiveness and needs to be understood through the lens of racial politics rather than biology, we can use one of law's stories to combat unacknowledged assumptions of inequality that make black inventors startling. As we write and talk about invention and innovation in legal publications and in classrooms we can use the power of this legal story to shape understandings of ability, using history to normalize the black inventor in our present.

We can also rethink the stakes of current conversations about inclusivity and access to the patent system.¹⁵⁷ Understanding patents as political facts is a new perspective for those of us trained in and practicing patent law. We are accustomed to evaluating the patent system on its ability to “promote the progress of the useful arts” by encouraging technological innovation through individual economic reward.¹⁵⁸ In a world of corporate research, we consider the collective use of patents in portfolios and pools, but remain unaware of the continuing significance of patents as a collective resource for those advocating for group inclusion.¹⁵⁹ This history reminds us that techno-economic factors are not the only consideration in improving the patent system.

For the political meaning of patents continues in the present. Patents remain potent symbols of individual ability as well as a collective source of national pride.¹⁶⁰ The patent office provides space for and collaborates with the National Inventors Hall of Fame to honor and publicize American inventors, celebrating original thought.¹⁶¹ The United States government, led by the patent office, claims the significance of patents, in both number and quality, in demonstrating a characteristic of the United States people that distinguishes this country from the rest of the world, echoing Baker's analysis that inventive skill is a valued contribution to the nation.¹⁶² Underscoring the

¹⁵⁷ See, e.g., Holly Fechner and Matthew S. Shapanka, *Closing Diversity Gaps in Innovation: Gender, Race, and Income Disparities in Patenting and Commercialization of Inventions*, 19 *TECH. & INNOVATION* 727 (2018).

¹⁵⁸ But see Jason Rantanen, Sarah E. Jack, *Patents as Credentials*, 76 *WASH. & LEE L. REV.* 311, 396 (2019); William Hubbard, *Inventing Norms*, 44 *CONN. L. REV.* 369, 414 (2011).

¹⁵⁹ See, e.g., Michael Mattioli, *Patent Pool Outsiders*, 33 *BERK. TECH. L. J.* 225 (2018); David S. Olson, *Removing the Troll from the Thicket: The Case for Enhancing Patent Maintenance Fees in Relation to the Size of a Patent Owner's Patent Portfolio*, 68 *FLORIDA L. REV.* 519 (2016).

¹⁶⁰ Sapna Kumar, *Innovation Nationalism*, 51 *CONN. L. REV.* (2019), forthcoming. Available at SSRN: <https://ssrn.com/abstract=3134106>.

¹⁶¹ <https://www.uspto.gov/learning-and-resources/ip-programs-and-awards/uspto-and-national-inventors-hall-fame-programs>.

¹⁶² See, e.g., Press release, Feb. 7, 2019, *United States Moves Up in International Rankings for Patent Protection*. See also Kumar, *supra* note /160/ (arguing that US is using

continued link between patents and citizenship, patents collectively granted to immigrants are offered as evidence of their worthiness to join the United States community.¹⁶³ Demonstrating participation in the patent system remains a way of claiming to be an American, fully within the borders of belonging.

Recognizing this significance of patents adds new urgency to the severe underinclusion of persons of color, particularly African Americans, in the patent system.¹⁶⁴ Once we see patents as political facts, we can appreciate that the rate at which African Americans apply for and receive patents is more than just another data point in discussions of STEM education or the innovation economy. Including *Invention of a Slave* within our legal memory is a crucial intervention to understand how the patent system serves as a rhetorical resource to reify racial hierarchies and also offers the opportunity to destabilize them.¹⁶⁵ As the activists I have highlighted understood, that opportunity expands as the list of African American patentee grows. At a moment when the US patent and trademark office is considering whether for the first time to collect data on the sex and race identification of applicants, remembering Ned, Jeremiah and Oscar underscores the need to create such lists.¹⁶⁶ It also provides additional incentive to encourage participation by marginalized groups in the patent system, reminding us that doing so will

patents to claim that it is “innovative”).

¹⁶³ See, e.g., Ufuk Akcigit, John Grigsby, Tom Nicholas, *Immigration and the Rise of American Ingenuity* Harvard Business School Working Paper 17-064 (2017)(analysis of inventors 1880-1940); Shai Bernstein, Rebecca Diamond, Timothy McQuade and Beatriz Pousada, *The Contribution of High-Skilled Immigrants to Innovation in the United States*, Stanford Business School Working Paper No. 3748 (Nov. 6, 2018)(using patents issued 1976-2012 to measure immigrant contribution to innovation).

¹⁶⁴ Adams Nager, David Hart, Stephen Ezell, and Robert D. Atkinson, *The Demographics of Innovation in the United States*, at 6 (Feb. 2016)(American-born blacks severely underrepresented in 21st century patenting).

¹⁶⁵ While this Essay has focused on the relationship between the patent system and anti-black racism by considering the racial identification of inventors, there is a related relationship between the patent system and racial categories through the use of racial language in issued patents, a topic explored more explicitly by Jonathan Kahn, *Race-ing Patents/Patenting Race: An Emerging Political Geography of Intellectual Property in Biotechnology*, 92 IOWA L. REV. 353 (2007) and *Revisiting Racial Patents in an Era of Precision Medicine*, 67 CASE WESTERN RESERVE L. REV. 1153 (2017) and SHUBHA GHOSH, *IDENTITY, INVENTION AND THE CULTURE OF PERSONALIZED MEDICINE PATENTING* (2014).

¹⁶⁶ Commerce Department, Request for Comments and Notice of Public Hearings on the Report Required by the Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018, April 26, 2019, available at <https://www.federalregister.gov/documents/2019/04/26/2019-08437/request-for-comments-and-notice-of-public-hearings-on-the-report-required-by-the-study-of> (last viewed July 4, 2019).

renegotiate the borders of belonging in ways that reverberate far beyond patents.

Finally, appreciating the costs of legal forgetting surrounding *Invention of a Slave* offers lessons to those of us who think, write, and teach about the law in areas outside patents. It teaches that we in law are living within a color line that imposes costs on our work of understanding what the law is, how it is working, and particularly, where and how the fault lines of entrenched racism in the United States continue to disrupt our legal promises of equality and inclusion. The storytellers whose history I have excavated, many of whom had no interest in technological innovation or patent office policy, provide an important reminder that questions of race and rights, of citizenship and belonging, and of the role of law in shaping American identity, are answered in many places.

If we are interested in these overarching questions of law and society, we need to consider the history I have recounted as one example of a broader phenomenon that requires us to shift our attention in at least two ways. By looking across the color line that surrounds our legal memory, we can expose our selective blindness to legal stories we need to understand. We also remind ourselves that the borders of belonging are forged in all parts of law and its bureaucracies, not just in the regulation of physical borders and polling places. Fundamentally, understanding the stakes of over a century of remembering Ned's story teaches us how law participates in US society and culture to shape our shared concept of our nation and its citizens, a legal lesson worth remembering.