

1999

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Recommended Citation

Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L. & HUMAN. 251 (1999).

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Becoming a Citizen: Reconstruction Era Regulation of African American Marriages

Katherine M. Franke*

I. INTRODUCTION

While many Black people regarded slavery as a form of social death,¹ some nineteenth-century white policy-makers extolled the virtues of slavery as a tool to uplift the characters of Africans in America: “[Slavery in America] has been the lever by which five million human beings have been elevated from the degraded and benighted condition of savage life . . . to a knowledge of their responsibilities to God and their relations to society,”² observed a Kentucky Congressman in 1860. These sentiments were echoed by abolitionist northern officers not three years later when the institution of marriage was lauded for its civilizing effect on the newly freed men and women: “[Marriage] is the great lever by which [the freed men and women] are to be lifted up and prepared for a state of civilization.”³

With an increasingly heterogeneous population in the United States, nineteenth-century social reformers considered it their

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1. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

2. CONG. GLOBE, 36th Cong., 1st Sess., app. at 200 (1860) (statement of Rep. William Simms, Democrat of Kentucky).

3. Statement of Col. William A. Pile, Testimony taken in Kentucky, Tennessee and Missouri, November and December 1863, the Am. Freedmen's Inquiry Comm'n, St. Louis, Mo., Record Group 94 [hereinafter N.A. R.G. 94], M 619, roll 201, frame 139 (National Archives, Washington, D.C.).

project to lift uncivilized people up from a natural savage state and mold them into proper citizens. Institutions such as slavery and marriage provided these reformers with a domesticating technology or lever that could pry the uncivilized apart from their savage ways.

Of course, African Americans experienced these institutions very differently. If slavery was a kind of social death for Black people in the United States, then Reconstruction held out the promise of social rebirth—rebirth as enfranchised citizens and rights holders. During the period after the Civil War, Black people in the United States celebrated the right to alienate their labor, own property, and participate in the institutions of civil and public society that were considered fundamental to a good and free life. The right to marry figured prominently among the bundle of rights African Americans held dear in the postbellum years.

Because the status *citizen* had both legal and moral content for nineteenth-century republicans, the transition of Black people from slave to citizen was not something the larger culture regarded as self-executing upon ratification of the Thirteenth and Fourteenth Amendments to the Constitution. Rather, even to progressives of this era, citizenship was something that had to be cultivated in Black people. In this Article, I will show how the institution of marriage was viewed as one of the primary instruments by which citizenship was both developed and managed in African Americans.

Antebellum social rules and laws considered enslaved people morally and legally unfit to marry. They were incapacitated from entering into civil contracts, of which marriage was one, and were regarded as lacking the moral fiber necessary to respect and honor the sanctity of the marital vows. Nevertheless, many slave couples lived together as husband and wife after undertaking wedding celebrations as simple as jumping over a broomstick,⁴ or as elaborate as a “Scripture Wedding,”⁵ or grand banquet thrown for the entire community.⁶ These couples considered themselves married before the eyes of God, the community, and, in some cases, their owners. But of course they were not married in the eyes of the law.

For many newly freed slaves in the latter half of the nineteenth century, the ability to marry was a powerfully important aspect of

4. See HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 275-77 (1979); LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 240 (1979); ANN PATTON MALONE, *SWEET CHARITY: SLAVE FAMILY AND HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOUISIANA* 224 n.64 (1992).

5. MALONE, *supra* note 4, at 224.

6. See *id.* at 225 (“When weddings were allowed, they became community observations and social occasions rivaled only by Christmas and end-of-harvest celebrations.”).

freedom and of acceptance into civil society. Black people celebrated the transition from marriage-in-fact to marriage-in-law, but the transmogrification of the civil and legal status of African Americans' intimate relationships was not bereft of both unintended and tragic consequences. Close attention to the records of this era reveals the paradox of legal recognition and regulation, and draws into question the fiction of a rights discourse that fixes as victory participation in institutions such as marriage.

African Americans did not enter civil society on their own terms and accompanied by their own values, but rather did so on the non-negotiable terms set by the dominant culture. Those who sought to enjoy the benefits of legal marriage according to pre-existing Black community norms—norms that were more fluid and more communal than that of white culture—were harshly punished, disciplined, and thereby domesticated by postbellum laws in ways less severe than, but not dissimilar to, antebellum laws.

The experiences of formerly enslaved people in the immediate postbellum period illustrates something quite important, and by no means unique to African Americans, about the relationship between civil rights and state regulation. The abolition of slavery is commonly understood to have accomplished both an escape from coercive state control and a grant of autonomy and rights. Yet, for African Americans, the ability to exercise these new rights merely inaugurated a different relationship with the state. Rather than escaping from the coercive power of the state, the newly emancipated former slaves encountered the state in new institutional garb. Marriage, I will argue, provides the best—albeit not the only—example of the degree to which African Americans had to be “domesticated” before they could be admitted into society as full citizens.

In many important respects, contemporary civil rights struggles must be understood as the legacy of the battles won and lost by and on behalf of African Americans in the Reconstruction era. Civil rights movements inevitably formulate both inequity and freedom in rights-based terms: the right to contract, to own property, to racially-integrated education, to privacy, to vote, to speak Spanish, and to marry a person of a different race or of the same sex. The emancipatory force of rights-based claims made on behalf of subordinated groups remains relatively unquestioned in modern liberatory discourses within the academy as well as in practical political and legal domains. Rights-based strategies have retained this stature notwithstanding sustained, principled critiques from various shores. Without attempting to rehearse the now well-known

critiques and defenses of rights made elsewhere,⁷ yet mindful of the difficult problems these conversations have raised, I want to interrogate a paradox lurking in virtually all modern civil rights movements. The struggles of abject groups to emerge from the obscurity of the legal margins into the mainstream of civil society often materialized through demands for legal recognition by the state, and inclusion in the dominant legal and political institutions of society. Marriage is a good example, but surely not the only one.⁸ Ignored in these struggles is the degree to which these institutions are highly regulatory in nature: They are the sites in which the state is actively involved in creating social and legal statuses for both men and women in highly raced and gendered terms. Thus, an institution like marriage accomplishes a kind of colonialism by domesticating more “primitive” sexuality. Insofar as “sexuality . . . provides the principle categories for a strategic transformation of behavior into manipulable characterological types,”⁹ husbands and wives—the primary adult units of civilized society—are the product of this cultural positioning. The process by which previously enslaved men and women became free husbands and wives reveals a great deal about the manner in which the assertion of rights initiates regulation by a “bureaucratic juridical apparatus”¹⁰ even as those rights are asserted as a means of liberation.

What tends to be obscured in marriage-based civil rights strategies

7. Just as Critical Legal Studies theorists sought to destabilize the legitimacy of rights-based claims for justice, Critical Race Theorists argued for their retention as their exercise signaled the legal and political personhood of previously disenfranchised groups. For the Critical Legal Studies critique of rights, see, for example, DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); Jack Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990); Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). For Critical Race Theory responses to the critique of rights, see, for example, PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Robert Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987).

8. Another right incident to emancipation that was widely considered to be fundamental to African Americans' legal and practical freedom was the right to contract freely—particularly to contract for one's own labor. Yet, no sooner were African Americans *allowed* to enter into labor contracts, than southern states began to enact harsh codes that punished public dependence and vagrancy. Amy Dru Stanley forcefully demonstrates the degree to which the freed men and women were met with “a double message: an affirmation of the former slaves' right to liberty and a warning that freedom barred dependence.” AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* 123 (1998). Thus, Stanley cites to the explicit policy of the Freedmen's Bureau that at once empowered and regulated African Americans in the name of freedom: “While the freedmen must and will be protected in their rights, they must be required to meet these first and foremost conditions of a state of freedom, *a visible means of support, and fidelity to contracts.*” *Id.* (quoting *Orders Issued by the Commissioner and Assistant Commissioners of the Freedmen's Bureau*, H.R. EXEC. DOC. NO. 39-70, at 139, 155 (1865)) (emphasis in original).

9. LEO BERSANI, *HOMOS* 3 (1995).

10. WENDY BROWN, *STATES OF INJURY* 121 n.41 (1995).

is the manner in which abject status is exchanged for that of civil(ized) subject, tamed by the disciplinary technology of public marital norms. Civil rights, it becomes clear, come at a price:

Historically, rights emerged in modernity both as a vehicle of emancipation from political disenfranchisement or institutionalized servitude and as a means of privileging an emerging bourgeois class within a discourse of formal egalitarianism and universal citizenship. Thus, they emerged both as a means of protection against arbitrary use and abuse by sovereign and social power as a mode of securing and naturalizing dominant social powers—class, gender and so forth.¹¹

Wendy Brown poses the problem as follows: “When does identity articulated through rights become production? When does legal recognition become an instrument of regulation, and political recognition become an instrument of subordination?”¹²

Primary archival evidence as well as postbellum legal opinions demonstrate that African Americans who emerged from slavery to participate freely in society were transformed in subtle and not so subtle ways into the kinds of citizens upon which southern society depended at that time. Historian Nancy Cott claims that “[o]ne might go so far as to say that the institution of marriage and the modern state have been mutually constitutive.”¹³ Without question, African Americans have been called upon, and often coerced, to play a role in nation-building at different times in different ways.¹⁴ The evidence I discuss below demonstrates the extent to which matrimonial laws and norms afforded African American people social and economic benefits that had been previously foreclosed to them, but on the condition that African Americans abide by the race- and gender-based rules of bourgeois culture. Moreover, the complex way in which African Americans were inducted into the regulatory regime of marriage can be explained by reference to the felicitous convergence of the interests of Blacks and white males. White men had their own stake in Freedpeople’s adherence to

11. *Id.* at 99; see also STANLEY, *supra* note 8, at 175-217.

12. BROWN, *supra* note 10, at 99.

13. Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century*, in U.S. HISTORY AS WOMEN’S HISTORY 107, 109 (Linda Kerber & Alice Kessler-Harris eds., 1995).

14. See, e.g., AM. FREEDMEN’S INQUIRY COMM’N, FINAL REPORT OF THE AMERICAN FREEDMEN’S INQUIRY COMMISSION TO THE SECRETARY OF WAR (May 15, 1864), S. EXEC. DOC. NO. 38-53, at 99 (1st Sess. 1864) [hereinafter FINAL REPORT] (“We need the negro not only as a soldier to aid in quelling the rebellion, but as a loyal citizen to assist in reconstructing on a permanently peaceful and orderly basis the insurrectionary South.”).

marriage laws wholly independent from any altruistic concern for Black civil rights or personal sovereignty.

In Part II, I discuss the various ways in which enslaved people organized their intimate sexual relationships.¹⁵ I examine secondary materials discussing the nature of slave society, as well as Freedmen's Bureau reports and war widow pension applications containing transcripts of interviews with formerly enslaved women in which they discuss the kinds of relationships maintained by enslaved Black people. These materials reveal that while many enslaved people preferred to live as husband and wife, thereby making life-long, monogamous commitments to one another,¹⁶ slave communities acknowledged other acceptable arrangements: "taking up," "sweethearting," living together, and trial marriages. Couples who took up or were sweethearts were not necessarily monogamous, although they could be. It was acceptable for enslaved women to bear children in all manner of relationships. These primary and secondary materials indicate that slave societies permitted a range of sexual relationships for their members.

After emancipation, formerly enslaved people were granted the right to marry legally. An array of laws were passed legitimizing both slave marriages and the children that had been born to enslaved parents. In Part III, I explore the ways in which formerly enslaved people were folded into civilized and free society through their inclusion in the institution of marriage. It cannot be denied that many African American people had lived as husband and wife while enslaved. The legitimization of their relationships did little to affect the form of those relationships. However, I show that for a significant number of former slaves, legal marriage was not experienced as a source of validation and empowerment, but as discipline and punishment when the rigid rules of legal marriage were transgressed, often unintentionally. Thus, the robust

15. While it is entirely possible, no doubt likely, that some enslaved people engaged in sex with other people of the same sex, there was certainly no gay or lesbian identity amongst enslaved people, nor, for that matter, amongst the dominant white culture, as the categories lesbian and gay are a more modern invention. Same-sex sexuality among enslaved people would certainly make an interesting subject of inquiry. However, I leave that to others to explore. I have limited my observations here to heterosexual sexuality amongst enslaved people.

16. Of course this commitment was constrained by the exogenous threat that the master could separate families by selling one or more members at any time. For this reason, some slave weddings ended not with the familiar climax "till death do you part," but with variations such as "till death or buckra part you." EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 481 (1974). One Virginia master married his slaves with the following vows: "Dat yo' wife, Dat yo' husban', Ise yo' Marser, She yo' Missus, You're Married." LITWACK, *supra* note 4, at 240.

enforcement of bigamy, fornication, and adultery laws served to domesticate African American people who were either unaware of, or ignored, the formal requirements of marital formation and dissolution, or who chose to conduct their intimate sexual relationships in ways that fell outside the matrimonial norms of Victorian society. In the end, the efforts of African Americans to maintain a spectrum of intimate sexual relationships in the postbellum period had to give way to the dictates of positive marriage laws. Part III shows how the process of becoming husbands and wives was not a benign one whereby the state lent its imprimatur to autonomous, self-defining couples, but rather was coercive in nature: Previously acceptable behavior was punished and the regulatory force of the state was invoked so as to mold the newly freed slaves into citizens. These cases illustrate “public authority using marriage policy to create a social order” and to create proper citizens.¹⁷

The right to marry that African Americans enjoyed in the postbellum period must be understood within a cultural context in which marriage and the family were institutions employed by the larger culture to promote certain social and economic values. Reform of the law of marriage during this period played a key role in advancing these agendas. In Part IV, I argue that African Americans were granted the right to marry at precisely the moment when that right was being radically transformed in such a way that the public interest in marriage took priority over private interests in the creation of autonomous intimate partnerships. In this Part, I provide an account of the implications of the prosecution and incarceration of African Americans—more often men than women—for violating laws regulating matrimonial morality. The aggressiveness with which African American men were prosecuted for matrimonial deviance can be seen as an epiphenomenon of changes in white masculinity and agency that were taking place in postbellum industrializing America more generally. If the integrity of white male agency could no longer be anchored as the antinomy of Black chattel slavery, since all men were now, at least in theory, free market actors, then white masculinity required new ground against which to be set off. This task was complicated by the fact that wage laborers in the Gilded Age were in a famously weak position to negotiate with industrialists over wages and working conditions. Thus, as Nancy Cott¹⁸ and Amy

17. Cott, *supra* note 13, at 119.

18. See Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440 (1998).

Dru Stanley¹⁹ have argued, white men needed to construct a new domain other than slavery against which to contrast masculine agency. Marriage and the domestic sphere of the feminine became that fiction. It would have been calamitous for African American men to be able to opt out of this important regulatory regime. Thus African Americans entered the domain of marriage just as its institutional boundaries became heavily freighted in new ways.

This Part concludes with the observation that the use of criminal prosecutions accomplished the disenfranchisement of Blackmen and supported the creation of a criminal leasing system in which Black male prisoners were leased out to white planters to work the fields under conditions that were, in many respects, worse than those during slavery.

Thus, winning the right to marry was a source of great celebration as well as great suffering for many African Americans in the postbellum period. This is hardly surprising, given that it did not take place in isolation from the material and symbolic interests of the larger Victorian culture.

II. AFRICAN AMERICAN RELATIONSHIPS UNDER SLAVERY

An extensive historical literature has documented the circumstances and experiences of slave domestic life and kinship formation.²⁰ Indeed, family life amongst enslaved people has recently attracted renewed interest from feminist historians, as evidenced by several outstanding new texts.²¹ This literature portrays anything but a singular account of slave family structures and reflects, in part, a desire to provide an historical response to contemporary narratives about the pathology of the modern black family.

A. The Historiography of Slave Families

Early accounts advanced a pathological view of slave families. These narratives generally portrayed enslaved people as culturally

19. See STANLEY, *supra* note 8.

20. See, e.g., J.W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1972); E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939); GENOVESE, *supra* note 16; GUTMAN, *supra* note 4; KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956); DEBORAH GREY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* (1985).

21. See, e.g., LAURA EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997); NORALEE FRANKEL, *FREEDOM'S WOMEN: BLACK WOMEN AND FAMILIES IN CIVIL WAR ERA MISSISSIPPI* (1999); TERA HUNTER, *TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR* (1997); MALONE, *supra* note 4; BRENDA E. STEVENSON, *LIFE IN BLACK AND WHITE: FAMILY AND COMMUNITY IN THE SLAVE SOUTH* (1996).

and essentially inferior to whites, the men alternately as overly sexual, violent beasts or as passive and dependent Sambos, and the women as oversexed Jezebels or nurturing Mammys.²² The American Freedman's Inquiry Commission, a body created by the War Department in 1863 to develop recommendations for dealing with African Americans after emancipation, heard testimony that "[i]t is a very rare thing to find female virtue among [Negroes]."²³ In its preliminary report to the Secretary of War, the Commission stated that enslaved people spent "the night in huts of a single room, where all ages and both sexes herded promiscuously. Young girls of fifteen—some of an earlier age—became mothers, not only without marriage, but often without any pretence [sic] of fidelity to which even a slave could give that name."²⁴ Indeed, the perceived sexual depravity of enslaved people seemed to fascinate nineteenth-century white observers. The remarks of a Mississippi planter were typical in this regard:

As to their habits of amalgamation and intercourse, I know of no means whereby to regulate them, or to restrain them; I attempted it for many years, preaching virtue and decency, encouraging marriages, and by punishing, with some severity, departures from marital obligations; but it was all in vain.²⁵

These views persisted well into the next century. In 1956 Kenneth Stampp described both the "indifference with which most fathers and even some mothers regarded their children" among enslaved people, and "widespread sexual promiscuity."²⁶

In the 1950s through the 1970s, prominent historians of African American life and culture such as E. Franklin Frazier²⁷ and Stanley Elkins²⁸ sought to counter these well-accepted images of African Americans living under slavery by telling a different story. By their

22. See, e.g., PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 85-90 (1984); WHITE, *supra* note 20, at 27-61, 164-65.

23. Statement of Col. William A. Pile, Testimony taken in Kentucky, Tennessee and Missouri, November and December 1863, N.A. R.G. 94, *supra* note 3, at M 619, roll 201, frame 139.

24. AM. FREEDMEN'S INQUIRY COMM'N, *PRELIMINARY REPORT TOUCHING THE CONDITION AND MANAGEMENT OF EMANCIPATED REFUGEES*; S. EXEC. DOC. NO. 38-53, at 5 (1st Sess. 1863) [hereinafter *PRELIMINARY REPORT*].

25. X DEBOW'S REVIEW 623 (1836), *quoted in* BLASSINGAME, *supra* note 20, at 153.

26. STAMPP, *supra* note 20, at 346. Stampp is regarded as responsible for promoting the "Sambo thesis" of African American slave identity. See DONNA L. FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY* 7-8 (1997).

27. See FRAZIER, *supra* note 20.

28. See STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1959).

account, the form of slave family life was not traceable to some intrinsic pathology, but to the annihilating effects that slavery had on African American culture.²⁹ Frazier observed that

the Negro, stripped of his cultural heritage, acquired a new personality on American soil [T]he emergence of the slave as a human being was facilitated by his assimilation into the household of the master race. There he took over more or less the ideas and attitudes and morals and manners of his masters. His marriage and family relations reflected the different stages and aspects of this process.³⁰

Thus, for the historians of this era, “the environment of the slave experience had been such as to exclude the development of black marriage and family norms.”³¹ These authors contended that, by patterning their family lives upon those of their masters, some enslaved people formed long-term, monogamous relationships and raised their children in nuclear-type families. By forming these kinds of kinship networks—networks remarkably similar to those of European Americans—African Americans were able to survive the devastation of slavery.³² Nineteenth-century sources reinforce this view. The American Freedman’s Inquiry Commission observed that “[the Negro] is found quite ready to copy whatever he believes are the rights and obligations of what he looks up to as the superior race.”³³

These new narratives of slave family life were designed to remove the stigma of the weak male, the female-headed household, and loose morals, for which modern Black families had been condemned. Reflecting upon this scholarship, Brenda Stevenson observed that many of these scholars were unable to resist the temptation to make

29. See, e.g., STEVENSON, *supra* note 21, at 226-57. Kenneth Stampp argued that [i]n Africa the Negroes had been accustomed to a strictly regulated family life and a rigidly enforced moral code. But in America the disintegration of their social organization removed the traditional sanctions which had encouraged them to respect their old customs Here, as at so many other points, the slaves had lost their native culture without being able to find a workable substitute and therefore lived in a kind of cultural chaos.

STAMPP, *supra* note 20, at 340.

30. FRAZIER, *supra* note 20, at 32.

31. Brenda Stevenson, *Black Family Structure in Colonial and Antebellum Virginia: Amending the Revisionist Perspective*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS* 27, 30 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995).

32. Scholars of the time “largely attributed the long-term survival of enslaved African Americans to the viability of the slave family as their principal sociocultural institution.” *Id.* at 28.

33. PRELIMINARY REPORT, *supra* note 24, at 6.

implicit comparisons between the slaves' marital and familial practices and those of European Americans. This politically-motivated historical project rested on the premise that if, and only if, they could document that the historical Black family was similar in design, structure, function, and relations to that of whites, then could they effectively argue that it had a positive impact on Black life.³⁴

Herbert Gutman's now classic 1979 book, *The Black Family in Slavery and Freedom, 1750-1925*, picked up this theme explicitly in response to Senator Daniel Patrick Moynihan's 1965 study, *The Negro Family in America: The Case for National Action*.³⁵ Moynihan maintained that the "tangle of pathology" of contemporary Black families could be traced to the manner in which slavery forced the formation of fatherless matrifocal families that were incapable of imparting the values necessary for successful and responsible adult life.³⁶ Gutman sought to debunk Moynihan's thesis by showing that enslaved people had formed viable nuclear families, notwithstanding all of the structural impediments to traditional family formation.³⁷ Thus, in *The Black Family in Slavery and Freedom*, Gutman set out to document in great detail how "ordinary black men, women, and children . . . adapted to enslavement by developing distinctive domestic arrangements and kin networks that nurtured a new Afro-American culture."³⁸

Now, a number of years after Gutman's work retold the story of slave family life, a new generation of historians has sketched out a different portrait of slave intimate relationships that challenges what has come to be called the "Gutman thesis," the view that most enslaved people lived in nuclear, male-headed households and in monogamous, long-term relationships. In particular, the works of contemporary historians Brenda Stevenson,³⁹ Tony Kaye,⁴⁰ Ann Patton Malone,⁴¹ Laura Edwards,⁴² Donna Franklin,⁴³ and Noralee

34. See Stevenson, *supra* note 31, at 28.

35. See GUTMAN, *supra* note 4, at xvii-xviii; OFFICE OF PLANNING AND RESEARCH, U.S. DEPARTMENT OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) [hereinafter *NEGRO FAMILY*].

36. *NEGRO FAMILY*, *supra* note 35, at 29.

37. See GUTMAN, *supra* note 4, at 461-75.

38. *Id.* at 3.

39. See STEVENSON, *supra* note 21; Stevenson, *supra* note 31.

40. See Tony Kaye, *The Personality of Power: The Ideology of Slaves in the Natchez District and the Delta of Mississippi, 1830-1865* (unpublished draft Ph.D. dissertation, Columbia University) (on file with author).

41. See MALONE, *supra* note 4.

42. See EDWARDS, *supra* note 21; Laura Edwards, "The Marriage Covenant is at the Foundation of all Our Rights": The Politics of Slave Marriages in North Carolina after Emancipation, 14 L. & HIST. REV. 81 (1996).

Frankel⁴⁴ have challenged many fundamental aspects of the Gutman thesis.

These historians have described a complex constellation of relationships formed by African Americans in the antebellum period. Brenda Stevenson concludes that “slave marriages and families exhibited a diversity of form and relationship that marked them [as] substantially different from those of European Americans. Even when enslaved people did live in nuclear households and sustained monogamous marriages, these institutions did not function similarly to those of contemporary whites.”⁴⁵ In addition to marrying, enslaved adults “sweethearted,” “took up,” and lived together in non-marital relationships.

Tony Kaye has provided the richest and most nuanced account of the various forms and meanings of these relationships. He describes sweethearting as a frequently non-monogamous relationship, entered into primarily by young people: “a temporary tie that entailed more prerogatives than obligations and many new feelings and pleasures . . . many sweethearts had children together.”⁴⁶ These children were often described as “sweetheart children.”⁴⁷

Like “sweethearting,” “taking up” was an open-ended and non-exclusive type of relationship. Kaye concludes that “taking up” was a way to describe the non-exclusive relationships of older people, or sweethearts that had been together for some time.⁴⁸ The relationships of couples who had “taken up” could mature into ones in which they were regarded by the community as living together or married. Kaye concludes that “sweethearting” and “taking up” were distinguished from “living together” and marriage by two important factors: the nature of the commitment they represented, and the degree to which the relationships were mediated by others. According to Kaye’s analysis, “[s]laves believed that living together, like marriage, obliged husbands and wives to stick to each other for

43. See FRANKLIN, *supra* note 26.

44. See FRANKEL, *supra* note 21; Noralee Frankel, *Workers, Wives, and Mothers: Black Women in Mississippi, 1860-1870* (1983) (unpublished Ph.D. dissertation, George Washington University) (on file with author) [hereinafter *Workers, Wives, and Mothers*].

45. Stevenson, *supra* note 31, at 52-53.

46. Kaye, *supra* note 40, at 7-9.

47. See Testimony of Susan Alexander (Dec. 26, 1874), in Pension File of Allen Alexander (certificate 97,533), Bureau of Pensions, Civil War and Later Pension Files, 1861-1942, Widow’s Certificate Series, Record Group 15 (National Archives, Washington, D.C.) [hereinafter N.A. R.G. 15], cited in Kaye, *supra* note 40, at 7-9. The pension files are boxed as original paper documents. The files contain application numbers if a pension was applied for but never awarded, and certificate numbers if a pension was awarded.

48. See Kaye, *supra* note 40, at 9-10.

life and to be monogamous for the duration.”⁴⁹ So too, living together and marriage were relationships of a more public nature:

Couples who sweethearted or took up were slaves who found that the most straightforward course between the conflicting claims of romantic desire and chattel property was to keep their relationship entirely their own affair. Whereas couples took some pains to enlist both their fellow slaves and their owners to participate in marriage ceremonies or recognize husbands and wives who were living together, sweethearts and couples who were taking up went to great lengths to be left to their own devices.⁵⁰

Brenda Stevenson’s research led to the same conclusion: “[T]he family history of slaves in colonial and antebellum Virginia offers compelling evidence that many slaves did not have a nuclear structure or ‘core’ in their families, and there is little evidence that suggests that a nuclear family was their sociological ideal.”⁵¹ Rather, “[p]olygyny, or something akin to it in which a slave man had long-standing, continuous intimate relationships with more than one woman probably was a much more popular alternative to monogamy than has been realized.”⁵²

Laura Edwards finds similar evidence of the role that community recognition played in the formalization of the relationships of enslaved people. When one previously-married member of the couple began to live with another person openly, the community treated the former marriage as dissolved.⁵³ It was also common for enslaved people to enter “trial marriages” of several weeks or years, during which time the couple would check each other out. Harriet Beecher Stowe recounted a female slave’s description of her relationship with a man as: “[W]e lib along two year—he watchin my ways and I watchin his ways.”⁵⁴

Underlying these different accounts of the nature of slave family life are disputes as to the facts of life under slavery, as well as questions regarding the agency of enslaved people. Did African Americans in the antebellum period overwhelmingly enter into monogamous, nuclear relationships, or did their intimate relationships take on a variety of forms in addition to that which

49. *Id.* at 17.

50. *Id.* at 13.

51. Stevenson, *supra* note 31, at 36.

52. STEVENSON, *supra* note 21, at 233.

53. See Edwards, *supra* note 42, at 109.

54. HARRIET BEECHER STOWE, *THE KEY TO UNCLE TOM’S CABIN* 298-301 (1854), *quoted in* GUTMAN, *supra* note 4, at 64.

mirrored traditional bourgeois marriage? Whatever form these relationships took, could we understand them to reflect the vestiges of African cultural norms?⁵⁵ Were these relationships the results of meaningful choices made as acts of survival and resistance to the crushing reality of slavery, or could enslaved people “learn only from their owners so that slave culture, a source of slave belief and behavior, was at best ‘imitative’ . . . little more than responses to master-sponsored external stimuli?”⁵⁶

In the end, the same evidence viewed from different vantage points leads to very different explanations for why enslaved people formed the families they did. As a preliminary matter, no generalization about the behavior of enslaved people would hold true for the entire system of chattel slavery, as the variations in the conditions of enslavement from one locality to another were often dramatic. In Louisiana, it was common for enslaved people to be housed in barracks, whereas in most other regions family cabins were more the norm.⁵⁷ Evidence of a custom in many locations in favor of nuclear family groupings accompanied by informal marriages and monogamous coupling might lead one to conclude, as Gutman did, that this custom was an expression of the preferences of enslaved people. But it is equally true that planters consciously used housing policy, distribution of extra rations, marriage ceremonies, and work assignments in order to manipulate the birth rates among their enslaved workers.⁵⁸ This is not to argue that enslaved women were passively reacting to the incentivizing strategies of their masters, since enslaved women in other countries reacted differently to the tactics of owners to maximize fertility.⁵⁹ Rather, the formation of

55. See MELVILLE J. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* (1941).

56. GUTMAN, *supra* note 4, at 32; see also Ariela Gross, “*Like Master, Like Man*”: *Constructing Whiteness in the Commercial Law of Slavery, 1800-1861*, 18 CARDOZO L. REV. 263 (1996) (discussing cases for breach of warranty in sale of slaves, which show that determination of slave character was a reflection of the owner’s character).

57. See ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* (1989); MALONE, *supra* note 4. Many authors have documented the common practice by which slave men and women were forced by their masters to “marry” and reproduce. See, e.g., LITWACK, *supra* note 4, at 234.

58. See FOGEL, *supra* note 57, at 153; JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 20 (1985); MALONE, *supra* note 4, at 16-18, 180; LESLIE A. SCHWALM, “A HARD FIGHT FOR WE”: *WOMEN’S TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA* 19-44 (1997); John Campbell, *Work, Pregnancy, and Infant Mortality among Southern Slaves*, 14 J. INTERDISC. HIST. 793 (1984); Christopher Morris, *The Articulation of Two Worlds: The Master-Slave Relationship Reconsidered*, 85 J. AM. HIST. 982, 988-89 (1998).

59. See BARBARA BUSH, *SLAVE WOMEN IN CARIBBEAN SOCIETY, 1650-1838*, at 120-50 (1990); SIDNEY W. MINTZ, *CARIBBEAN TRANSFORMATIONS* (1984); Barbara Bush-Slimani, *Hard Labour: Women, Childbirth, and Resistance in British Caribbean Slave Societies*, 36 HIST.

families under slavery must be understood as a complex synthesis of planter coercion and incentives and slave resistance and accommodation.

Thus, the search for an "authentic" African American culture is no longer either an interesting or viable question.⁶⁰ An uncompromising account of the agency of enslaved persons that portrays it as a force struggling to break through the enveloping canopy of white planters' acts of coercion fails to acknowledge how human agency is a synthesis of resistance, assimilation, and persistence.⁶¹ Recent scholarship by Christopher Morris persuasively demonstrates how the behavior of planters and slaves could be mutually constitutive:

The master-slave relationship was not entirely the conscious creation of paternalistic slaveholders or resistant slaves. On the contrary, the structures of that relationship shaped the ways in which both might act paternalistically or capitalistically, accommodatingly or rebelliously. Both master and slave, whether through consent or through concession, acted within structural/systemic boundaries and by so doing they tended to perpetuate the status quo.⁶²

Morris does not mean to imply that the perpetuation of slavery was desired by enslaved people, but rather that there were numerous ways in which the organization of slave life that was less oppressive to slaves could also coincide with making slavery profitable for masters. Thus, "[o]n a structural level . . . dominance and resistance could become reciprocal, both perpetuating the conditions necessary to sustain the system."⁶³

In the section that follows, I will describe the array of domestic arrangements entered into by African American people while

WORKSHOP 36 (1993).

60. In another context, Kathryn Abrams has undertaken the project of investigating the possibility and meaning of female agency under conditions of overwhelming constraint imposed by patriarchy. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 305 (1995); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994).

61. In this sense the search for an authentic African American slave family mistakenly assumes that "real" African culture maintains authenticity only by remaining static and a-historical while permitting the modern to adapt and evolve.

62. Morris, *supra* note 58, at 987. In this article, Morris contrasts two plantations. On the first plantation, the planter determined that it would be more profitable to abandon growing cotton and instead engage in a "slave breeding" business, which led him to improve the domestic conditions in which the slaves lived. The second planter decided to maximize profits from his rice plantation by minimizing expenditures on the material needs of the slaves. Thus, the first owner raised living conditions in order to raise people, whereas the second sacrificed people for profits from rice. In the first case the slave birthrate was 12%, whereas in the second, the child mortality rate was 90%.

63. *Id.*

enslaved, according to their own reports as well as the observations of white Freedmen's Bureau agents. These primary materials disclose no generalizable truth about the intimate lives of enslaved people, but instead reflect the diverse ways in which Black people adjusted to the inhumane situations in which they found themselves. These documents also reveal the complex ways in which planters adapted their behavior in response to slave culture and resistance.

B. Relationships Among Enslaved People—Primary Accounts

A rich array of primary archival sources provides a lens through which to view the intimate relationships of enslaved people. I examine two sets of materials that supply particularly detailed accounts of the ways in which enslaved people chose sexual partners and arranged their intimate lives. One group of sources consists of affidavits made out by African American women in support of their applications for war widows' pensions after their husbands died fighting in colored regiments in the Civil War. The second group is composed of reports filed by Freedmen's Bureau and other federal agents describing their observations about the domestic customs of African American people.⁶⁴

These materials show several interesting things about the kinds of relationships Black people entered into during the ante- and postbellum eras. Black men were known to have more than one wife, sometimes with the consent of their owners. Some slave couples considered themselves married in the absence of any religious or public ceremony and simply decided to live as husband and wife. Women drew a distinction between being married to a man and merely "having one," and bearing children did not seem to affect this status. Some formerly enslaved couples underwent marriage ceremonies after emancipation even though they considered themselves married prior to the ceremonies,⁶⁵ while others felt no

64. While these two sets of materials are replete with minute details and grand statements about the lives of Black people during the ante- and postbellum periods, the reliability of both are subject to reasonable contestation. As to the Pension Bureau applications of war widows, the purpose for which the affidavits were supplied to the Bureau—proof of a valid marriage—provided an incentive for applicants to distort the facts in such a way as to have the Bureau favorably dispose of their claims. Similarly, the white Freedmen's Bureau agents' descriptions of the lives of Black people are subject to the distortion of the agents' racism, unfamiliarity with cultural norms amongst enslaved people, and their own personal agendas. Keeping these concerns in mind, I remain convinced that both sets of material provide valuable evidence of the nature of intimate relationships amongst Black people in the antebellum period.

65. The daughter-in-law of Daniel Williams's owner testified that "Daniel and Henrietta ran away to Natchez, Miss., to get married although they were as good as married for at least a year before this." Affidavit of Anna B. Allen (Aug. 23, 1884), in Pension File of Daniel Williams (application 167,134), N.A. R.G. 15, *supra* note 47.

need to further solemnize their relationships once they were legally permitted to do so.⁶⁶

The enormously high casualty rates of Union soldiers resulted in the impoverishment of hundreds of thousands of surviving widows and children: "The accumulated bloodshed of the war's first fifteen months made the care of bereaved families a central issue by the summer of 1862, when Congress expanded federal responsibility for military families."⁶⁷ Survivors of deceased white soldiers were the beneficiaries Congress had in mind when the pension laws were amended in 1862.⁶⁸ Yet, shortly after colored soldiers began to fight in the Union army in early 1863,⁶⁹ the federal government's Pension Bureau was faced with war widow pension claims filed by Black women whose husbands had died in the war. In fact, once Black men were conscripted, their casualties were exceedingly high. The Confederate Secretary of War declared that captured Black Union soldiers were not to be treated as prisoners of war, but rather as "slaves in arms" who were to be turned over to local authorities whereupon they were executed as incendiaries or insurrectionists.⁷⁰ To Confederate officials, "[t]he most efficient way to deal with the vexing issue of black prisoners was to take no prisoners."⁷¹

Then, in April 1864, Confederate soldiers massacred an estimated eight hundred Union troops, half of whom were Black, at Fort Pillow, Tennessee. The Fort Pillow massacre prompted Congress to contend with the problems of proof that had arisen in Black women's

66. See, e.g., Pension File of Charles Alfred (certificate 177,642), N.A. R.G. 15, *supra* note 47.

67. Megan J. McClintock, *Civil War Pensions and the Reconstruction of Union Families*, 83 J. AM. HIST. 456, 461 (1996) (providing an outstanding account of the Civil War pension system and what its records reveal about family formations in the 19th century).

68. See Act of July 14, 1862, ch. 166, 12 Stat. 566 (1862) (establishing Civil War pensions).

69. Notwithstanding an overwhelming need to raise troops, and even after issuance of the preliminary version of the Emancipation Proclamation in July, 1862, President Lincoln opposed the enlistment of Black men into the Union army. "From Lincoln's point of view it made more sense to talk of colonizing the blacks out of the country than to plan on making them soldiers." DAVID HERBERT DONALD, *LINCOLN* 430 (1995). Without Lincoln's knowledge, in the summer of 1862, War Department Secretary Edwin Stanton had already approved the use of Black troops in South Carolina, Louisiana, and Kansas. Of course, the final Emancipation Proclamation, issued in September 1862, reflected Lincoln's acquiescence to the pressure of his advisors that Black troops be conscripted. "By spring, the President was urging a massive recruitment of negro troops." *Id.* at 431. DUDLEY TAYLOR, *THE SABLE ARM: NEGRO TROOPS IN THE UNION ARMY, 1861-1865* (1956) is authoritative on this issue; see also LITWACK, *supra* note 4, at 65-79 (describing Black interest in and white resistance to the recruitment of Black men for a "liberating army").

70. See LITWACK, *supra* note 4, at 88.

71. *Id.* at 89 ("'No orders, threats, or commands,' a Confederate soldier reported, 'could restrain the men from vengeance on the negroes, and they were piled in great heaps about the wagons, in the tangled brushwood, and upon muddy and trampled roads.'").

pension claims.⁷² Senator Lafayette Foster sponsored a bill designed to address this issue because

there is this unfortunate distinction between the widows and children of white and black soldiers: the blacks who come from the slave States, and who probably were slaves before they entered the service, although they had wives and children, were not, according to the laws of the States within which they lived, legally married. [T]hey could not by law be recognized as the wives or widows and children of the persons thus killed.⁷³

The Pension Statute was amended on July 4, 1864, entitling the free widows and children of colored soldiers killed in the war to a pension "without other proof of marriage than that the parties had habitually recognized each other as man and wife, and lived together as such for a definite period next preceding the soldier's enlistment, not less than two years, to be shown by the affidavits of credible witnesses."⁷⁴ An exception was made for those claimants who had "resided in any state in which their marriage may have been solemnized, the usual evidence shall be required."⁷⁵

This law was amended in 1866 after emancipation made it possible for freed men and women to marry. Under the new law, regardless of whether the claimant had been free or enslaved when she had married the deceased soldier, Black war widow pension claimants were permitted to submit "proof, satisfactory to the Commissioner of Pensions, that the parties had habitually recognized each other as man and wife, and lived together as such."⁷⁶ The standard of proof required to demonstrate a valid African American marriage was amended one last time in 1873, when Congress required "satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife and were so recognized by their neighbors, and lived together as such up to the date of enlistment."⁷⁷

The Commissioner of Pensions was thus faced with evaluating claims by war widows for federal pensions in light of these statutory

72. See McClintock, *supra* note 67, at 473.

73. CONG. GLOBE, 38th Cong., 1st Sess. 3233 (1864) (statement of Sen. Lafayette Foster, Republican of Connecticut).

74. Act of July 4, 1864, ch. 247, § 14, 13 Stat. 387 (1864) (supplementing Act of July 14, 1862, *supra* note 68, which granted pensions).

75. *Id.*

76. Act of June 6, 1866, ch. 106, § 14, 14 Stat. 56 (1866) (supplementing several acts relating to pensions).

77. Act of June 6, 1873, ch. 234, § 11, 17 Stat. 566 (1873) (revising, consolidating, and amending laws relating to pensions).

definitions of valid African American marriages. Thus, the pension files of African American widows are full of statements provided by the widows themselves, neighbors, Black clergy, slave masters and others attesting to the nature and form of adult relationships between enslaved and free Black people.

Many of the files support Gutman's thesis that relationships among enslaved adults in the antebellum period conformed to traditional norms of monogamous marriage. Quite frequently, enslaved men and women were married in ceremonies conducted by slave preachers. One pension claimant referred to her 1861 marriage by a Black preacher as adhering to "slave rules."⁷⁸ Ellen Waters's application is typical in this regard. Her husband Aaron enlisted in the Union army on September 15, 1863, immediately after he had been freed by the Emancipation Proclamation, and died less than two years later from dysentery, a common cause of death among Civil War soldiers.⁷⁹ Ellen Waters was granted a monthly pension of eight dollars based upon her own testimony as well as testimony provided by two former slaves. They had witnessed the April 3, 1862, ceremony in Jefferson County, Arkansas, in which Ellen Moore and Aaron Waters had been married by Major Waters, "a colored Baptist preacher,"⁸⁰ described as "an illiterate colored man."⁸¹ These statements sufficed to establish a marriage under the 1864 pension act since Mr. and Mrs. Waters "were slaves at the time of the marriage and consequently there was no church or other public record of said event in existence."⁸²

Similar facts were testified to in the pension file of Elias Johnson, a free Black man who enlisted in the First Regiment of the U.S. Colored Troops in Washington, D.C., on May 19, 1863, and died of dysentery on September 6, 1864. His wife, the former Nancy Gordon, was described in the 1846 court papers certifying her freedom as "a dark copper coloured woman . . . about five feet and half an inch high, rather handsome face, sharp pointed chin, and fine regular features, hair long and black and nearly straight and a scar from a burn on the front part of the neck."⁸³ Beginning on September

78. Secondary Proof of Marriage (Nov. 12, 1896), in Pension File of Collin Johnson (application 643,658), N.A. R.G. 15, *supra* note 47.

79. See Widow's Pension Application, Summary of Proof, in Pension File of Aaron Waters (certificate 157,761), N.A. R.G. 15, *supra* note 47.

80. Affidavit of Ellen Waters (Mar. 14, 1871), in *id.*

81. Affidavit of Agnes Waters and Lucinda Waters (July 16, 1866), in *id.*

82. Affidavit of Ellen Waters (Mar. 14, 1871), in *id.*

83. Affidavit of William Brent, Clerk of the Circuit Court of the District of Columbia (Oct. 2, 1843), in Pension File of Elias Johnson (certificate 56,536), N.A. R.G. 15, *supra* note 47.

6, 1864, Mrs. Johnson received a monthly widow's pension of eight dollars from the Bureau of Pensions. In order to secure the pension, Mrs. Johnson had produced the following two documents: a notarized marriage certificate issued by Reverend G. Brown, Pastor of the First Colored Baptist Church in Washington City, D.C., dated March 6, 1850; and an affidavit of two long-time friends of the Johnsons who testified that Elias and Nancy Johnson had lived and cohabited together as man and wife from the date of their marriage up until Mr. Johnson's enlistment in the army, and that they had been regarded as husband and wife by their community.⁸⁴

Preachers were not the only officials who presided over the marriages of enslaved people. Masters sometimes did so as well. Susan and Allen Alexander were both purchased as children by Charles Whitmore and taken from Virginia to his Mount Pleasant plantation in Mississippi. In or around 1838,⁸⁵ they were married by their master in a ceremony described in the following way:

[T]hey stood up before him and he ask [sic] affiant if she was willing to take Allen as her husband and do for him all that a woman should and he asked Allen the same about affiant from that time until Allen was taken while in the army they lived

84. See Affidavit of Joseph Dozier and James H. Johnson (July 21, 1881), *in id.* On May 9, 1872, Milly Williams was awarded a pension due to the war-related death of her husband, George (which had occurred less than two months after he had enlisted on March 11, 1864). In support of Mrs. Williams's claim, the couple's former owners supplied an affidavit stating that Millie "was married at our residence in the County of Cole & State of Missouri to George Williams colored man in 1859 by Isaac Handy a colored ex porter . . . Milly and George Williams lived and cohabited together as man and wife from the day of marriage to the time of his entering the army as man and wife, were so regarded by the affiants and all their friends and neighbors then & until death." Affidavit of Theodore Stanley and Martha M. Stanley (July 14, 1869), *in* Pension File of George Williams (certificate 157,858), N.A. R.G. 15, *supra* note 47.

Similarly, Margaret Johnson was found to have been the lawful wife of Elija Johnson, a colored soldier who was killed in action on August 16, 1864, in Deep Bottom, Georgia. Affidavits supplied in support of Mrs. Johnson's pension claim showed that they had been married by the Reverend Abraham Freed, a minister in Somerset County, Maryland, on November 2, 1856. According to the documents, the Johnsons had lived together for 11 years prior to their marriage, during which time they had had two daughters, one in 1851 and another in 1853. See Pension File of Elijah Johnson (certificate 114,336), N.A. R.G. 15, *supra* note 47. The file does not indicate why they chose to marry in 1856, having "lived together as man and wife for several years preceeding [sic] their marriage." Affidavit of Rev. Nathan C. Conner (Dec. 23, 1867), *in id.*

It is really quite remarkable that in states such as Maryland, Missouri, and Arkansas, border states that had been occupied by Union troops and that had had military governors appointed by Washington in 1862, former slave owners were willing to support the claims of their former slaves for pensions related to their husbands' service in the Union army.

85. See Affidavit of Susan Alexander (Dec. 26, 1874), *in* Pension File of Allen Alexander (certificate 97,533), N.A. R.G. 15, *supra* note 47 ("[T]hey were married a great many years ago, she can not tell when.").

together and cohabited as husband and wife.”⁸⁶

While other slaves on the Mount Pleasant plantation regarded Mr. and Mrs. Alexander as living together as husband and wife, they were unaware that the Alexanders had undergone a formal marriage ceremony conducted by their owner. Louisa Woods, another slave owned by the Whitmores, testified that “they were not married at their owners just took up with each other and lived together for many years they were living together for at least 15 years.”⁸⁷ While this fact did not affect Susan Alexander’s claim to a war widow’s pension, it does reveal something interesting about marital norms amongst enslaved people at that time. Louisa Woods’s testimony is evidence of Tony Kaye’s thesis concerning the variety of slave relationships that included “taking up,” living together, and marriage. The community recognized relationships as permanent, monogamous, and sacred without requiring the marriage ceremony as a necessary formality.

Indeed, some formerly enslaved people testified that it was not the custom to undertake a wedding ceremony in order to create a marriage between slaves. In January 1876, Dilly Bostick was granted a war widow’s pension, due to her husband Joseph’s death from consumption in Alexandria, Virginia, in October 1864.⁸⁸ With respect to her marriage, Mrs. Bostick testified to Bureau agents that she could “furnish no evidence of marriage, as no marriage ceremony took place she and her husband having been married by cohabitation.”⁸⁹ A close friend of the Bosticks testified that “it was not the custom for colored people to marry by regular ceremony.”⁹⁰ This statement was echoed by Christianna Poole, who explained in her pension application that she and a man “went together in the days of slavery both being slaves, there was no marriage ceremony.”⁹¹ These first-hand accounts from formerly enslaved people contradict Gutman’s claim—drawn almost entirely from the reports of white people—that “nonlegal ritual and ceremony accompanied most slave

86. *Id.*

87. Affidavit of Louisa Woods (Dec. 30, 1874), *in id.*

88. See Pension File of Joseph Bostick (certificate 171,629), N.A. R.G. 15, *supra* note 47.

89. Affidavit of Dilly Bostick (Dec. 19, 1887), *in id.*

90. Pension File of Joseph Bostick (certificate 171,629), N.A. R.G. 15, *supra* note 47.

91. Affidavit of Christianna Poole (Dec. 8, 1890), *in* Pension File of Robert Poole (certificate 286,824), N.A. R.G. 15, *supra* note 47; see also Pension File of Charles Alfred (certificate 177,642), N.A. R.G. 15, *supra* note 47 (“She and her said husband being slaves at the time [1857] and no marriage ceremony being recognized by the then existing laws of the State of Louisiana—their marriage was simply a voluntary union between themselves as man and wife.”).

marriages.”⁹² According to Gutman, these ceremonies, such as jumping over a broomstick, converted a “free” slave union into a legitimate slave marriage.⁹³ The pension records reveal, however, that delegitimized “free” slave unions were more common than Gutman’s evidence revealed.

Instead, these records reinforce Brenda Stevenson’s claim that relationships of enslaved people took a number of forms in addition to monogamous marriage. Many formerly enslaved women described how they “took up” with a man, lived with him, perhaps even had children with him, but never sought out the services of a preacher to solemnize the relationship as a marriage.⁹⁴ And it was not uncommon for enslaved men to have more than one wife. For instance, two women claimed to be the widow of Collin Johnson and were therefore entitled to a pension. The pension files reveal that Mr. Johnson had married Caroline Johnson in the summer of 1861 and Harriet Johnson in June of 1862. All three of them lived on the same plantation in Mississippi, and “it was very probable that the soldier lived with both Harriet and Caroline at the same time.”⁹⁵ Ultimately both Caroline and Harriet Johnson abandoned their pension claims.

Daniel Allen appeared to have maintained an even more complicated set of relationships. Two women claimed to be entitled to pensions as his widow; however, in this case, both women were successful. It appears from the record that Daniel Allen was enslaved by William Allen as his personal servant and was brought to Mississippi when William Allen and his family moved there from Maryland in 1836.⁹⁶ William Allen owned two properties in Mississippi: a plantation on the Mississippi River and a home in Vicksburg. Daniel Allen frequently traveled back and forth between these two properties with his owner. It seems that Daniel “took up” with an enslaved woman named Winnie in Vicksburg, as well as a house slave named Henrietta on the plantation. Winnie Allen maintained that she and Daniel were married in 1855. Upon Daniel’s death from smallpox in March of 1864, Winnie applied for and was awarded a war widow’s pension. She received this pension until her

92. GUTMAN, *supra* note 4, at 270.

93. *See id.* at 275.

94. *See, e.g.*, Pension File of Charles Alfred (certificate 146,842), N.A. R.G. 15, *supra* note 47; Pension File of Daniel Allen (application 167,134), N.A. R.G. 15, *supra* note 47; Pension File of Robert Poole (certificate 286,824), N.A. R.G. 15, *supra* note 47.

95. Letter to the Commission of Pensions from F. Farrow, Auditor (Apr. 16, 1897), in Pension File of Collin Johnson (application 643,658), N.A. R.G. 15, *supra* note 47.

96. *See* Pension File of Daniel Allen (application 167,134), N.A. R.G. 15, *supra* note 47.

death.

After Winnie's death, Henrietta applied for a pension as Daniel's widow as well. She maintained that she and Daniel were both house servants in the Williams house in Vicksburg, and that she secretly "had" Daniel without her owners' consent. Only when she became pregnant in 1862 did her mistress find out. Mrs. Williams got angry with Henrietta, but ultimately gave her permission to live with Daniel. From that point forward, Henrietta and Daniel lived as husband and wife.⁹⁷ After emancipation, Daniel and Henrietta moved to Natchez, Mississippi, and were married "under the flag" when Daniel enlisted in the army. Henrietta was regarded as Daniel's wife until his death. The Bureau investigator concluded that "[i]t seems true that the soldier did have two wives."⁹⁸ Because the evidence demonstrated that Daniel cohabited with Henrietta at the time of enlistment, and because "Winnie Allen's case is settled by her death,"⁹⁹ Henrietta was awarded a pension. As part of the claim, Henrietta Allen testified that she had not remarried after Daniel's death—a prerequisite for receipt of a pension—although she "had Lewis Williams for a man for a number of months." Henrietta Allen explained that, "[h]e did not live with me but slept and stayed with me occasionally."¹⁰⁰ Henrietta had a child with Lewis Williams, but the baby was stillborn.¹⁰¹

The distinction between marriage and "having a man" was significant for Mary Johnson as well. When asked whether her deceased husband was her first husband, she replied: "I never lived with any man as his wife before I lived with my husband but I now admit that I had one child by Jim Finley . . . No, I never went under Finley's name. I never lived with Jim Finley. I simply had a child by him."¹⁰²

These records reveal that African Americans emerged out of slavery accustomed to forming a spectrum of culturally sanctioned intimate adult relationships. These practices, we shall see, were not abandoned at the moment when Black people were allowed to marry

97. See Affidavit of Henrietta Williams (Feb. 23, 1883), *in id*; see also BLASSINGAME, *supra* note 20, at 165 (explaining that "the marriage ceremony in most cases consisted of the slaves' simply getting the master's permission and moving into a cabin together.").

98. Pension File of Daniel Allen (application 167,134), N.A. R.G. 15, *supra* note 47.

99. *Id.*

100. *Id.*

101. See *id.* The Bureau agent who worked on Henrietta's claim noted in the file that there was no record of either the birth or burial of the child she had with Lewis Williams: "A colored baby is of less account here to white people than a good dog and is less known." *Id.*

102. Affidavit of Mary E. Johnson (Mar. 24, 1907), *in* Pension File of Frank Johnson (certificate 296,067), N.A. R.G. 15, *supra* note 47.

legally.

African Americans retained their own definition of marriage. Many refused to marry legally and even those who did had far different domestic relations than those of wealthier whites. Nonetheless, African Americans knew enough about the place of legal marriage in southern society to use it as leverage in their struggle to realize their own vision of freedom.¹⁰³

Thus, the reality of family formation among African Americans in the immediate ante- and postbellum periods was more complex than that portrayed by Gutman and other rehabilitative historians of his era. Primary archival evidence, as well as recent secondary accounts, indicate African Americans' nonconformance to Victorian norms in their intimate relationships prior to emancipation. These historical accounts surely complicate the meaning of the "right to marry" enjoyed by freed men and women in the immediate postbellum era. It is to this period that I now turn—an era in which African Americans both celebrated and exercised new rights secured by the Thirteenth and Fourteenth Amendments. The evidence reveals that they did so in a way that clearly demonstrates Wendy Brown's thesis: Legal and political recognition were used by the state as instruments for new forms of regulation and subordination.

III. POSTBELLUM MARRIAGE LAWS AND THE CULTIVATION OF AFRICAN AMERICAN CITIZENS

The initiation and acceptance of African Americans into U.S. society as citizens was by no means the only logical or acceptable implication of the end of slavery. Abraham Lincoln's initial impulse in the 1850s was to emancipate the slaves in the border states and transport them to Liberia.¹⁰⁴ This preference for African American emigration over integration echoed Thomas Jefferson's earlier sentiment that Blacks, once emancipated, would have to be sent elsewhere.¹⁰⁵

103. EDWARDS, *supra* note 21, at 45, 46.

104. See DONALD, *supra* note 69, at 166.

105. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138-143 (William Peden ed., 1982) (1785). Jefferson expressed concern about miscegenation: "When freed, [the Negro] is to be removed beyond the reach of mixture." *Id.* at 143. This is certainly a curious remark, given his now well-documented relationship with Sally Hemings. See generally ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997). After resigning as Governor of Virginia, and while recovering from being thrown from a horse, Jefferson wrote a great deal about the nature of Black people. In his *Notes on Virginia* he provided a rather odd encyclopedic enumeration of the attributes of Black people, "love seems with them to be more an eager desire, than a tender delicate mixture of sentiment and sensation In general, their existence appears to participate more

In August of 1862, Lincoln told a gathering of free Black people:

You and we are different races . . . [Y]our race suffer very greatly . . . by living among us, while ours suffer from your presence [O]n this broad continent, not a single man of your race is made the equal of a single man of ours It is better for us both, therefore, to be separated.¹⁰⁶

By this time, Lincoln recognized the impracticality of returning the enslaved people to Africa, and he considered compensating them for their harm and assisting their emigration to Central America or the Caribbean.¹⁰⁷ Indeed, in December 1862, he arranged for the settlement of five thousand American Blacks in Haiti.¹⁰⁸ Prominent African Americans who shared his pessimism about the possibility of a truly integrated republic urged the recolonization of Liberia or the annexation of one of the territories as a Black homeland, Kansas being the most popular locale.¹⁰⁹

Yet, for a complex set of reasons, the decision was made not to purge African Americans from United States soil, but rather to make them United States citizens. Notwithstanding the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, as well as the enactment of various civil rights laws beginning in 1865, it was commonly believed by white people that citizenship had to be cultivated in African Americans. Marriage laws and the legal regulation of intimate relationships played a significant role in this process of cultural husbandry. Regardless of the technical definition of United States citizenship contained in the 1866 Civil Rights Act and Section One of the Fourteenth Amendment, the dominant view at the time was that African Americans in the immediate postbellum period were not born, but could become, citizens.¹¹⁰ Historian Kenneth Stampp observed in 1956 that "[t]he

of sensation than reflection." JEFFERSON, *supra*, at 139.

106. Abraham Lincoln, Address on Colonization to a Deputation of Negroes (Aug. 14, 1862), in 5 COLLECTED WORKS 370, 371 (Roy P. Basler ed., 1953).

107. See DONALD, *supra* note 69, at 344; see also ERIC FONER, RECONSTRUCTION AMERICA'S UNFINISHED REVOLUTION 6 (1988); GEORGE FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 148-49 (1971); N.A.N. Clevan, *Some Plans for Colonizing Liberated Negro Slaves in Hispanic America*, 11 J. NEGRO HIST. 35, 35-49 (1926); Michael Vorenberg, *Abraham Lincoln and the Politics of Black Colonization*, 14 J. ABRAHAM LINCOLN ASS'N. 23, 23 (1993).

108. See FONER, *supra* note 107, at 6.

109. See *id.* at 600-01.

110. Recall Simone de Beauvoir's similar observation about women: "One is not born, but rather becomes, a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature . . ." SIMONE DE BEAUVOIR, THE SECOND SEX 267 (H.M. Parshley ed. & trans., Vintage Books 1989) (1949).

only way that Negroes ever learned how to live in America as responsible free men was by experience—by *starting* to live as free men.”¹¹¹ To observers like Stamp, emancipation did not render African Americans “responsible free men.” Rather, they needed guidance, training, and, quite frequently, coercive discipline to acquire such a status. As Stamp observed, “[t]he plantation school never accomplished this: its aim was merely to train them to be slaves.”¹¹² Thus, regulation by a new bureaucratic juridical apparatus was necessary to induct African Americans into society as citizens.

A. The Importance of Marriage to Emancipated African Americans

As early as 1774, enslaved people identified the inhumanity of slavery as lying, in significant part, in the inability to marry: “[W]e are deprived of every thing that hath a tendency to make life even tolerable, the endearing ties of husband and wife we are strangers to for we are no longer man and wife than our masters or mistresses thinks proper marred or onmarred.”¹¹³ Abolitionist Angelina Grimké argued that both positive and natural legal principles required that the United States “[n]o longer deny [African Americans] the right of marriage, but let every man have his own wife, and let every woman have her own husband.”¹¹⁴ In 1850, Henry Bibb, an enslaved person, observed: “I presume that there are no class of people in the United States who so highly appreciate the legality of marriage as those persons who have been held and treated as property.”¹¹⁵ Arguing in favor of the 1866 Civil Rights Act, Senator Trumbull specifically identified the right to marry as a necessary aspect of citizenship.¹¹⁶

Thus, the right to marry figured prominently in the bundle of rights understood to have been denied to enslaved people, and was

111. STAMP, *supra* note 20, at 12.

112. *Id.*

113. Petition to the Governor, the Council, and the House of Representatives of Massachusetts (May 25, 1774), reprinted in 1 HERBERT APETHEKER, *AMERICAN NEGRO SLAVE REVOLTS* 8-9 (1943), quoted in PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 109 (1997).

114. Letter from Angelina Grimké to Catharine E. Beecher (June 17, 1837), reprinted in *THE ABOLITIONISTS: MEANS, ENDS, AND MOTIVATIONS* 61-63 (H. Hawkins ed., 1972); see also DAVID A.J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* 91-94 (1998).

115. HENRY BIBB, *NARRATIVE OF THE LIFE AND ADVENTURES OF HENRY BIBB, AN AMERICAN SLAVE, WRITTEN BY HIMSELF* 192 (Negro Univ. Press 1969) (1850).

116. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull, Republican of Connecticut).

considered necessary to any robust conception of liberty.¹¹⁷ Marriage provided a way to establish the integrity of their relationships, to bring a new security to their family lives, and, to affirm their freedom If the prohibition on marriage had underscored their dependent position and the precariousness of their family ties in slavery, the act of marriage now symbolized the rejection of their slave status.¹¹⁸

Formerly enslaved people and abolitionists generally deemed the right to marry one of the most important ramifications of emancipation.

After emancipation, formerly enslaved people traveled great distances¹¹⁹ and endured enormous hardships¹²⁰ in order to reunite families that had been separated under slavery. Shortly after the end of the war, southern states acted quickly to amend their constitutions or enact statutes validating marriages begun under slavery. Laws that simply legitimized slave marriages if the couple were cohabiting as husband and wife when the law went into effect were quite common. Mississippi's 1865 civil rights law was typical: "All freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabited together as husband and wife shall be taken and held in law as legally married."¹²¹

117. See DAVIS, *supra* note 113, at 108-17; FONER, *supra* note 107, at 82-84; MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 133 (1985); GUTMAN, *supra* note 4, at 204-07; MALONE, *supra* note 4, at 166; Workers, Wives, and Mothers, *supra* note 44, at 146-47.

118. Edwards, *supra* note 42, at 101.

119. See, e.g., GUTMAN, *supra* note 4, at 82 ("Northern Reporter John Dennett encountered a freedman who had walked more than 600 miles from Georgia to North Carolina, searching for his wife and children from whom he had been separated by sale.").

120. See LITWACK, *supra* note 4, at 234-35 (noting that "[h]usbands and wives not only located each other in the aftermath of emancipation but made what one Federal officer described as 'superhuman efforts' to find the children who had been sold away from them"). Freedmen's Bureau agents estimated that one in six slave marriages was destroyed by the sale of one or both spouses, some of whom "suffered this wrong more than once." Report of John Eaton, General Superintendent of Freedmen, Department of Tennessee (Apr. 29, 1863), N.A. R.G. 94, *supra* note 3, at 91; see also FONER, *supra* note 107, at 82-84; GUTMAN, *supra* note 4, at 318.

121. Civil Rights Act of Nov. 25, 1865, Ch. 4, § 2, 1865 Miss. Laws 82, 82. Georgia, North Carolina, South Carolina, and Virginia passed similar laws during this period. See, e.g., Act of Mar. 9, 1866, tit. 31, § 5, 1866 Ga. Laws 239, 240 (prescribing and regulating the relation of husband and wife between persons of color); Act of Mar. 10, 1866, ch. 40, §§ 1-5, 1866 N.C. Sess. Laws 99-101 (concerning negroes and persons of color or of mixed blood); Act of 1865, 1865 S.C. Acts 291, 292 (establishing and regulating the domestic relations of persons of color, and amending the law in relation to paupers and vagrancy); Act of Feb. 27, 1865, ch. 18, § 2, 1865 Va. Acts 85 (legalizing marriages of colored persons now cohabitating as husband and wife), in JUNE PURCELL GUILD, *BLACK LAWS OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROES FROM EARLIEST TIMES TO THE PRESENT* 33 (1996); see also LAWS RELATING TO FREEDMEN, COMPILED BY COMMAND OF

Some states took a different approach to the marriage of former slaves, giving "all colored inhabitants of this State claiming to be living together in the relation of husband and wife . . . and who shall mutually desire to continue in that relation," nine months to formally re-marry one another before a minister or civil authority.¹²² These laws further required newly married couples to file a marriage license with the county circuit court, a bureaucratic detail that carried a prohibitively high price for many freedpeople.¹²³ In every state with such laws, failure to comply with these requirements while continuing to cohabit would render the offenders subject to criminal prosecution for adultery and fornication.¹²⁴ North Carolina gave the freed people just under six months to register their marriages with the county clerk. Each month they failed to do so constituted a distinct and separately prosecutable criminal offense.¹²⁵

While many formerly enslaved people merely allowed the law to operate upon them, automatically legitimizing their marriages, others "swamped public officials with demands to validate old and new unions."¹²⁶ Thus, the right to marry for African Americans in the immediate postbellum period had both symbolic and practical significance—symbolic in the sense that enjoyment of the right signaled acceptance into the moral community of civil society, and practical to the extent that social and economic benefits flowed from being legally married.

However, the right to marry was not merely an unconstrained liberty enjoyed by African Americans independent of state interest or control. Even prior to the end of the war, state and federal officials played an active role in impressing upon Black people the responsibilities, rather than the rights, that marriage imposed.

MAJOR GENERAL O.O. HOWARD, COMMISSIONER, BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS, S. EXEC. DOC. NO. 39-6, at 179 (1866) (a collection of Black Laws assembled by the head of the Freedman's Bureau and submitted to Congress in 1866-67).

122. Act of Jan. 11, 1866, ch. 1469, § 1, 1865 Fla. Laws 31.

123. North Carolina entitled the county clerk to charge the newlyweds a fee of 25 cents for the task of filing a certificate of marriage. See Act of Mar. 10, 1866, ch. 40, § 5, 1866 N.C. Sess. Laws 101. In 1866, 25 cents was an amount of money that put nuptial legitimacy well outside the reach of most African Americans. Recall that war widows were expected to support themselves and their children on eight dollars a month.

124. See, e.g., Act of Dec. 14, 1866, ch. 1552, § 1, 1866 Fla. Laws 22.

125. See Act of Mar. 10, 1866, ch. 40, § 6, 1866 N.C. Sess. Laws 101.

126. GROSSBERG, *supra* note 117, at 134; see also LITWACK, *supra* note 4, at 240-41. Litwack comments that "[w]hatever the most compelling reason, mass wedding ceremonies involving as many as seventy couples at a time became a common sight in the postwar South." In addition, he notes that, "[i]n 1866 over 9,000 couples registered their marriages in seventeen North Carolina counties." LITWACK, *supra* note 4, at 133.

B. The Role of Federal Officials in Enforcing Marriage Laws

For some time prior to the establishment of the Freedmen's Bureau in 1865, federal officers played a significant role in the promotion of marriage among Black people. In 1862, John Eaton was appointed by General Grant to set up what were termed "contraband camps," settlements that housed Black fugitives in Tennessee and northern Mississippi.¹²⁷ In April 1863, Eaton reported that "all entering our camps who have been living or desire to live together as husband and wife are required to be married in the proper manner This regulation has done much to promote the good order of the camp."¹²⁸ In March 1864, the Secretary of War made Eaton's regulation official United States policy, and ordered Freedmen's Bureau agents to "solemnize the rite of marriage among Freedmen."¹²⁹ Thereafter, superintendents of the contraband camps uniformly reported that "the introduction of the rite of christian marriage and requiring its strict observance, exerted a most wholesome influence upon the order of the camps and the conduct of the people."¹³⁰ The necessary relationship between morality and citizenship was a constant theme in the approach that federal officers took to the management of African Americans' transition from slavery to freedom. In hearings before the American Freedmen's Inquiry Commission—the federal commission created in 1863 to suggest methods for dealing with the emancipated slaves—Colonel William Pile, the administrator of the Vicksburg, Mississippi, contraband camp, testified to the Commission that

[o]ne great defect in the management of the negroes down there was, as I judged, the ignoring of the family relationship My judgement is that one of the first things to be done with these people, to qualify them for citizenship, for self-protection and self-support, is to impress upon them the family obligations.¹³¹

This view was echoed by John Eaton in his instructions to the federal officials running the contraband camps: "Among the things to be

127. See GUTMAN, *supra* note 4, at 57.

128. Report of John Eaton, General Superintendent of Freedmen, Department of Tennessee (Apr. 29, 1863), N.A. R.G. 94, *supra* note 3, M619, roll 200, at 89-90 [hereinafter Eaton Report]. Gutman reports that "the earliest 'contraband marriage' for which a record exists occurred during the first week of September in 1861." GUTMAN, *supra* note 4, at 412.

129. Special Orders, No. 15 (Mar. 28, 1864), in Eaton Report, *supra* note 128, at 89-90; see also GUTMAN, *supra* note 4, at 18.

130. Report by Chaplain Warren (May 18, 1864), included in Eaton Report, *supra* note 128, at 89-90.

131. Statement of Col. William A. Pile, Testimony taken in Kentucky, Tennessee, and Missouri, November and December 1863, N.A. R.G. 94, *supra* note 3, at frame 139.

done, to fit the freed people for a life of happiness and usefulness, it was obvious that the inculcation of right principles and practices in regard to the social relations ought to find a place."¹³²

In its reports to the Secretary of War, the American Freedmen's Inquiry Commission reflected the view dominant among whites that Black people were uncivilized, degraded, undisciplined, and lived in wholly unchristian ways, but that the rule of law as well as patient guidance from whites would tame and civilize them. Thus the Commission observed that "[t]he law, in the shape of military rule, takes for him the place of his master, with this difference—that he submits to it more heartily and cheerfully, without any sense of degradation."¹³³ Urging an active role for the federal government in the moral cultivation of Black character, the Commission's Final Report concluded on an optimistic note: "[T]hey will learn much and gain much from us. They will gain in force of character, in mental cultivation, in self-reliance, in enterprise, in breadth of views and habits of generalization. Our influence over them, if we treat them well, will be powerful for good."¹³⁴ In support of this claim, the Commission referred to a Canadian high school principal who maintained that proximity to whites could even "whiten" Black people's unattractive physical features.¹³⁵

Thus, federal officials acted as the guardians of the moral practices of Black people in order to qualify them for citizenship. The enforcement of marriage laws was widely regarded as the best lever to accomplish these ends. As Michael Grossberg notes,

[a]lthough their response to most black demands for legal rights was negative, southern whites readily granted the matrimonial request of their former charges. The prevailing belief that marriage civilized and controlled the brutish nature of all people encouraged the use of formal matrimony as a remedy for the widespread immorality and promiscuity that whites believed to prevail among blacks.¹³⁶

Much of the rhetoric of the time related to the need to civilize the freed men and women. Gutman summarized these beliefs as follows: "As slaves, after all, their marriages had not been sanctioned by the

132. Eaton Report, *supra* note 128, at 89-90.

133. PRELIMINARY REPORT, *supra* note 24, at 12.

134. FINAL REPORT, *supra* note 14, at 107 n.1.

135. *See id.* at note ‡ (the principal is quoted as saying that "[c]olored people brought up among whites look better than others. Their rougher, harsher features disappear. I think that colored children brought up among white people look better than their parents.").

136. GROSSBERG, *supra* note 117, at 133.

civil law and therefore 'the sexual passion' went unrestrained."¹³⁷ White officials informed African American audiences that "[t]he loose ideas which have prevailed among you on this subject must cease,"¹³⁸ and that "no race of mankind can be expected to become exalted in the scale of humanity, whose sexes, without any binding obligation, cohabit promiscuously together."¹³⁹

Freedmen's Bureau agents had their hands full dealing with the systemic violence suffered by African Americans at the hands of white people, including lynchings, rapes, beatings, and other brutal assaults,¹⁴⁰ and "outrages," as well as overwhelming white resistance to honoring labor contracts with the newly freed Blacks. Their weekly and monthly reports, however, are replete with exasperation regarding the manner in which Blacks were flaunting the institution of marriage. Agents complained that the freed men and women persisted in "the disgusting practice of living together as man and wife without proper marriage,"¹⁴¹ "living together and calling themselves man and wife as long as it conveniently suits them,"¹⁴² and maintaining bigamous¹⁴³ or adulterous¹⁴⁴ relationships. In "many instances," wrote one agent, "where after being legally and lawfully married they live together but a short time. Separate and marry again or live together without any obligation at all."¹⁴⁵ Time and again, the agents complained that Blacks continued to "act as they did in time of slavery,"¹⁴⁶ clinging to "old habits of an immoral

137. GUTMAN, *supra* note 4, at 295.

138. Edwards, *supra* note 42; at 93 (quoting Alfred M. Waddell, a Confederate army officer and newspaper editor).

139. *Id.* (quoting a member of the Commission that designed the North Carolina Black Codes); see also STAMPP, *supra* note 20, at 12.

140. See GUTMAN, *supra* note 4, at 148; LITWACK, *supra* note 4, at 277-82.

141. Report from Headquarters of the Bureau of Freedmen, Refugees and Abandoned Lands for the state of Louisiana (Sept. 30, 1867), N.A. R.G. 105, M 1027, roll 27, frame 226 [hereinafter N.A. R.G. 105].

142. Report for the month of August, 1867 for Sub District of Oxford, Mississippi (Aug. 31, 1867), N.A. R.G. 105, at M 826, roll 30, frames 147-48; see also Report of Operations of the Bureau, Sub-District of Oxford, Mississippi (Aug. 31, 1867), *in id.* at M 823, roll 30, frames 147-48.

143. Regarding the "possession of several wives and also several husbands," see Report for the month of September, 1867, for the Sub District of Greenville, Mississippi (Sept. 30, 1867), *in id.* at M 826, roll 30, frame 455; Report of the Sub District for Montgomery, Alabama, for the month ending August 31, 1865 (Sept. 1, 1865), *in id.* at M 809, roll 18, frames 566-67.

144. See, e.g., Narrative Report for the month of August, 1867, for the Sub District of Grenada, Mississippi, *in id.* at M 826, roll 30, frame 232; Narrative Report for the Sub District of Tupelo, Mississippi, for the month ending August, 1867 (Aug. 31, 1867), *in id.* at M 826, roll 30, frame 221.

145. Report for the month of August, 1867, from Lt. George Waller, Sub Assistant Commissioner (Aug. 31, 1867), *in id.* at M 826, roll 30, frame 225.

146. Report of the Condition of the Sub Division, Woodville, Mississippi (Oct. 31, 1867), *in*

character.”¹⁴⁷ They were particularly outraged by the habit of “taking up”¹⁴⁸ with a person, and then separating when they tired of one another.¹⁴⁹ “It would appear to be more difficult to change their ideas in this matter than on any other affecting their welfare,”¹⁵⁰ wrote Alvan Gillem, Bureau agent in charge of Mississippi, in 1868. Gillem took a particular interest in the problem of marriage among African Americans, requiring his agents in the Mississippi sub-districts to provide a detailed account of the freedmen’s marital relations each month.

Once emancipated, many African American people found themselves in violation of local marriage laws for a number of reasons. It was not uncommon for a man and woman to marry one another while enslaved, only to experience the eventual sale of the husband to another planter. Subsequently, the wife would marry another man, believing, reasonably, that she would never see her first husband again. Christianna Poole testified to exactly this set of circumstances in her war widow pension application: “My first husband and I went together in the days of slavery, both being slaves, there was no marriage ceremony, and him being sold away, it is impossible for me or anyone else to say anything about him.”¹⁵¹ After emancipation, when formerly enslaved people struggled to reunify relationships shattered by slavery, the first husband might

id. at M 826, roll 30; *see also* Report of Events Pertaining to Bureau of Refugees, Freedmen, and Abandoned Lands, Sub District of Wordville, Mississippi, for the Month ending September, 1867, *in id.* at M 826, roll 30, frame 486; Report for the month of August, 1867 from Lt. George Waller, Sub Assistant Commissioner (Aug. 31, 1867), *in id.* at M 826, roll 30, frame 225.

147. Report of the Condition of the Freedpeople and operations of the Bureau throughout the District for the month of January 1868 (Jan. 31, 1868), *in id.* at M 1027, roll 27, frames 323-24.

148. Report from the Sub District of East Pascagoula, Mississippi for the month of August, 1867 (Aug. 31, 1867), *in id.* at M 823, roll 30; *see also* Report for the Sub District of Rosedale, Mississippi, for the month of October, 1867 (Nov. 14, 1867), *in id.* at M 826, roll 30, frame 1002; Narrative Report for the month of October, 1867 for the Sub District of Yazoo City, Mississippi, *in id.* at M 826, roll 30, frames 784-85; Report of the Condition of the Sub Division, Woodville, Mississippi (Oct. 31, 1867), *in id.* at M 826, roll 30; Narrative Report for the Sub District of Tupelo, Mississippi, for the month ending August, 1867 (Aug. 31, 1867), *in id.* at M 826, roll 30, frame 221; Report of the Sub District for Montgomery, Alabama, for the month ending August 31, 1865 (Sept. 1, 1865), *in id.* at M 809, roll 18, frames 566-67; Testimony taken in Kentucky, Tennessee, and Missouri before the American Freedman’s Inquiry Commission, November and December 1863, N.A. R.G. 94, *supra* note 3, at M 619-201, frame 140.

149. *See* Report of Events Pertaining to Bureau of Refugees, Freedmen, and Abandoned Lands, Sub District of Wordville, Mississippi, for the month ending September, 1867, N.A. R.G. 105, at M 826, roll 30, frame 486.

150. Report upon the Conduct of Affairs Concerning Freedmen in Mississippi for the quarter ending September 30, 1868 (Oct. 14, 1868), *in id.* at M 826, roll 3, frame 1077.

151. Affidavit of Christianna Poole (Dec. 8, 1890), *in* Pension File of Robert Poole (certificate 286,824), N.A. R.G. 15, *supra* note 47.

reappear and expect his wife to live with him as his wife. Thus, many formerly enslaved people found themselves with two or more spouses at the end of the war.¹⁵² Given that bigamy was a crime in every state, persons with multiple spouses were forced to choose one and only one legal spouse and to cease intimate relations and/or cohabitation with others.¹⁵³ Georgia's 1866 law relating to "Persons of Color" set forth the following:

[P]ersons of color, now living together as husband and wife, are hereby declared to sustain that legal relation to each other, unless a man shall have two or more reputed wives, or a woman two or more reputed husbands. In such an event, the man, immediately after the passage of this Act by the General Assembly, shall select one of his reputed wives, with her consent; or the woman one of her reputed husbands, with his consent; and the ceremony of marriage between these two shall be performed.¹⁵⁴

The statute then instructed that persons who fail or refuse to comply with these requirements shall be prosecuted for fornication, adultery, or both.¹⁵⁵ South Carolina imposed a similar statutory duty of election.¹⁵⁶

Even though some state laws were silent on the question of multiple spouses, state and federal officials forced freed men and women to choose one and only one spouse as a matter of practice. In some cases where a freed man or woman was unwilling or unable to choose, Bureau agents felt free to do so for them. An agent in North Carolina reported that "[w]henever a negro appears before me with two or three wives who have equal claim upon him . . . I marry him to the woman who had the greatest number of helpless children who

152. See GUTMAN, *supra* note 4, at 417-25; LITWACK, *supra* note 4, at 241-42. Gutman describes how in some cases women who emerged from slavery with more than one husband would choose a legal husband based upon a number of different factors, such as the man's wealth, or the man's willingness to provide for all of her children, even those fathered by other men. See *id.* at 423-25. Litwack describes how some women chose to reunite with their first husbands, to whom they felt a special moral connection because their marriages had ended due to the forced separation of the couple. Ex-slave Jane Ferguson chose to reunite with her first husband, Martin Barnwell, even though she had married a man named Ferguson after her master had sold away Barnwell: "I told [Ferguson] I never 'spects Martin *could* come back, but if he did he would be my husband above all others." *Id.* at 242.

153. See JESSIE BERNARD, MARRIAGE AND FAMILY AMONG NEGROES 10-11 (1966).

154. Act of Mar. 9, 1866, tit. 31, § 5, 1866 Ga. Laws 240 (prescribing and regulating the relation of husband and wife between persons of color).

155. See *id.*

156. Act of 1865, 1865 S.C. Acts 291, 292 (establishing and regulating the domestic relations of persons of color, and amending the law in relation to paupers and vagrancy).

otherwise would become a charge on the Bureau."¹⁵⁷

Many Bureau agents felt that moral suasion was insufficient to gain African American compliance with marriage laws and determined that the law must be looked to to solve this problem.¹⁵⁸ Their frustration led them to turn adulterers, bigamists, and fornicators over to the local authorities for prosecution under local criminal laws. Some Freedmen's Bureau agents also encouraged white planters to punish Blacks for adultery and fornication.¹⁵⁹ Gillem informed the Washington Bureau office in September 1868 that "I have caused the proper steps to be taken to bring this matter before the Civil Courts and shall urge that offenders be brought to trial and punished."¹⁶⁰ Other officers followed suit.¹⁶¹ "The courts alone can establish a radical cure,"¹⁶² wrote Gillem in October 1867.

George Hall fell victim to this strategy in Tupelo, Mississippi. His wife went to the local Bureau agent and reported that her husband had been cohabiting with another woman. The agent turned him over to the local Justice of the Peace, who had him arrested. Law enforcement officials explained "to him the evils of such a course of conduct and the punishment that would be visited on him by law if he still persisted in such actions."¹⁶³ He was released from custody only after he promised to return to his wife and conduct himself in a proper manner.¹⁶⁴

157. LITWACK, *supra* note 4, at 242; *see also* GUTMAN, *supra* note 4, at 420.

158. *See* Narrative Report for the Sub District of Grenada, Mississippi for the month of September, 1867 (Sept. 30, 1867), N.A. R.G. 105, at M 826, roll 30, frame 426 ("Laws are required to remedy this evil."); *see also* Narrative Report for the Sub District of Grenada, Mississippi, for the month of August, 1867 *in id.* at M 826, roll 30, frame 232 ("It is no uncommon thing for the husband and wife to [illegible] and live in adultery on the same plantation, the planters say they do not sanction it but they are powerless to remedy the evil. Some severe laws will have to be passed and [illegible] executed before these conditions in this respect will be improved.").

159. *See* Workers, Wives, and Mothers, *supra* note 44, at 179.

160. Report upon the Conduct of Affairs Concerning Freedmen in Mississippi for the quarter ending September 30, 1868 (Oct. 14, 1868), N.A. R.G. 105, at M 826, roll 3, frame 1077.

161. *See, e.g.,* Report for the Sub District of Brookhaven, Mississippi for the month of June, 1867 (July 15, 1867), *in id.* at M 826, roll 3, frame 108; Narrative Report for the Sub District of Tupelo, Mississippi, for the month of September, 1867 (Sept. 30, 1867), *in id.* at M 826, roll 30; Narrative Report for the Sub District of Tupelo, Mississippi, for the month of August, 1867 (Aug. 31, 1867), *in id.* at M 826, roll 30, frame 221.

162. Report of the Operations of the Bureau of Refugees, Freedmen and Abandoned Lands for the State of Mississippi for month of October 1867 (Nov. 28, 1867), *in id.* at M 826, roll 3, frames 17-18; *see also* PRELIMINARY REPORT, *supra* note 24, at 10; Report of the Operations of the Bureau in the State of Mississippi for the Quarter ending June 30, 1868 (July 14, 1868), *in id.* at M 826, roll 3, frames 959-60.

163. Narrative Report for the Sub District of Tupelo, Mississippi for the month of September, 1867 (Sept. 30, 1867), N.A. R.G. 105, at M 826, roll 30.

164. *See id.*

As Bureau agents pushed local officials to enforce the marriage laws against the freedmen, it was not uncommon for local judges to seek assistance from the Bureau with domestic cases that came before them. In one instance a probate judge in Tuskegee, Alabama, wrote to Major General Wager Swayne, head of the Freedmen's Bureau in Alabama, seeking instruction in a case in which a freedman with two wives sought to obtain custody of the two children he had had with the wife with whom he did not currently reside. Apparently he had ceased living with the wife in question after the local prosecutor had threatened to arrest him for bigamy some months earlier.¹⁶⁵ Swayne responded that the judge should merely follow the law, a reply in keeping with Swayne's general strategy in Alabama of authorizing local magistrates to act as Bureau agents in most judicial proceedings.¹⁶⁶

Although reluctant at first, state law enforcement officials did, after a time, heed the pleas of Gillem and others to prosecute and jail freed men and women who persisted in maintaining "deplorable" extra-marital relationships. The new marriage laws' automatic legalization of slave marriages was a double-edged sword for many African Americans. Because the laws did not require the formerly enslaved people to "remarry" one another or register their existing marriages with the state, African Americans were able to have their relationships legally sanctioned and legitimized without the additional expense of a wedding or licensing fees. The backdraft of this policy was quite devastating for many Black people, however. More than a few people found they bore the responsibilities that accompanied marriage without enjoying many of the rights attendant thereto.¹⁶⁷

165. See Letter from Judge C.A. Stanton to Maj. Gen. Wager Swayne, Letters Received, Sub District for Alabama (May 13, 1867), in *id.* at M 809, roll 13, frames 134-36. A cynical reading between the lines of the letter suggests that he sought custody of these children for the income he could receive from hiring them out, just as he had hired out the children of the wife with whom he currently resided.

166. See FONER, *supra* note 107, at 149. This approach differed from that of most other Bureau Assistant Commissioners, who insisted on exercising jurisdiction over many state law disputes because of the intransigence of local judicial officers to enforce the law fairly in cases involving freed men and women. According to Foner, Swayne's experiment failed, "for these officials, mostly former slaveholders who had held office under the Confederacy, frequently inflicted severe punishment on freedmen charged with vagrancy, contract violations, or 'insolence' (a crime that did not exist for whites)." *Id.* (footnote omitted).

167. In addition to the strict enforcement of the technical requirements of marriage experienced by African Americans that I describe below, parents of Black children found themselves powerless to protect their children from an oppressive child-apprentice system. Judges were permitted to bind to white employers those children whose parents were determined to be unable to support them. "To blacks, such apprenticeships represented nothing less than a continuation of slavery." FONER, *supra* note 107, at 201. The laws

Recall that in most states the automatic marriage statutes were accompanied by a provision requiring the freedpeople to choose one and only one spouse if the reunion of formerly fractured families left people married to more than one person.¹⁶⁸ If a man, for instance, failed to make such a selection and continued to cohabit with two women, he would be considered married to neither, while at the same time vulnerable to a fornication prosecution. This is exactly what happened to Sam Means. A Georgia jury convicted him of fornication upon a finding that Means, "a negro man, was living with two women as his reputed wives, and had never selected either and made her his lawful wife, as required by the [1866] act."¹⁶⁹

Often couples found themselves legally married when they had never so intended. Gillem acknowledged this problem in his correspondence to Washington in 1868:

This act was doubtless based upon the best of motives. Its effect was to enforce matrimony between tens of thousands of freedpeople who were ignorant of the passage of the act. A large proportion of them is today still ignorant of the purport of that law. It is safe to say that one half of the adult freedmen of this state are by this law married to those with whom they cohabit on the 25th of November, 1865, and are ignorant of their legal marital relations.¹⁷⁰

Southern judges stepped in after a period to rectify this unhappy situation, and, as the following cases demonstrate, the technical requirements of marriage laws were enforced uncompromisingly against African Americans regardless of whether they were shown to have understood the details or implications of this new regulatory regime. In *Williams v. Georgia*,¹⁷¹ the male defendant, whose first name is never mentioned by the court, was shown to have been married to Elizabeth Williams when they were both enslaved. They were separated by their master and sold to different owners, but

empowering judges to remove children from their parents, often after they had just been reunited at the end of slavery, "came close to legalized kidnapping in many instances, depriving parents of children if a white judge deemed it 'better for the habits and comfort' of a child to be bound out to a white guardian." LITWACK, *supra* note 4, at 237; *see also* Edwards, *supra* note 42, at 97 (citing laws that "gave African Americans little but obligations").

168. *See supra* text accompanying notes 152-157.

169. Means v. State, 25 S.E. 682, 682 (Ga. 1896).

170. Annual Report of the Operations of the Bureau of Refugees, Freedmen and Abandoned Lands for the State of Mississippi for the year ending October 14, 1868 (Dec. 12, 1868), N.A. R.G. 105, *supra* note 141, at M 826, roll 3, frame 1183; *see also* Brown v. State, 52 Ala. 338, 340 (1875) ("The only witness [to the alleged wedding] was an ignorant negro woman, who probably was unable to understand the meaning of what was actually said and done.").

171. 67 Ga. 260 (1881).

were reunited on December 21, 1864, two months after General Sherman marched to the sea.¹⁷² Thereafter, Elizabeth “associated immorally with another, and the defendant quit her and married another woman.”¹⁷³ Since Williams had reunited with Elizabeth before March 9, 1866 (the effective date of the act legitimizing pre-existing slave marriages) and did not “quit” her until after that date, he was determined to have been legally married to Elizabeth when he married his second wife. The court rejected the defendant’s argument that he did not intend his cohabitation with Elizabeth in 1866 to amount to a legal marriage. Instead the court ruled that the 1866 Act married the couple and that “[h]is wife was unfaithful; he got mad and married again without divorce. Being a free citizen, *he must act like one*, carrying the burdens, if he so considers them, as well as enjoying the privileges of his new condition.”¹⁷⁴

In *State v. Melton*,¹⁷⁵ Allen Melton’s conviction for bigamy was upheld by the North Carolina Supreme Court. The trial court found that Melton had been married to Harriett Melton when both of them were enslaved, and that they had continued to cohabit as husband and wife after emancipation. By operation of the state’s 1866 marriage law, they were “ipso facto married (Act of 1866, c. 40) and no acknowledgment before an officer was essential.”¹⁷⁶ Melton subsequently married Delia Ann Teel in 1894, without having divorced his first wife. On these facts, Melton was convicted of bigamy.¹⁷⁷

172. One witness who testified at trial dated the couple’s reunion by reference to the date federal forces occupied Savannah. *Id.* at 261. It was not uncommon in this era for African American people to date events by reference to important personal or cultural events. This case would make an interesting addition to introductory evidence texts, as the Georgia Supreme Court held that “[s]uch a great public event as Sherman’s march to the sea, and the time it occurred, would be judicially taken cognizance of without proof.” *Id.* at 262. Time, dates, and ages, in general, were something enslaved people were unable to keep account of; they certainly did not have watches, and were unable to date their own ages because many had been separated from their parents at an early age. *See, e.g.*, Testimony of Charlotte Burris, Testimony taken in Kentucky, Tennessee, and Missouri, November and December 1863, N.A. R.G. 94, *supra* note 3, at M 619, roll 201, page 81 (“Q: How old are you? A: That is what has grieved me a good deal. I can’t tell you my age to save my life. You know when children are separated from their parents early, they don’t know how old they are.”).

173. *Williams*, 67 Ga. at 261.

174. *Id.* at 263 (emphasis added). The court did note, however, that the trial judge had heeded the jury’s recommendation that he receive a very light sentence for the crime. *See id.*

175. 26 S.E. 933 (N.C. 1897).

176. *Id.* at 934.

177. In contrast, in an 1864 case in which an enslaved person, Stephen King, had represented publicly that he was married to Nancy Moreland, the court nonetheless found that he had not committed bigamy. King had left Moreland at the end of the war, but resumed cohabitation and sexual relations with her for roughly a year in January 1866. In 1868, he married Henrietta Grubbs and was thereafter convicted of bigamy. At trial it was argued that

So too, a Black man named Kirk was convicted of bigamy having lived with a woman on the effective date of the Georgia automatic marriage statute in 1866, left her in 1879, and thereafter married another woman without having obtained a divorce.¹⁷⁸ Ignorance of the law served as no defense.

Thus, even in the absence of matrimonial intentions, African Americans were held to the substantive obligations of marriage and divorce imposed by the technical operation of law. The application of the laws in this fashion was regarded as necessary to inculcate African Americans in the obligations of citizenship— if they wanted to be respected as citizens, they had better act like them.

Other freed men and women found themselves in legal jeopardy when they knowingly complied with the legal requirements pertaining to the creation of a marriage, but persisted in the old ways by refusing to dissolve their marriages according to the technical requirements of divorce. In 1867, Celia McConico married David Hartwell. After two and a half years of marriage, they “mutually agreed to separate and did then separate from each other as husband and wife.”¹⁷⁹ A year later McConico married Edom Jacobs and was thereafter prosecuted for bigamy.¹⁸⁰ At trial McConico argued that since Alabama’s 1867 law automatically solemnized pre-existing slave marriages without legal formalities, she assumed she was able to dissolve her marriage without legal formality.¹⁸¹ An Alabama jury convicted her of bigamy and the court sentenced her to two years in the state penitentiary. Her conviction and sentence were affirmed by the Alabama Supreme Court.¹⁸²

Freedmen’s Bureau agents frequently reported their dismay with the manner in which freedpeople ignored the requirements of the law, even when they were fully aware of its technical demands. A

King did not know that he could be punished if he married a second time without divorcing Nancy. The Georgia Supreme Court reversed King’s conviction. The court reasoned that while enslaved persons might have called their relationships “marriages,” they may not have comprehended the sacredness of the marriage tie:

[T]here were also a large number of cases among slaves where the marriage tie was very loose. It had not the sanction of law; and circumstances, inevitable in in [sic] their character, made it liable to many interruptions, and when freedom was cast suddenly upon the race, it is not strange that for some time both men and women should cohabit under circumstances where it was very doubtful what was the true relation which they proposed to occupy to each other. They might be man and wife, they might be living together immorally.

King v. Georgia, 40 Ga. 244, 247-48 (1869).

178. See Kirk v. Georgia, 65 Ga. 159 (1880).

179. McConico v. State, 49 Ala. 6, 6 (1873).

180. See *id.*

181. See *id.* at 7.

182. See *id.* at 8.

local agent in Mississippi wrote in 1867 that he would

hear of men leaving their wives and running away with other women to parts unknown and some women leaving their husbands, taking up with other men. I feel confident these acts are not done through ignorance of the law in such cases, but more from the want of a will to comply with the law. I have explained the law to them with reference to adultery etc. but without much avail.¹⁸³

Thus, freedpeople who “took up” or were “sweethearts” but who failed to formalize their relationships in accordance with the law were prosecuted for adultery, fornication or both. Others who neglected or chose not to comply with technical requirements for obtaining a divorce, and began a sexual relationship with another person not their lawful spouse, were prosecuted for adultery, bigamy or both.

Marital infidelity or immorality also formed the basis for the denial of pension benefits for African Americans war widows who had lawfully married after 1866 but behaved in what was considered an unseemly manner after the death of their husbands. When Congress amended the pension laws in 1866, it included a provision denying pension rights to a widow who was shown to have engaged in “immoral conduct.”¹⁸⁴ The 1882 amendments required the termination of a widow’s pension where she was shown to live in an “open and notorious adulterous cohabitation.”¹⁸⁵ Mary Johnson fell victim to these provisions when her pension claim was rejected because she was found to have “cohabitated with other men from within two or three months after the death of her husband.”¹⁸⁶ Similarly, Elizabeth Johnson lost her claim for a pension when the investigator concluded that “for more than twenty years she was mistress of one of the most disreputable houses of prostitution” in New Orleans.¹⁸⁷

The Freedmen’s Bureau, working in tandem with local law

183. Narrative Report for the Sub District of Tupelo, Mississippi, for the month ending August, 1867 (Aug. 31, 1867), N.A. R.G. 105, at M 826, roll 30, frame 221; *see also* Narrative Report for the Sub District of Tupelo, Mississippi, for the month ending October, 1867 (Oct. 31, 1867), *in id.* at M 826, roll 30, frame 812 (“There is much need of a reform with reference to the marriage relations of the freed people in this Sub District, they either do not understand the law in this particular, or disregard its teachings. I am inclined to think the latter.”).

184. Act of June 6, 1866, ch. 106, § 11, 14 Stat. 56 (1866).

185. Act of Aug. 7, 1882, ch. 438, § 2 (amending 57 U.S. REV. STAT. § 4702).

186. Pension File of Eli Johnson (application 253,796), N.A. R.G. 15, *supra* note 47.

187. Letter from Henry H. Molers, Special Examiner, to Hon. John C. Black, Commissioner of Pensions (Feb. 18, 1888), *in* Pension File of Edward Johnson (application 215,782), N.A. R.G. 15.

enforcement authorities, undertook an aggressive campaign to force freed men and women to comply with the requirements of local marriage laws. As such, the "right to marry," so celebrated in many quarters, was experienced by many African Americans of this era as an unwelcome and punitive responsibility that resulted in the incarceration of many people.

C. Black Community Enforcement of Traditional Marital Norms

Many African American people were acutely aware of the symbolic role that marriage played in the transformation of their status from slave to citizen. Northern Black elites were often as judgmental as whites when it came to the practices of poor Blacks. Laura Edwards noted that

[m]any African-American leaders were quite aware that white northerners and southerners alike used marriage as a barometer of their people's fitness for freedom, and they urged poor blacks to adopt the domestic patterns common among elite whites. This, they argued, would help convince the nation that ex-slaves deserved the rights and privileges of freedom.¹⁸⁸

In support of this effort, one African American leader argued, "[l]et us do nothing to re-kindle the slumbering fires of prejudice between the two races. Remember, we are on trial before the tribunal of the nation and of the world, that it may be known . . . whether we are worthy to be a free, self-governing people."¹⁸⁹

The work of transforming formerly enslaved people into citizens was not left to the state alone. The task of discipline and punishment for those who kept up the old ways was taken up by Black people themselves. Dan Johnson, it appears, did not consider marrying the woman with whom he had lived for many years until he sought to become a member of the St. John's Lodge of Odd Fellows in 1868.

188. EDWARDS, *supra* note 21, at 56.

189. Remarks of James H. Harris, *quoted in id.* at 56. Immediately after the war, Federal Freedmen's Bureau officers also compiled lists of exemplary African American men who might be appointed to various political offices in the military governments set up by the Bureau after Congress passed the first Reconstruction Act. See Richard Lowe, *The Freedmen's Bureau and Local Black Leadership*, 80 J. AM. HIST. 989 (1993). Lowe argues that the "black men who, in [the Bureau's] opinion, had demonstrated some ability and capacity for leadership in the two years since the end of slavery," were more than likely light skinned. *Id.* at 992. Bureau agents explicitly disfavored "black men who had already established a reputation for alienating the native white community." *Id.* at 995. Thus, Lowe concludes, the "black leaders" listed by Bureau officers were not, in many cases, the people whom the Black community would have identified had they been asked. Here, as elsewhere, the freedmen who won the praises of white military and civilian authorities served as examples against which "bad blacks" were unfavorably compared for refusing to play within the bounds of white supremacy and Victorian ideology.

After his death, his widow applied for a pension, and one witness testified that "they were living together in adultery at the time he petitioned to become a member [T]he Lodge would not let him join until he married."¹⁹⁰

In *Taylor v. State*,¹⁹¹ an African American man accused of having two wives was prosecuted for violating Mississippi's bigamy law. At the end of the trial, the typed charge sent to the racially mixed jury mistakenly contained the district attorney's written comments: "This is among a people of loose ways; try to elevate your race."¹⁹² The defendant was thereafter convicted. On appeal, the Mississippi Supreme Court interpreted the district attorney's holographic instructions as a message to the Black members of the jury:

[I]nasmuch as the accused was a colored man, and a number of his own race were on the jury, the words were liable to be mistaken by the jurors for a portion of the charge, and as constituting a judicial exhortation to convict the prisoner for the good of the race.¹⁹³

Notwithstanding this reading, the appellate court found the district attorney's admonition to be harmless error.¹⁹⁴

Dennis Taylor's conviction for bigamy and Dan Johnson's compliance with Odd Fellow rules reflect three key aspects of the cultivation of Victorian norms in African Americans. First, "civilized Blacks" were performing their duty as members of society by sitting on a jury—a right only recently afforded African American men—or by joining civic clubs. Second, those very model citizens were acting as instruments in the policing and punishment of undomesticated or uncivilized Blacks who had persisted in behaving in the "old ways." Third, Dennis Taylor, having been convicted of a felony, of course was sent to jail, but also most likely lost the right to vote and sit on juries. As such, he was legally and socially segregated from his brothers, who earned the status of citizen by comporting themselves correctly in their roles as jurors and guardians of Victorian moral values.

Colored newspapers also played a role in encouraging African American people to understand their responsibilities relative to the

190. Pension File of Dan Johnson (application 429,023), N.A. R.G. 15, *supra* note 47.

191. 52 Miss. 84 (1876).

192. *Id.* at 88.

193. *Id.* at 88-89.

194. *See id.* The court also rejected another ground asserted by the defendant to set aside the verdict. The former master of the defendant was a member of the jury and had stated to the other jurors during deliberation that "he knew the accused had at least three wives." *Id.* at 87.

marriage relation. *The Savannah Tribune*, formerly *The Colored Tribune*, printed an editorial in November 1876 strongly counseling Black women against "Marrying in Haste":

Do not place yourself habitually in the society of any suitor until you have decided the question of marriage; human wills are weak, and people often become bewildered and do not know their error until it is too late A promise may be made in a moment of sympathy, or even half delirious ecstasy, which must be redeemed through years of sorrow and pain.¹⁹⁵

In like fashion, the *Semi-Weekly Louisianan* cautioned its readers to consider the sanctity and magnitude of the marital obligation so as to avoid a wedding being a "sudden and unconsidered thing—the freak or the passion of an excited hour."¹⁹⁶

These examples show that by the mid-1870s some African Americans were both performing within and serving Victorian cultural institutions, at once evidencing their own successful domestication and regulating those who did not conform to larger cultural norms relating to sex, gender, and sexuality. For some, conformity to these norms was a price paid instrumentally for the respect they believed it would buy. For others, no doubt, this was what it meant to be a free person.

IV. THE REGULATION OF AFRICAN AMERICAN MARRIAGE RELATIVE TO OTHER VICTORIAN SOCIAL MOVEMENTS

The regulation of African American intimate heterosexual relationships did not take place in a cultural vacuum, of course. Rather, Blacks jumped, or were pushed, into a fast-moving stream whose flow they were in no position to resist. As a result, they found themselves pulled under by the often contradictory currents of those who sought to renegotiate a number of fundamental social identities and policies through the institution of marriage. The uncompromising enforcement of marriage laws against African Americans contrasted with a period of lax enforcement of those same laws against whites. This seeming anomaly can be explained only partially, I believe, by reference to the racism of southern judges and prosecutors. The strict enforcement of marriage laws for persons of color was also a necessary part of a larger cultural transformation of the relationship between production and reproduction. Marriage laws were used in the latter half of the

195. *Marrying in Haste*, SAVANNAH TRIB., Nov. 13, 1876, at 4.

196. *Hasty Marriages and Divorces*, SEMI-WEEKLY LOUISIANAN, May 28, 1871, at 1.

nineteenth century to delimit the family as a place of dependency that stood opposed to the realm of independence and agency enjoyed by white men in the wage-labor market. As such, the advocates of this particular masculine position had an investment in African American respect for and compliance with marriage laws that operationalized the boundary between dependency and autonomy. To allow the freed men and women to liberally negotiate the terms of what it meant to be a husband and a wife threatened to undermine their position in a larger social struggle over masculine agency and feminine dependency.

A. Nineteenth-Century Family Law Reform

By the middle of the nineteenth century virtually every state recognized the viability of common-law marriage, allowing the Supreme Court to declare a consensus on the issue among courts and commentators alike when it approved the doctrine in *Meister v. Moore*.¹⁹⁷ In this sense, the rise of common-law marriage reflected a generally observable trend in the reform of legal relationships during the Progressive Era, most often characterized as the transformation from status to contract.¹⁹⁸ While this generalization is arguably true for some aspects of nineteenth-century society, it would be too simple a description of marital relations during this period.¹⁹⁹ Instead, as Ariela Dubler has persuasively demonstrated, the law of marriage in the Gilded Age reflected a hybrid of status and contract, or "status-contract,"²⁰⁰ where courts often spoke in terms of contract but applied notions of status, or intoned the importance of socially created status and then applied the rules of contract.²⁰¹

197. 96 U.S. 76 (1877) (stating that common-law marriage "has become the settled doctrine of the American courts.").

198. See generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

199. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *YALE L.J.* 2117, 2147 (1996) ("[T]he conventional 'status to contract' story told about the nineteenth-century reform of marriage law obscures as much as it reveals about the evolution of the marital relationship in the modern era."); Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 *YALE L.J.* 1885, 1891-95 (1998).

200. Dubler, *supra* note 199, at 1907.

201. See *id.* at 1912-15. In 1892, the Supreme Court of Washington in *In re McLaughlin's Estate*, 4 Wash. 570 (1892), refused to recognize the marriage of a couple who had failed to comply with the state's formal matrimonial requirements. In so doing, the court explained its insistence on compliance with technical formalities as an essential element of legal marriage:

By adhering to the statutory provisions all objectionable cases of this kind are eliminated, parties are led to regard the contract as a sacred one, as one not lightly to be entered into, and are forcibly impressed with the idea that they are *forming a relationship in which society has an interest, and to which it is a party.*

Despite the general acceptance of common-law marriage by the judiciary, legislative reformers of this era voiced concern about a crisis of the family provoked by the perceived ease with which divorce could be obtained,²⁰² the prevalence of male promiscuity,²⁰³ the incidence of polygamy amongst certain social groups,²⁰⁴ and the nascent feminist movement, which was diminishing the traditional role of the husband as the head of the household.²⁰⁵ "Each departure from orthodoxy . . . undermined needed domestic division of labor, sexual restraints, paternal authority, and household economic responsibilities."²⁰⁶ Increasingly, marriage was positioned as an institution that would "save the race from moral ruin."²⁰⁷ This anxiety about moral chaos reflected reformers' more general preoccupation with the perceived disintegration of social order.²⁰⁸

Id. at 590 (emphasis added).

202. In the first half of the 19th century, some southern states allowed divorce exclusively by petition to the state legislature, and then only with great hesitation. See NELSON MANFRED BLAKE, *THE ROAD TO RENO* 51 (1962). According to Blake, South Carolina granted no divorces during the entire antebellum period. *Id.* at 63. "By 1867, at least 33 of the then 37 states had prohibited legislative divorce," *id.* at 56, yet the Supreme Court upheld the constitutionality of legislative divorce as late as 1888 in *Maynard v. Hill*, 125 U.S. 190, 208 (1888). As state legislatures were becoming overwhelmed by divorce petitions, however, the responsibility for granting divorces was gradually shifting to the courts. By 1897, all of the states had eliminated legislative divorce. See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 655 (1984).

203. See GROSSBERG, *supra* note 117, at 10-11.

204. In 1856, the Republican Party condemned slavery and polygamy as the "twin relics of barbarism." 1 NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Donald B. Johnson & Kirk H. Porter eds., 1973); see also Sarah Barringer Gordon, "The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America, 83 J. AM. HIST. 815 (1996).

205. See, e.g., *The Future of the Family*, 7 THE NATION 453, 454 (1868) ("[T]he women's rights movement . . . is doing much to weaken the family bond. One effect of it is undoubtedly to make women more and more unwilling to accept the theory of their position taught by the church and held by men, and to make men think more and more lightly of the responsibility of keeping the family pure and intact.").

206. GROSSBERG, *supra* note 117, at 10-11.

207. *Society and Marriage*, 10 THE NATION 332, 332 (1870). The race to which the author referred is, presumably, the human race.

208. Frank Gaylord Cook gave voice to this bourgeois anxiety in a series of articles in *The Atlantic Monthly* in 1888. This distress derived, in significant part, from the United States' profound transformation from a relatively homogeneous nation to one characterized by racial, ethnic, and religious diversity. In this new world order, social respectability, moral discipline, and social order were much more difficult to maintain, necessitating the deployment of institutions such as marriage to restore badly needed discipline. See Frank Gaylord Cook, *The Marriage Celebration in the Colonies*, 1888 ATLANTIC MONTHLY 350; Frank Gaylord Cook, *The Marriage Celebration in Europe*, 1888 ATLANTIC MONTHLY 245; Frank Gaylord Cook, *The Marriage Celebration in the United States*, 1888 ATLANTIC MONTHLY 520; Frank Gaylord Cook, *Reform in the Marriage Celebration*, 1888 ATLANTIC MONTHLY 680; see also Dubler, *supra* note 199, at 1903-05. The enthusiasm with which southern legislatures enacted laws prohibiting miscegenation clearly derived from a similar concern with the deterioration of natural boundaries and the proper social order more generally.

Attacks on common-law marriage formed one of the centerpieces of the marital reform movement of this era. These attacks were grounded in the notion that marriage was not like other contracts, which the parties can create and dissolve at will, but was rather a special kind of status-creating compact in which society had a particular interest. As a consequence, state after state enacted positive laws setting forth the terms of valid marriages and limiting the means of dissolution.²⁰⁹

Undergirding these reform efforts lay two important norms of particular relevance to the application of these marriage laws to newly freed African Americans. First, formal marriage, it was believed, performed the very important social function of taming wanton licentiousness and civilizing uncontrollable desire: “[T]he first object of marriage still is to regulate [sexual passion].”²¹⁰ For some reformers and courts of this period, common-law marriage was too fluid an institution to accomplish this crucial disciplinary function: “These loose and irregular contracts, as a general thing, derive no support from morals or religion but are most generally founded in a wanton and licentious cohabitation.”²¹¹

Second, reformers increasingly convinced both legislatures and courts of the public stake in marriage. While marriage was treated as a civil contract, it was a special kind of contract insofar as the state was obligated to enact laws prescribing who could marry and according to what positive legal requirements, as well as imposing significant restraints upon the terms of exit, or divorce. The Washington Supreme Court advanced this view when it held in 1892 that,

[a]fter the marriage relation is entered into, it is then considered in light of a civil institution, in which the state itself has an interest, as well as the parties. And the interest of the state is that these contracts shall be permanent and not revokable [sic] at the will of the parties.²¹²

209. These reforms took the form of numerous statutes setting forth nuptial fitness, licensing and registration requirements, and substantive requirements dictating the nature of the commitment the husband and wife were making to one another. “These laws challenged the common-law reliance on consent as the major test of nuptial fitness,” and in its place imposed a requirement that the parties possess proper matrimonial intentions, that is, the intent to set up and maintain a household grounded in republican family values. GROSSBERG, *supra* note 117, at 64-152. See *In re McLaughlin’s Estate*, 4 Wash. 570, 572 (1892) (“under our statutory regulations a marriage ceremony must be performed in one of the ways pointed out by the statute in order to render a marriage valid.”).

210. *Society and Marriage*, *supra* note 207, at 332 (emphasis in original).

211. *Denison v. Denison*, 35 Md. 361, 381 (1871).

212. *In re McLaughlin’s Estate*, 4 Wash. at 575; see also Hendrik Hartog, *Marital Exits and*

All of these views of marriage were invoked by the Supreme Court in 1888, when Justice Field summarized the status of marriage during the era of reform: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."²¹³ Thus the Court concluded that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."²¹⁴ For Victorian legislators and jurists alike the question of legal marriage involved "the best interests of society, and the preservation of the home and family—the foundation of all society."²¹⁵

Despite significant legislative reform of marriage during this period, many courts persisted in recognizing common-law marriages well into the next century. They did so, however, by tacitly adopting a rule of recognition that, in the end, advanced the social policy objectives of those concerned about licensing depravity with lax marriage laws. Thus, courts of this era were willing to validate marriages that were deficient in form, yet traditional in substance. At the same time, they expressed significant moral opprobrium toward those couples who sought to renegotiate the fundamental normative structure of marriage in their nonconforming couplings,²¹⁶ and

Marital Exemptions in Nineteenth-Century America, 80 GEO. L.J. 95, 97-98 (1991); Dubler, *supra* note 199, at 1903-05.

213. *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (arguing that a legislative grant of a divorce, without the consent of the wife, to a husband who had breached the marriage contract by abandoning his wife, was an impairment of contract).

214. *Id.* at 211.

215. *Id.* at 588.

216. Two nineteenth-century domestic relations cases are particularly good examples of the Gilded Age movement away from common-law marriage and toward the establishment of marriage as an inherently public, not private, institution. In *Kansas v. Walker*, 36 Kan. 297 (1887), the Kansas Supreme Court described how Lillian Harman and E.C. Walker had entered into an "autonomistic marriage," *id.* at 297, in which they had declared to one another that "[m]arriage, being a strictly personal matter, we deny the right of society, in the form of church and state, to regulate it, or interfere with the individual man and woman in this relation." *Id.* at 299. They then acknowledged to one another that a life-long commitment may be an unrealistic promise, and that

[t]he promise to "love and honor and obey so long as both shall live" commonly exacted of woman, we regard as a highly immoral promise. It makes woman the inferior, the vassal of her husband, and when from any cause love ceases to exist between the parties this promise binds her to do an immoral act, viz.: it binds her to prostitute her sex-hood at the command of an unloving and unlovable husband.

Id. E.C. Walker then declared that "she remains sovereign of herself . . . I cheerfully and distinctly recognize this woman's right to the control of her own person; her right and duty to retain her own name; her right to the possession of all property . . ." *Id.* at 300. Both Lillian Harman and W.C. Walker were thereafter convicted of violating the state's fornication statute

toward men who "treated bigamy as an informal means of common-law divorce."²¹⁷

Yet, these accounts of Gilded Age courts' willingness to persist in lax enforcement of marriage laws and strict enforcement of divorce laws²¹⁸ seem to better describe the experiences of white people than people of color. Recall how federal officials zealously attempted to persuade refugees in the contraband camps and, later, freed men and women to comply with the technical requirements of marriage laws.²¹⁹ Even where freed men and women were found to have entered into traditional couplings but innocently transgressed the formal requirements of marriage, they were subject to the full weight of legal sanctions,²²⁰ whereas a similarly mistaken white couple would most likely have escaped the attention of local prosecutors or courts.²²¹

Here, as virtually everywhere else, race and racism shaped the way social policy was advanced through public institutional means. First, it is important to acknowledge the different views held by federal and local officials during this period. While federal officers believed the best interests of both the freed people and society at large required African Americans to comply with marriage laws, local

and given jail sentences of 45 days and 75 days respectively. The Kansas Supreme Court affirmed their convictions and sentences on the grounds that the state could legitimately punish people of this ilk who refuse to comply with the formal legislative requirements for marriage. Interestingly enough, the court held that even if the marriage were found to be a valid common-law marriage, the legislature could impose a punishment for the parties' failure to ratify the substantive form of the marital relationship: taking each other as man and wife. *Id.* at 307. "Punishment may be inflicted on those who enter the marriage relation in disregard of the prescribed statutory conditions, without rendering the marriage itself void." *Id.* at 304. As the Chief Justice, concurring, made clear, "society is supremely interested in having marriage entered into" according to the statutory requirements. *Id.* at 309 (Horton, C.J., concurring).

In *Peck v. Peck*, 155 Mass. 479 (1892), the Massachusetts Supreme Judicial Court was asked to decide the validity of a "copartnership" entered into by a man and a woman in 1877:

Recognizing love as the only law which should govern the sexual relationship, we agree to continue this copartnership so long as mutual affection shall exist, and to dissolve it when the union becomes disagreeable or undesirable to either party. We also agree that all property that shall be acquired by mutual effort shall be equally divided on the dissolution of said copartnership

Id. at 479-80. After living together for 11 years pursuant to this contract, the man in the relationship left, and the woman sought a divorce and alimony on the ground of desertion. The court rejected her petition, holding that "[t]here being no marriage, their subsequent cohabitation points only to the illegal contract under which it began." *Id.* at 480.

217. Timothy J. Gilfoyle, *The Hearts of Nineteenth-Century Men: Bigamy and Working Class Marriage in New York City, 1800-1890*, 19 PROSPECTS 135, 151 (1994).

218. See OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 105-60 (1922); WILLIAM L. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 26-27 (1967); Dubler, *supra* note 199, at 1909.

219. See *supra* notes 128-150

220. See *supra* notes 171-174, and accompanying text.

221. See, e.g., *Meister v. Moore*, 96 U.S. 76 (1877).

officials were far less adamant. Freedmen's Bureau agents frequently expressed frustration at the fact that local authorities²²² and juries²²³ initially failed to take the freedmen's flouting of marriage laws as seriously as did the Bureau. By 1868, Bureau agents concluded that a few prosecutions might well serve as a more persuasive means of scaring the freedmen into compliance with the law: "It is to be hoped that the civil authorities of the State will soon recognize the necessity of taking action in a matter in which all good citizens should feel an interest and by a few proper examples exert a salutary effect upon the masses."²²⁴

The initial sluggishness of local officials to heed federal officials' calls to enforce the marriage laws against African Americans can be further explained by the racist and hetero-patriarchal views many southerners held about the respectability of marriage generally. Given great skepticism that the freed men and women would adhere to the sacred vows that marriage entailed, together with disgust that African American wives might acquire an unearned elevation in status by playing the lady to their husbands' gentlemen,²²⁵ some southern civic leaders voiced concern that legitimating African American marriages would cheapen the respectability that their own wives enjoyed as veritable southern ladies.²²⁶

222. See, e.g., Narrative Report for the Sub District of Macon, Mississippi, for the month of August, 1867 (Sept. 4, 1867), N.A. R.G. 105, at M 826, roll 30, frames 160-61 ("The civil authorities pay no attention in these matters between the freemen concerned."); Annual Report of the Operations of the Bureau of Refugees, Freedmen and Abandoned Lands for the State of Mississippi for the year ending October 14, 1868 (Dec. 12, 1868), *in id.* at M 826, roll 3, frames 1182-84 ("[B]oth judges and juries are loth [sic] to punish freedmen for a violation of obligations which are generally incurred by a solemn consent.").

223. See Narrative Report of the Sub District of Macon, Mississippi, for the month of October 1867 (Nov. 9, 1867), *in id.* at M 826, roll 30, frame 775 ("Four or five cases of adultery were tried at the recent term of the Circuit Court and in no [sic] one instance did the jury convict."); Report for the month of September, 1867, for the Sub District of Greenville, Mississippi (Sept. 30, 1867), *in id.* at M 826, roll 30, frame 455 ("The courts and grand juries of these counties, as far as I can ascertain, have never taken any notice of this misconduct in these particulars.").

224. Report of the Operations of the Bureau in the State of Mississippi for the Quarter ending June 30, 1868, (July 14, 1868), *in id.* at M 826, roll 3, frames 959-60; see also Frankel, *supra* note 44, at 180.

225. "[F]ormer masters protested that freedwomen aimed 'to play the lady and be supported by their husbands like white folks.' For them, the exchange of a husband's support for a wife's service at home symbolized white supremacy, but when mirrored in black marriages was a sign of profligacy." STANLEY, *supra* note 8, at 189 (quoting letter from M.C. Fulton to Brig. Gen. Davis Tilson (Apr. 17, 1866)).

226. See 3 ARTHUR W. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY 39-40 (1919) (quoting a Mississippi physician: "And by God, youah so-called constitution tears down the restrictions that the fo'sight of ouah statesmen faw mo' than a century has placed upon the negro in ouah country. If it is fo'ced on the people of the state, all the damned negro wenches in the country will believe they're just as good as the finest lady."); EDWARDS, *supra* note 21, at 147-52, 166-67; JONES, *supra* note 58, at 59-60.

While the racism of local leaders in the postbellum south should not be minimized, racism alone cannot explain the manner in which the state aggressively regulated African American marriages after emancipation. The disintegration of previously salient social boundaries, a fear of social disorder, and the increase in industrialization provoked a reexamination of masculine agency in which African Americans played both witting and unwitting roles. It is to this issue that I now turn in order to provide a more complete account of the way African Americans were inducted into the institutions of marriage and civil society.

B. Postbellum Re-imagination of Masculinity

In some important ways, nineteenth-century America could well be characterized as a period in which contract prevailed over coercion. Much of the momentum underlying the success of abolition and the passage of the 1866 Civil Rights Act can be traced to a free labor movement that idealized market actors who were free to alienate their labor in the rapidly industrializing nation. While it is undeniable that there was a trend during this period in favor of common-law marriage based in freedom of contract, the robust defense of this liberty interest vanished the moment it conflicted with other social policy goals, such as the maintenance of the domestic sphere as the site of female dependency. Ariela Dubler argues convincingly that through the trope of common-law marriage, courts were privatizing “women’s dependency in the era before the rise of the modern welfare state.”²²⁷

The liberalism of this era is perhaps most famously reflected in the Supreme Court’s *Lochner* decision, yet, as both Amy Dru Stanley and Nancy Cott have argued, the era’s liberalism did more than undergird nascent industry; it also shored up white masculinity, which had come loose from its antebellum mooring. Prior to the abolition of slavery, “[t]he wage laborer was an independent person, self-supporting, one who participated in the vast social exchange of the marketplace and obeyed its rules—the polar opposite of slavery.”²²⁸ This “intellectual tradition dissociated relations of personal dependency from transactions based on free contract That indeed had been the ideological lesson of slave emancipation, the basis for vindicating the free wage system.”²²⁹ Yet without slavery

227. Dubler, *supra* note 199, at 1887.

228. Amy Dru Stanley, *Beggars Can’t Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1272 (1992).

229. STANLEY, *supra* note 8, at 105.

as the antithesis of white male agency, it fell upon liberal reformers of the latter half of the nineteenth century to re-anchor the integrity of white masculine autonomy in some new institutionally antipodal position of dependency, and thereby rehabilitate the autonomous Enlightenment man as a *plausible bounded mirage*.²³⁰

Enter the family and the myth of separate spheres, argue Cott and Stanley. The freedom that contracting actors enjoyed in the marketplace stood in opposition to the dependency that necessarily characterized the household. Separate spheres doctrine thus “fence[d] in the dependencies of the home, to stop them from permeating and contaminating the marketplace where labor power was bought and sold.”²³¹ Thus, having lost slavery as the form of dependency against which free labor could contrast itself, masculine autonomy turned to marriage, the household, and femininity as tropes against which to distinguish itself.²³²

As the rhetoric surrounding the institutional reform of marriage invoked widespread concerns about immorality and respectability, it did so in the service of installing marriage and the household as the principal sites of private dependency. To be a husband necessarily entailed the status of head of household, while to be a wife rendered one structurally dependent upon the husband’s support.²³³ The neat trick of this ideology was at once to affirm the wife’s dependence upon the husband for support, and to deny the husband’s dependence upon the wife’s unpaid household labor “without which he could never maintain the facade of independence.”²³⁴ As Nancy Cott observes of this period, “[h]aving and supporting dependents was *evidence* of independence.”²³⁵ Thus, the self-governing free man of the antebellum era was, or could be, master to his slaves, while

230. I borrow this marvelous term from BENEDICT ANDERSON, *THE SPECTRE OF COMPARISONS: NATIONALISM, SOUTHEAST ASIA AND THE WORLD* 4 (1998).

231. Amy Dru Stanley, *Home Life and the Morality of the Market*, in *THE MARKET REVOLUTION IN AMERICA: SOCIAL, POLITICAL, AND RELIGIOUS EXPRESSIONS, 1800-1880*, at 74, 86 (Melvin Stokes & Stephen Conway eds., 1996).

232. See Cott, *supra* note 18, at 1452 (“Independence in this sense for the male household head existed in counterpoint to the dependence of others [within the household].”)

233. The law of coverture accomplished this fine deed. See LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998); CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988); Toby L. Ditz, *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750-1820*, 47 WM. & MARY Q. 256 (1990); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995).

234. Dubler, *supra* note 199, at 1917 n.184. Thus, “the ideology of dependency insidiously obscured the ways in which the family was structured to render the husband ‘independent’ and the wife ‘dependent.’” *Id.*

235. Cott, *supra* note 18, at 1452.

this same man became master over a household of dependents in the postbellum period. This domestic grouping—a household headed by a free man—emerged in the late nineteenth century as the fundamental unit of both consumption and production.

Since “[i]ndependence inhered in the self-governing individual who could dispose of his own labor profitably,”²³⁶ it would be disastrous for white masculinity if Black men could exercise that self governance in a way that undermined the stability of marriage as the institution that bounded dependence in the home and in femininity. Thus the freedom that African Americans enjoyed by virtue of the Thirteenth and Fourteenth Amendments had to be filtered through larger liberal notions of freedom that were being renegotiated during this era. Just as liberal reformers rejected the call from some feminists to liberalize marriage laws,²³⁷ so too postbellum officials were shocked that African Americans thought they were free to organize their intimate and family lives as they wished.²³⁸ Freedmen’s Bureau agents were aghast that “[l]iving together in a state of concubinage they have come to look upon as a privilege, in fact, a right which no one has a right to interfere with.”²³⁹ An agent in Mississippi commented incredulously that “the men contend that they had a right to have as many women as they could support.”²⁴⁰

Thus, one of the overarching projects of the postbellum era was the task of making women into wives and men into husbands. African American people were, for better or for worse, swept up into this social venture. Southern legislators were not, however, willing to leave this indoctrination process to chance or to the whims

236. *Id.* at 1453.

237. See RICHARDS, *supra* note 114.

238. Some African Americans of the time refused to participate in the institution of legal marriage because “it place[d] an impossible tax upon freedom in the form of a divorce.” CHARLES S. JOHNSON, *SHADOW OF THE PLANTATION* 83 (1934). In some cases, newly freed men and women chose not to avail themselves of the formalities of legal marriage because they regarded the institution “more binding than necessary or practical.” *Id.* (“It gives license to mistreatment; it imposes the risk of unprofitable husbands.”); see also FRANKLIN, *supra* note 26, at 34-35.

239. Narrative Report for October 1867 from George S. Smith, Sub Assistant Commissioner for the Sub District of Macon, Mississippi, to Lt. Merritt Barber (Nov. 9, 1867), N.A. R.G. 105, *supra* note 141, at M 826, roll 30, frame 775. Alvan O. Gillem, Bureau agent for the State of Mississippi, expressed the same anguish to his command in Washington with respect to the irregular domestic arrangements of the freedmen: “They appear to consider the immemorial license which has been allowed to them in the particular as a right which ought not to be interfered with.” Report of the Operations of the Bureau of Refugees, Freedmen, and Abandoned Lands in the State of Mississippi for the Month of October 1867 from Alvan O. Gillem to Maj. General O.O. Howard (Nov. 28, 1867), *in id.* at M 826, roll 3, frame 454.

240. Report for September 1867, Sub District for Greenville, Mississippi (Sept. 30, 1867), *in id.* at M 826, roll 30, frame 455.

of extra-legal suasion. Their ideological investment in the boundary between domesticity and dependency, on the one hand, and free labor, autonomy, and masculinity on the other was operationalized explicitly in the Freedmen's Bureau policy and state laws passed in the immediate postbellum period.

In its sketch of the charge to the soon-to-be formed Freedmen's Bureau, the American Freedmen's Inquiry Commission was unhesitating in its inclination to link the independence or agency of freedmen and laborers to their economic responsibilities qua husbands and fathers.²⁴¹ Thus, the Commission observed that "it is most desirable that a freedman should learn, as speedily as possible, that emancipation means neither idleness nor gratuitous work, but fair labor for fair usages."²⁴² Then, one paragraph later, the Commission recommended that, "[in] connection with this regular payment of wages . . . each married [Black] laborer or soldier, at the time his pay is received, cede a part of it, proportioned to the size of his family, for their support."²⁴³

The Bureau took such a strong position relative to the marriage of newly freed slaves in large part because they wanted to shift the costs of support of indigents from the state to private parties: "The issue demanded immediate attention . . . so that freedpeople would not become a 'huge white elephant,' dependent upon the state or their former masters for support."²⁴⁴ According to Frankel, "[t]he agency's overriding concern was keeping blacks from depending on the federal government for economic assistance."²⁴⁵ By solemnizing marriages, the husband became legally responsible for the care and support of his wife and children, thereby relieving the state of any obligation. To avoid any uncertainty, statutes imposing legal responsibility for maintenance upon African American adults were

241. Virtually the first question asked of every white witness was, "[w]hat do you think of the capability of the slaves of this state to take care of themselves?" See, e.g., Testimony of George W. Fishback, Proprietor, St. Louis, Missouri, Testimony taken in Kentucky, Tennessee, and Missouri, November and December 1863, N.A. R.G. 94, at M 619, roll 201, page 141. All of the Black witnesses before the Commission where queried about their likelihood of self-support. See, e.g., Testimony of Colored Man (name unknown), *in id.* ("It is a mistaken idea that the black people cannot take care of themselves."); Testimony of Charlotte Burris, *in id.* ("We have never been dependent; we have never been troublesome to anybody. If it is little, we have enough, and are satisfied with what we have."); see also PRELIMINARY REPORT, *supra* note 24, at 1 ("these refugees need not be, except for a very brief period, any burden whatever on the government.").

242. PRELIMINARY REPORT, *supra* note 24, at 15.

243. *Id.* at 15-16.

244. EDWARDS, *supra* note 21, at 32 n.23.

245. Workers, Wives, and Mothers, *supra* note 44, at 155.

passed in many states during this period.²⁴⁶

Freedmen's Bureau agents played an active role in forcing freedmen within their control to support their wives and children. Frequently Bureau agents adjudicated domestic disputes between freed men and women. Jane Moon filed a complaint with an Austin, Mississippi Agent, claiming that her husband had not supported her. The Bureau agent noted in his monthly report that the case was "settled by James agreeing to support her; and take good care of her in future."²⁴⁷ Similarly, a Louisville, Mississippi Agent reported that "Rachael complains that her husband beats her wrongfully, and will not support the children, Jack, present, ordered to do better by wife, and children, or be put in jail for one week."²⁴⁸ At least one agent observed that the cause would be advanced by authorizing Bureau agents to "solemnize the rites of marriage."²⁴⁹

At the same time the southern states enacted laws legitimizing African American marriages, they were careful to build into these laws systems of masculine agency and the privatization of dependency. In the same breath that the South Carolina legislature declared the legitimacy of the marriages of previously enslaved persons, they deemed paupers or persons who were public charges incompetent to contract marriage.²⁵⁰ The Louisiana legislature mandated that all labor contracts with freedmen for labor on plantations be "made with the heads of the families [and] shall embrace the labor of all the members of the family."²⁵¹ Furthermore, married African American men in South Carolina were forced by the state to support their families, and if they failed to do so, were subject to a judge forcibly binding them to work for renewable year terms—usually in the service of former slave owners.²⁵²

246. See, e.g., Act of Mar. 9, 1866, tit. 31, § 5, 1866 Ga. Laws 240 ("That among persons of color, the parent shall be required to maintain his, or her children, whether legitimate or illegitimate.").

247. Report of Cases Tried During the Month Ending November 31, 1867, from Headquarters of the Sub District of Austin, Mississippi (Dec. 2, 1867), N.A. R.G. 105, *supra* note 141, at M 826, roll 31, frame 16.

248. Report of Sub District of Louisville, Mississippi for December 1867 (Jan. 3, 1896), *in id.* at M 826, roll 31, frame 476.

249. See Report of the Sub District of Montgomery, Alabama for the month ending August 31, 1865 (Sept. 1, 1865), *in id.* at M 809, roll 18, frame 567.

250. See Act of 1865, 1865 S.C. Acts 291, 292 (establishing and regulating the domestic relations of persons of color and amending the law in relation to paupers and vagrancy).

251. HOWARD, *supra* note 121, at 182.

252. A South Carolina law provided that

[a] husband, not disabled, who has been thus convicted of having abandoned or turned away his wife, or has been shown to fail in maintaining his wife and children, may be bound to service by the district judge, from year to year, and so much of the profits of his labor as may be requisite applied to the maintenance of his wife and children.

The greater threat to the integrity of African American families during this period lay, however, in the postbellum apprenticeship system. White southern authorities respected the integrity of Black families only in so far as parents were able to support their children beyond a certain subsistence level. When, however, parents were found to be paupers,²⁵³ were not habitually employed in some honest, industrious occupation,²⁵⁴ were deemed to be of notoriously bad character,²⁵⁵ or where it was determined that it would simply be better for the habits and comfort of a child,²⁵⁶ a court could order that a minor child be bound as an apprentice to some white person, often the family's former owner,²⁵⁷ until the child reached the age of majority.

These postbellum statutes are typical of the ways in which southern legislatures permitted African Americans to participate in the institution of marriage, but did so on terms that respected the integrity of households they created only in so far as (1) the father or husband performed his proper role as provider and head of household, and (2) the household itself was the place where the needs of dependents were met privately.²⁵⁸ To the extent that poverty or some "moral infirmity" hindered African American men from performing the role of republican husband or father, they were categorically denied the privilege of participation in this exalted institution.

The challenge these legislators faced was to structure the binary relation of free labor and domesticity in terms of autonomous masculinity and dependent femininity, yet to do so in such a way that these social identities could be positioned racially as well. Thus, white men needed to grant Black men a degree of autonomy in their collaborative project re-imagining masculine agency, but at the same

Act of 1865, 1865 S.C. Acts 291, 292. Wives were similarly subject to being bound to service but only in relation to their failure to support their children as they bore no reciprocal obligation to support their husbands. *See id.*; *see also* Stanley, *supra* note 228, at 1283-88.

253. *See, e.g.*, Act of Nov. 22, 1865, ch. 5, 1865 Miss. Laws 86, 86-90 (regulating the relation of master and apprentice, with respect to "freedmen, free negroes, and mulattoes").

254. *See, e.g.*, Act of Mar. 10, 1866, ch. 40, §15, 1866 N.C. Sess. Laws 99, 104-05.

255. *See, e.g.*, 1865 S.C. Acts 291 (establishing and regulating the domestic relations of persons of color and amending the law in relation to paupers and vagrancy).

256. *See* Md. Code Ann., Apprentices, art. VI, § 31 (1860).

257. *See, e.g.*, Act of Nov. 22, 1865, ch. 5, 1865 Miss. Laws 86.

258. This view was also expressed by the American Freedmen's Inquiry Commission in 1863: Superintendents of the Contraband Camps "will, as a general rule, find no difficulty in inducing refugees, when bringing with them those whom they acknowledge to be their wives and children, to consent to a ceremony, which, while it legitimizes these relations, imposes upon the husband and father the legal obligation to support his family." PRELIMINARY REPORT, *supra* note 24, at 4.

time white men wanted to preserve the right to portray Black male sexuality as a fundamental threat to white society.²⁵⁹ Similarly, postbellum reformers retooled the household and the family as the natural site of dependency while determining to deny Black women and wives the respectability that occupying that space granted to white women. Southern officials were thus challenged to legislate on a razor's edge, cutting a narrow path between the rights that had been assured the freed men and women, and the interests of liberalism, patriarchy, and white supremacy.

What is more, I have a strong suspicion that Black men were prosecuted for bigamy, fornication, and adultery—serious crimes in many states in the postbellum period—in part to achieve their disenfranchisement.²⁶⁰ This was accomplished either explicitly through statutes or constitutional provisions that disenfranchised certain convicted criminals,²⁶¹ or implicitly by binding African American men to work in circumstances that made voting a practical impossibility.

It is very likely that the prosecution of Black men for these crimes was related to the evolution of what Jennifer Roback has termed “a labor-market cartel among white employers” in the postbellum period.²⁶² In an effort to maintain the viability of the plantation system in the absence of slave labor, southern planters enlisted the aid of the government to “accomplish what race prejudice could not do by itself”²⁶³ any longer. Postbellum Black Codes made vagrancy, poverty, disrespect for white people, and a wide array of otherwise inoffensive conduct criminal, and African American men were selectively and falsely prosecuted for an array of crimes. Their incarceration made their labor available to private employers at cut rate prices.²⁶⁴

The use of convict leasing and criminal surety laws assured an abundant and cheap source of labor in the postbellum era in a

259. See Martha Hodes, *The Sexualization of Reconstruction Politics: White Women and Black Men in the South After the Civil War*, 3 J. HIST. SEXUALITY 402 (1993). See generally MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* (1997).

260. I am indebted to Denise Morgan for suggesting this connection.

261. See, e.g., MISS. CONST. of 1890, § 241 (deeming men convicted of, inter alia, bigamy unqualified to vote); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding the constitutionality of § 241 of the Mississippi Constitution of 1890).

262. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1162 (1984).

263. *Id.*

264. See FONER, *supra* note 107, at 199-201.

manner that perpetuated slave labor for African American men.²⁶⁵ Under the convict lease system, which was particularly popular in southern states in the 1880s,²⁶⁶ convicted criminals were leased from the state by private employers to work at extremely low wages and under working conditions that exceeded those of the antebellum slave system in their barbarism.²⁶⁷ Criminal surety laws worked a similar expropriation of labor. Under these laws, a person convicted of a crime for which a financial penalty was assessed as sentence could enter into a peonage contract with a bondsman who would pay the convict's fine in exchange for allowing the surety to hire him out until he had worked off his debt.²⁶⁸ In Mississippi, for instance, the law provided that any Black person who failed to pay within five days all fines or costs levied in connection with the conviction of a misdemeanor "shall be hired out by the sheriff or other officer, at public outcry, to any white person who will pay said fine and all costs."²⁶⁹ The working conditions of criminal surety peons fell below even those of the leased criminal. In 1914, the United States

265. In 1919, Alabama Governor Thomas E. Kilby declared his state's chain gangs and convict-lease system "a relic of barbarism . . . a form of human slavery." GEORGE BROWN TINDALL, *THE EMERGENCE OF THE NEW SOUTH, 1913-1945*, at 213 (1967). See generally RAY S. BAKER, *FOLLOWING THE COLOR LINE 95-97* (1964); MARY CHURCH TERRELL, *PEONAGE IN THE UNITED STATES: THE CONVICT LEASE SYSTEM AND THE CHAIN GANGS IN THE NINETEENTH CENTURY* 62, 308 (1907); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, in *BLACK SOUTHERNERS AND THE LAW, 1865-1900* at 35, 59 (Donald G. Nieman ed., 1994); Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441 (1997); Matthew J. Mancini, *Race, Economics and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 340 (1978); Nancy A. Ozimek, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753, 758-59 (1997); Emily S. Sanford, *The Propriety and Constitutionality of Chain Gangs*, 13 GA. ST. U. L. REV. 1155 (1997); Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 651 (1982). Mississippi abandoned the convict lease system in 1890, Tennessee in 1895, Georgia in 1908, Florida in 1924, and North Carolina in 1933. See F. Green, *Some Aspects of the Convict Lease System in the Southern States*, in *THE JAMES SPRUNT STUDIES IN HISTORY AND POLITICAL SCIENCE: ESSAYS IN SOUTHERN HISTORY* 121 (1949).

266. See Roback, *supra* note 262, at 1170.

267. Because the convicts' leaseholder had no interest in keeping the workers alive or healthy past the term of their sentence, the death rate among convict-workers was very high. According to Roback,

the firm had no interest in keeping the convicts alive past the end of their sentence or contract period, since the convict has no "scrap" or "resale" value. In this respect, the lease system was worse than slavery: since a slaveholder receives the full capitalized value of the slave's output for his entire working life, he has an incentive to maintain the slave's health. The death rate on these chain gangs illustrate this difference: mortality rates were as high as forty-five percent.

Id. at 1170 (footnote omitted).

268. See *id.* at 1175.

269. Act of Nov. 29, 1865, ch. 23, § 5, 1865 Miss. Laws 165, 167 (punishing certain offenses).

Supreme Court invalidated criminal surety systems as violations of the Thirteenth Amendment,²⁷⁰ but convict leasing programs remained in effect up to and through the turn of the century in Virginia, Georgia, Florida, Tennessee, Alabama, and Louisiana.²⁷¹ Although these laws were racially neutral on their faces, virtually “all the convicts caught in this lethal system were blacks.”²⁷²

Thus the aggressive enforcement of bigamy, fornication, and adultery laws against African Americans served the material needs of white planters to repopulate the plantations with cheap, fungible labor while at the same time denying these newly enfranchised citizens the opportunity or right to vote.

V. CONCLUSION

This history illustrates the problem of treating the right to marry as an unproblematic civil rights victory and in treating “slavery” and “liberty” as antinomous terms. While the right to legally marry brought significant economic, legal, and psychological benefits to freedpeople, there were also harmful consequences. The larger Victorian society had its own agenda, that the freedpeople did not share, and that worked to the detriment of African American men and women. These agendas were advanced in part through the use of marriage laws. Some at the time believed that the glory of the right to marry was that the slave master no longer functioned as the head of the African American household. While this was true, it did not mean that African American men and women enjoyed the kind of matrimonial autonomy often portrayed in romanticized accounts of this period. Rather, the state stepped in to regulate the form and structure of African American intimate relationships in ways that coerced freedpeople to participate in the re-imagination of masculine agency by conforming to republican family norms while at the same time appropriating their labor in order to repair and industrialize the postbellum southern economy.

My aim has been to demonstrate the complexity of rights discourses in movements for personal and political emancipation. Rather than simply liberating a people to make autonomous decisions free from state-imposed constraints, the granting of rights signals the inauguration of a new relationship with the state. Rights

270. See *United States v. Reynolds*, 235 U.S. 133 (1914).

271. See Roback, *supra* note 262, at 1165.

272. Schmidt, *supra* note 265, at 651; see also MILFRED C. FIERCE, *SLAVERY REVISITED* 48 (1994) (stating that the “convict labor system [was] comprised of up to ninety percent African-Americans”), quoted in Gorman, *supra* note 265, at 449.

both shape political culture and produce political subjects. In the postbellum era, African Americans acquired an identity as rights holders and entered the “bureaucratic juridical apparatus”²⁷³ through which those rights were negotiated. Wendy Brown frames this dynamic in the following way: “Rights . . . may subject us to intense forms of bureaucratic domination and regulatory power even at the moment that we assert them in our own defense.”²⁷⁴

Frederick Douglass once said that freedom cannot be given, it must be seized. An examination of the relationship of the newly freed slaves to the state during Reconstruction suggests that citizenship cannot be seized but must be cultivated. Marriage laws were expressly deployed by the larger culture to discipline African Americans who failed to “act like citizens.” As Laura Edwards observes,

[w]ithout the moral influence of marriage, many white legislators and editorialists maintained, freedpeople would never take responsibility for themselves and their families. Completely ignoring the state’s complicity in denying legal marriage to enslaved people, white commentators cited its absence as further evidence proving the immorality and irresponsibility of exslaves.²⁷⁵

This is not to say that we should abandon rights-based struggles altogether. Instead, we should appreciate the inherent complexities that lie in such strategies. The award of rights must not be regarded as the telos of any social movement but instead as a new location from which to negotiate state power and the production of political identity for individuals and groups. Again, Wendy Brown has adroitly described the degree to which rights strategies cut two or more ways, “naturalizing identity even as they reduce elements of its stigma, depoliticizing even as they protect recently produced political subjects, empowering what they also regulate.”²⁷⁶

Typically, the exclusion from an institution on racial or other similarly suspect grounds provokes demands for justice articulated in terms of equal access to that institution. The experiences of African Americans in the postbellum era demonstrate how a demand for institutional access must be accompanied by a critique of the institution to which access is being sought. This critique must include an analysis of the way in which the state always retains the power to

273. BROWN, *supra* note 10, at 121 n.41.

274. *Id.*

275. Edwards, *supra* note 42, at 93.

276. BROWN, *supra* note 10, at 121.

manipulate participation in an institution in ways that may be at odds with the interests of new rights holders. The experiences of African Americans in the immediate postbellum era illustrate well this paradox of simultaneous identity, empowerment, and regulation. And it holds lessons for contemporary rights-based movements in which the right to marry is held out as an intrinsic good, the enjoyment of which is regarded uncritically as an advance in the cause of equality and freedom.

