Becoming a Citizen: Reconstruction Era Regulation of African American Marriages

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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).
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, or as elaborate as a “Scripture Wedding,” or grand banquet thrown for the entire community. 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

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, 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 are 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. 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,” 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” even as those rights are asserted as a means of liberation.

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

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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 DREU 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).


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.\footnote{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?"\footnote{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."\footnote{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.\footnote{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

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\footnote{11. Id. at 99; see also STANLEY, supra note 8, at 175-217.}
\footnote{12. BROWN, supra note 10, at 99.}
\footnote{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).}
\footnote{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.\textsuperscript{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 lifelong, monogamous commitments to one another,\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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 epipheno menon 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.
Dru Stanley 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. Indeed, family life amongst enslaved people has recently attracted renewed interest from feminist historians, as evidenced by several outstanding new texts. 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.
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 Mannys.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

27. See Frazier, supra note 20.
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. 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.

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." 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. 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." 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.


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.  

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*. 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. 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. 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."

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, Tony Kaye, Ann Patton Malone, Laura Edwards, Donna Franklin, and Noralee

37. *See* GUTMAN, *supra* note 4, at 461-75.
38. *Id.* at 3.
Frankel 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." 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." These children were often described as "sweetheart children." 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. 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.
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 longstanding, 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.
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

56. GUTMAN, supra note 4, at 32; see also Ariela Gross, “Like Master, Like Man”: Constructing Whiteness in the Commercial Law of Slavery, 1801-1861, 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.
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. 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. 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.

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."

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


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 ahistorical 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.\textsuperscript{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.”\textsuperscript{67} Survivors of deceased white soldiers were the beneficiaries Congress had in mind when the pension laws were amended in 1862.\textsuperscript{68} Yet, shortly after colored soldiers began to fight in the Union army in early 1863,\textsuperscript{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.\textsuperscript{70} To Confederate officials, “[t]he most efficient way to deal with the vexing issue of black prisoners was to take no prisoners.”\textsuperscript{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

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


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

\textsuperscript{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.” \textit{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.” \textit{Id.} at 431. \textit{Dudley Taylor, The Sable Arm: Negro Troops in the Union Army,} 1861-1865 (1956) is authoritative on this issue; \textit{see also} \textit{Litwack, supra} note 4, at 65-79 (describing Black interest in and white resistance to the recruitment of Black men for a “liberating army”).

\textsuperscript{70} \textit{See Litwack, supra} note 4, at 88.

\textsuperscript{71} \textit{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. 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.

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." 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."

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." 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."

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

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72. See McClintock, supra note 67, at 473.
75. Id.
76. Act of June 6, 1866, ch. 106, § 14, 14 Stat. 56 (1866) (supplementing several acts 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.” 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. 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,” described as “an illiterate colored man.” 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.”

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.” Beginning on September

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.
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.\footnote{See Affidavit of Joseph Dozier and James H. Johnson (July 21, 1881), \textit{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), \textit{in Pension File of George Williams} (certificate 157,858), N.A. R.G. 15, \textit{supra} note 47.}

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,\footnote{See Affidavit of Susan Alexander (Dec. 26, 1874), \textit{in Pension File of Allen Alexander} (certificate 97,533), N.A. R.G. 15, \textit{supra} note 47 (“[T]hey were married a great many years ago, she can not tell when.”).} 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
together and cohabited as husband and wife.  

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." 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. 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." A close friend of the Bosticks testified that “it was not the custom for colored people to marry by regular ceremony." 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." 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.
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." According to Gutman, these ceremonies, such as jumping over a broomstick, converted a "free" slave union into a legitimate slave marriage. 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. 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." 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. 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.”).
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.
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.\(^\text{103}\)

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.\(^\text{104}\) This preference for African American emigration over integration echoed Thomas Jefferson's earlier sentiment that Blacks, once emancipated, would have to be sent elsewhere.\(^\text{105}\)

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\(^{103}\) 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

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 BEAUVIOR, 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." To observers like Stampp, 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 Stampp observed, “[t]he plantation school never accomplished this: its aim was merely to train them to be slaves.” 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 thinkes proper marred or onmarried.” 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.” 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.” Arguing in favor of the 1866 Civil Rights Act, Senator Trumbull specifically identified the right to marry as a necessary aspect of citizenship.

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

111. STAMPP, supra note 20, at 12.
112. Id.
considered necessary to any robust conception of liberty.\textsuperscript{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.\textellipsis 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.\textsuperscript{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 distances\textsuperscript{119} and endured enormous hardships\textsuperscript{120} 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."\textsuperscript{121}

\textsuperscript{117} See Davis, supra note 113, at 108-17; Foner, supra note 107, at 82-84; Michael Grossberg, Governing the Heart: 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.

\textsuperscript{118} Edwards, supra note 42, at 101.

\textsuperscript{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.").

\textsuperscript{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.

\textsuperscript{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. 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. 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. 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.

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.” 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.

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**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).


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.


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. 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.” 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.” 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.” 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

[One 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.]

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.
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.
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."\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,

\begin{quote}
though 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.\textsuperscript{136}
\end{quote}

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

\begin{itemize}
\item \textsuperscript{132} Eaton Report, supra note 128, at 89-90.
\item \textsuperscript{133} PRELIMINARY REPORT, supra note 24, at 12.
\item \textsuperscript{134} FINAL REPORT, supra note 14, at 107 n.1.
\item \textsuperscript{135} See id. at note 7 (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.”).
\item \textsuperscript{136} GROSSBERG, supra note 117, at 133.
\end{itemize}
civil law and therefore ‘the sexual passion’ went unrestrained.”

White officials informed African American audiences that “[t]he loose ideas which have prevailed among you on this subject must cease,” 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.”

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, 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,” “living together and calling themselves man and wife as long as it conveniently suits them,” and maintaining bigamous or adulterous 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.” Time and again, the agents complained that Blacks continued to “act as they did in time of slavery,” 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.
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.
146. Report of the Condition of the Sub Division, Woodville, Mississippi (Oct. 31, 1867), in
character." They were particularly outraged by the habit of "taking up" with a person, and then separating when they tired of one another. "It would appear to be more difficult to change their ideas in this matter than on any other affecting their welfare," 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. Christiana 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." After emancipation, when formerly enslaved people struggled to reunify relationships shattered by slavery, the first husband might

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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 Woodville, 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 Christiana 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:

[Person]s 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 ’spect Martin could come back, but if he did he would be my husband above all others.” Id. at 242.


155. See id.

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.
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.
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.\(^\text{165}\) 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.\(^\text{166}\)

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.\(^\text{167}\)

\(^{165}\) 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

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168. See supra text accompanying notes 152-157.
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. 358, 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.\textsuperscript{172} Thereafter, Elizabeth "associated immorally with another, and the defendant quit her and married another woman."\textsuperscript{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."\textsuperscript{174}

In \textit{State v. Melton},\textsuperscript{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 Harriet 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."\textsuperscript{176} Melton subsequently married Delia Ann Teel in 1894, without having divorced his first wife. On these facts, Melton was convicted of bigamy.\textsuperscript{177}

\textsuperscript{172} One witness who testified at trial dated the couple's reunion by reference to the date federal forces occupied Savannah. \textit{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." \textit{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. \textit{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.").

\textsuperscript{173} \textit{Williams}, 67 Ga. at 261.

\textsuperscript{174} \textit{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. \textit{See id.}

\textsuperscript{175} 26 S.E. 933 (N.C. 1897).

\textsuperscript{176} \textit{Id.} at 934.

\textsuperscript{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. 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.” A year later McConico married Edom Jacobs and was thereafter prosecuted for bigamy. 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. 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.

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:

[There 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).

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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{187}

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

\textsuperscript{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.”).

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


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

\textsuperscript{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
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-kindled 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.”

In *Taylor v. State*, 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.” 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:

[Int]asmuch 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.

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

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

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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.

> 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.

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