

TAKING CARE

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Care must be taken when human needs are expressed in the odd dialect of legal rights. This delicate act of translation—from private need to public obligation—demands acute sensitivity to the ways in which public responsibility inaugurates a new and complex encounter with a broad array of public preferences that deprive dependent subjects of primary stewardship over the ways in which their needs are met. Both Martha Fineman and Joan Williams have taken on the difficult project of making the ethical and political case for transforming dependency and care—from private or domestic need to public responsibility. In the articles they have contributed to this Symposium they both make significant contributions to this political project, building on the substantial work they have done elsewhere.¹

In *Contract and Care*,² Martha Fineman introduces something new to advance her now well-known thesis of collective responsibility for both inevitable and derivative dependency.³ Drawing from principles of private contract law as well as political social contract theory, she argues that “[u]sing the idea of background conditions [borrowed from contract law] it is possible to argue that it is time to rewrite our social contract, to reconsider the viability and equity of our existing social configurations and assumptions.”⁴ The back-ground assumptions that Fineman seeks to unsettle are those that take for granted that responsibility for dependency be delegated to the family and that the family be constructed as a quintessentially private institution. The privatization of dependency is possible, according to Fineman, when dependency is characterized as a set of “natural” needs, the family is constructed as an “organic” unit of human

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1. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13 (1999) [hereinafter Fineman, *Cracking the Foundational Myths*].

2. Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001).

3. For definitions of inevitable and derivative dependency, see *id.* at 1409 & nn.15-16.

4. *Id.* at 1431.

organization, and further, the family is treated as an economically independent unit—separate from the market and the state.⁵ Fineman has persuasively demonstrated how these fictions are radically untrue of actual social organizations, while they nevertheless undergird social policies that justify a minor public role in dependency care. Indeed, the failure to address human dependency adequately is most often attributed to private, not public, irresponsibility.⁶

With *Contract and Care*, Fineman seeks to make a break with this tradition by including a baseline of dependency needs within the ambit of the rights of citizenship, “no less important and worthy of governmental protection than civil and political rights.”⁷ The normative justification for this claim rests on the notion that dependency work is society-preserving work, and thus society owes a debt to those who perform this essential public function, similar to the collective obligation we feel toward those who secure our national security by serving in the military.⁸

Similarly, market actors are not excused from accepting some responsibility for the costs of dependency. With this article, Fineman seeks to illuminate the degree to which the relationship between employers and workers has become a virtual contract of adhesion—take it or leave it—on terms that are highly unfavorable to workers, and that ignore workers as full social beings whose working lives cannot be disaggregated from the complex webs of dependency in their lives.⁹ Thus, Fineman seeks to shift some of the costs of dependency to market actors as a matter of (re)distributive justice and worker security.

Joan Williams’s project is no less substantial than Fineman’s, but is more targeted in its aim. While Williams’s larger project is designed to reshape what she calls the work/family axis so as to make wage/labor work more compatible with most workers’ care obligations,¹⁰ her contribution to this Symposium examines the concept of domesticity and its relationship to gender identity formation. Just as Fineman introduces social contract theory in a novel way in *Contract and Care*, Williams draws from recent sociological¹¹ and gender performance theory¹² to elaborate a concept of

5. FINEMAN, *supra* note 1, at 190-91.

6. *See, e.g.*, 42 U.S.C. § 601 (Supp. IV 1999) (originally enacted as Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113).

7. Fineman, *supra* note 2, at 1437.

8. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 16-19.

9. Fineman, *supra* note 2, at 1432-34.

10. *See generally* WILLIAMS, *supra* note 1.

11. Williams draws from the work of Pierre Bourdieu. *See* Joan Williams, *From Difference to Dominance to Domesticity: Care As Work; Gender As Tradition*, 76 CHL.-KENT L. REV. 1441 (2001).

12. In this respect, Williams relies on the work of Judith Butler. *See id.*

gender as tradition.

Using the idea of gender as tradition, Williams seeks to elaborate a concept of domesticity that provides the normative sites in which particularly salient subject positions emerge that do the work of gendering females and males into traditional roles of primary caregiver/breadwinner. Williams's aim with this article is to "democratize domesticity" both within and without the family. She aims to break apart gendered caregiving roles in the family by analogizing these roles to a kind of drag performance, while urging a transformation of the ways in which the workplace is organized so that it can accommodate adults who have caregiving responsibilities at home.

In many respects Fineman and Williams share a descriptive project: they are concerned about the privatization of dependency/ caregiving as an individual responsibility. They both set their sights on the *practices of rule* imposed by the law of the private family and seek to unsettle those practices with new paradigms of rule and responsibility. Their prescriptive projects, however, look quite different: Fineman seeks to enlist state and market actors in the task of meeting inevitable dependency needs by radically reorganizing the institutional sites in which dependency is addressed. Included in this project is a quite novel rethinking of the nuclear family.¹³ Williams, on the other hand, is rather happy with the nuclear family as the institution in which caregiving takes place. She prefers to redistribute responsibilities and resources both at home and at work so that women and men can balance both work and family in a more equitable way.

Both projects make important contributions toward a reconceptualization of the ways in which dependency and caregiving are addressed as both a private and a public manner. And both projects suggest a theory of personal and civic sovereignty that to date has been denied to those who have been responsible for the care of others, a class overwhelmingly made up of women. In a sense, Fineman and Williams, following a long feminist tradition, are using law to breathe political life into second-class cultural subjects. This transformation from natural identity (natural mother), to culturally constructed role (domesticity understood as embodying gender roles), to empowered legal subject is a familiar liberal, rights-based trajectory pursued in many modern civil rights movements.

It is important to recognize, however, just how law generally, and rights specifically, insert themselves in these projects, in the name of

13. See generally FINEMAN, *supra* note 1.

affording women and other caregivers greater liberty and agency.¹⁴ The granting of rights and the recognition of public responsibility for dependency is unlikely to usher in a domain of unrestrained autonomy that some liberal projects promise. Rather, to shift responsibility for dependency outside the family is to exchange one practice of rule—the private family—for another set of regulatory governance practices, those imbued in the state and the market. While the logic of the private family is worthy of the exacting critique Fineman, Williams, and others¹⁵ have given it, these projects must be accompanied by an illumination of the rationalities of rule that come along with market and state responsibility for what was previously constructed as a purely private problem.

To shake the foundations of this private, political, and economic tradition by inviting greater involvement from both state and market actors is to simultaneously enable new opportunities for subjectivity and for subjection. Specifically, through history, the way that the state constitutes caring relationships is closely related to the manner in which citizenship is constituted. The linking of citizenship and dependency can be empowering, as Fineman notes,¹⁶ but it is not a strategy without potential costs. Indeed, the effects of public responsibility for meeting individual need are not in our control and, historically, come at a price. In the remainder of my Commentary, I will discuss an earlier moment in U.S. history when public responsibility for dependency was asserted at precisely the same moment that African Americans were constituted as political and legal rights-bearing subjects. Not surprisingly, this public concern for dependency did not take the form preferred by the freed men and women,¹⁷ rather, it was expressed as part of a larger project of governance undertaken in the service of twin goals: rebuilding the South and cultivating citizenship in the newly freed people. This historical example provides an interesting

14. See generally Renée Römkens, *Law As a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 *YALE J.L. & FEMINISM* (forthcoming 2001).

15. See *CIRCLES OF CARE: WORK AND IDENTITY IN WOMEN'S LIVES* (Emily K. Abel & Margaret K. Nelson eds., 1990); EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999); JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993).

16. "This responsibility marks a right of citizenship no less important and worthy of governmental protection than civil and political rights." Fineman, *supra* note 2, at 1437.

17. Indeed, many would have settled for forty acres and a mule and being left alone by white people altogether. See WILLIE LEE ROSE, *REHEARSAL FOR RECONSTRUCTION* 327 (1964). Freedmen's Bureau agents often reported that the freedmen were refusing to enter into labor contracts with white planters because they believed that by late 1865 or early 1866 the federal government would divide up and distribute Southern plantations to freedmen in forty acre lots. This belief was so widespread that the Freedmen's Bureau was forced to issue a formal notice correcting this misimpression and ordering freed men and women to enter into labor contracts, as "it is in their best interest to look to the property holders for employment." General O.O. Howard, Commissioner of the Freedmen's Bureau, Circular Letter (Nov. 11, 1865), RG 826, Roll 29, National Archives.

site to examine the intersecting projects elaborated in Fineman's and Williams's contributions to this Symposium. The reconstructed government that enabled greater autonomy and liberty for African Americans—in the name of newly granted citizenship—operationalized the normative expectations of citizenship by regulating African American families and testing their ability to “manage dependency.” This historical example demonstrates how new opportunities for political identity and for agency cannot be analyzed apart from how power is organized,¹⁸ since new political identities are most certainly the “effects of rule.”¹⁹

The period in which African Americans entered the U.S. civil polity as citizens was, most assuredly, among the most complex periods of state (re)formation in the nation's history. The enumeration and enforcement of civil rights for freed men and women, beginning with the Civil Rights Act of 1866,²⁰ played a central role in the creation of legal and political identities for African American people. But these political identities—as *freedpeople*—were not self-executing upon the ratification of the Thirteenth or Fourteenth Amendments. Rather, African Americans' status as citizens was an identity to be managed by various public and private actors in the immediate postbellum period. “Being a free citizen, *he must act as one*, carrying the burdens, if he so considers them, as well as enjoying the privileges of his new condition,”²¹ cautioned the chief judge of the Georgia Supreme Court in 1881. Similarly, Freedmen's Bureau agents were “instructed to act as General Counsellors for the Freed-people within their respective districts, and to give them such advice as will tend most to their ultimate good, and make them honest and upright citizens.”²² As I have discussed elsewhere, conformance with late-nineteenth-century marital norms was regarded by both Freedmen's Bureau agents and local Southern officials as one of the principal ways in which the freed men and women could be civilized and prepared for the demands of citizenship.²³

Thus, for African Americans in this era, the transition from enslavement to freedom and citizenship meant a shift in the domain of personal governance, from that of an owner to that of the state. Indeed, rather than securing a domain of autonomy and freedom from government

18. MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 20 (2001).

19. DAVID SCOTT, *REFASHIONING FUTURES: CRITICISM AFTER POSTCOLONIALITY* 25 (1999).

20. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

21. *Williams v. Georgia*, 67 Ga. 260, 263 (1881) (emphasis added).

22. Office of Assistant Commissioner, Bureau of Refugees, Freedmen and Abandoned Lands, Circular No. 6, Tallahassee, Fla. (Apr. 3, 1866), RG 105, M 826, Roll 28, National Archives.

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

regulation, inclusion into the domain of rights as *citizens* signified a “politico-ethical project of producing subjects and governing their conduct.”²⁴ What form did this take for African Americans in the postbellum era? How were family and parenting part of this politico-ethical project? After addressing these two questions, I will conclude with some reflections on why this history matters for Fineman’s and Williams’s contemporary projects.

As Union troops moved through the South, enslaved people fled their owners for the protection of refugee camps, or “contraband camps” as they were called at the time,²⁵ in order to gain their liberty and the protection of Northern troops.²⁶ The destitution, disease, and need of these people, freed by circumstance, was overwhelming. Henry Rowntree, a representative of the federal agency hastily formed to address the needs of indigent black people, described the living conditions of various freedpeople at Vicksburg, Mississippi, in the spring of 1864 as follows:

I called at a cattle shed without any siding, there huddled together were 35 poor wretchedly helpless negroes, one man who had lost one eye entirely, and the sight of the other fast going, he could do nothing.

Five women all Mothers, and the residue of 29 children, all small and under 12 years of age. One of the Women had the small pox, her face a perfect mass of Scabs, her children were left uncared for except for what they incidentally [received]. Another woman was nursing a little boy about 7 whose earthly life was fast ebbing away, she could pay but little attention to the rest of her family. Another was scarcely able to crawl about.

They had no bedding. Two old quilts and a soldiers old worn out blanket comprised the whole for 35 human beings. I enquired how they slept, they collect together to keep one another warm and then throw the quilts over them. There is no wood for them nearer than half a mile which these poor children have to toat as they could carry, hence they have a poor supply and the same with water, this has be carried the same distance and the only vessel they had to carry it in was a heavy 2 gallon stone jug, a load for a child when empty.

They owned One Pan, and one Iron kettle amongst them, they had no tin

24. SCOTT, *supra* note 19, at 52.

25. Notwithstanding the fact that the Fugitive Slave Act remained good law until mid-1864, Act of June 28, 1864, ch. 166, 13 Stat. 200 (repealing “the Fugitive Slave Act of eighteen hundred and fifty, and all Acts and Parts of Acts for the Rendition of Fugitive Slaves”), it was federal policy well before that time to treat escaped slaves as “contrabands” recognizing their status in-between confiscated property and human refugees. In May 1861, General Benjamin Butler declared fugitive slaves “contrabands,” on the ground that the Fugitive Slave Act did not apply in a foreign country—Virginia. See *The Contrabands at Fortress Monroe*, 8 ATLANTIC MONTHLY 626, 627 (1861); see also LEON F. LITWACK, *BEEN IN THE STORM SO LONG* 52-53 (1979); VERNON LANE WHARTON, *THE NEGRO IN MISSISSIPPI, 1865-1890*, at 23-25 (1947).

26. See W.E. Burghardt Du Bois, *The Freedmen’s Bureau*, 87 ATLANTIC MONTHLY 354, 354-55 (1901).

cup, no crockery of any kind, no knives or forks, and certainly were the poorest off, of any I have met with being literally and truthfully destitute in every sense of the word.²⁷

This description was not atypical of the living conditions of the formally enslaved people who had escaped behind Union lines. “Freedom” delivered cold comfort to those formerly enslaved people who sought the aid of federal officers at the end of the war. As the federal government deliberated over how to handle the sizable population of freed men and women, managing dependency stood out as the paramount problem to be addressed. The Contraband Relief Commission, and its postwar successor, the Bureau of Refugees, Freedmen and Abandoned Lands, took as their primary charge the “problem” of eliminating African Americans’ dependency upon the public fisc.²⁸ Lurking behind the Commission’s/Bureau’s work was the shibboleth: “a Nigger won’t work without whipping.”²⁹ When the American Freedmen’s Inquiry Commission toured the South holding hearings in order to establish the best ways of addressing the freedmen’s transition from slavery to freedom, virtually the first question asked of every white witness was, “What do you think of the capability of the slaves of this state to take care of themselves?”³⁰ Nearly every black witness before the Commission was queried about his or her capacity for self-support.³¹ For even the most

27. Letter from Henry Rowntree to Contraband Relief Commission, Jefferson Davis Mansion (Apr. 13, 1864), RG 105, Entry 2150, at 10-11, National Archives. Rowntree’s work documenting the state of the freed men and women is notable as he was employed both by the Contraband Relief Society of Cincinnati and the Society of Friends—private relief and missionary organizations that worked hand in hand with the nascent public relief agencies to rebuild the South after the war. See also JAMES E. YEATMAN, WESTERN SANITARY COMM’N, A REPORT ON THE CONDITION OF THE FREEDMEN OF THE MISSISSIPPI (1864) (containing a report dated Dec. 17, 1863, describing the destitute conditions of freedmen throughout Mississippi).

28. Consider this example of one tactic employed by these organizations to force the newly freed people into self-sufficiency:

There being a large accumulation of Negroes at this post, depending upon the Government for support, and this course of idleness being prejudicial to the interest of the Government, the community and themselves, it is hereby ordered:

That they return to their former homes, or seek employment elsewhere . . . They will be given ten days to obtain employment, and provide for their own subsistence; at which time the issue of rations will be discontinued.

General Order No. 2, Col. G.M.L. Johnson, Headquarters Post, Columbus, Miss. (June 7, 1865), RG 826, Roll 3, National Archives.

29. See, e.g., Letter from Col. J.L. Haynes to Capt. B.F. Morey, Vicksburg, Miss. (July 8, 1865), RG 826, Roll 11, at 2, National Archives.

30. See Testimony of George W. Fishback to the American Freedmen’s Inquiry Commission, St. Louis, Mo., Nov.–Dec. 1863, RG 94, M 619, Roll 201, at 141, National Archives. Testimonies before this Inquiry Commission were collected in November and December of that year, throughout Kentucky, Tennessee, and Missouri. See *id.*

31. *Id.*; Testimony of Colored Man (name unknown) to the American Freedmen’s Inquiry Commission, St. Louis, Mo., Nov.–Dec. 1863, RG 94, M 619, Roll 201, at 81, National Archives (“It is a mistaken idea that the black people cannot take care of themselves.”); Testimony of Charlotte Burris

progressive reformers of the era, freedom and citizenship for African Americans meant self-sufficiency, not dependency. These performative injunctions were issued nearly universally, notwithstanding the well-known absence of resources in the African American community. “They must remember that they cannot have rights without duties. Freedom does not mean the right to live without work at other people’s expense but means that each man shall enjoy the fair fruits of his labor. . . . No really respectable person wishes to be supported by others.”³²

The project we know as Reconstruction had as one of its central aims the reconfiguration of African Americans from nonagentic, nonsubjects who had been governed by the absolute will of their owners, to agentic, legal subjects whose entry into the domain of citizenship and rights ushered in a new relationship to the state. Among the top priorities of Reconstruction reformers was the use of law to achieve new habits of social discipline in the freedmen. I have written elsewhere about the priority of the institution of marriage in this politico-socio-legal project.³³ While it was surely of utmost importance to African Americans to have their marital and familial bonds respected by the state, the state’s recognition of the integrity of the African American family was motivated, in significant part, by a desire to privatize dependency.³⁴ By installing the husband as the head of the family and the fiscal sovereign of his family, the state absolved itself of responsibility for the costs of care of needy women and children. This move to shore up the black family and, in so doing, insulate the public from responsibility for black poverty was justified as a necessary component of the responsibilities of citizenship and freedom. In this respect, the Supreme Court’s odious claim that in 1883 freed men and women should “cease[] to be the special favorite of the laws,”³⁵ merely echoed the double bind of freedom for African Americans that Saidiya

to the American Freedmen’s Inquiry Commission, St. Louis, Mo., Nov.–Dec. 1863, RG 94, M 619, Roll 201, at 84, National Archives (“We have never been dependent; we have never been troublesome to anybody. If it is little, we have enough, and are satisfied with what we have.”); *see also* Franke, *supra* note 23, at 302-03.

32. Office of Assistant Commissioner, Bureau of Refugees, Freedmen and Abandoned Lands, Circular No. 4, Vicksburg, Miss. (July 29, 1865), RG 826, Roll 28, frame 259, National Archives.

33. *See* Franke, *supra* note 23.

34. *See* Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 *YALE L.J.* 1885, 1886-87 (1998).

35. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.

Id.

Hartman has termed “burdened individuality,”³⁶ whereby the granting of social and legal rights “resulted in the paradoxical construction of the freed both as self-determining and enormously burdened individuals and as members of a population whose productivity, procreation, and sexual practices were fiercely regulated and policed.”³⁷

This turn to privatize black dependency occurred at precisely the same time, however, that a public stake in the well-being of poor black children was asserted by Southern white officials. Throughout the South, legislatures enacted apprenticeship laws that permitted, or in some states *required*, local officials to remove a child from the home of an African American family when the child’s parents did not have the means to support the child. These black children were to be apprenticed to a suitable person.³⁸ When parents were found to be paupers,³⁹ were not habitually employed in some honest, industrious occupation,⁴⁰ were deemed to be of notoriously bad character,⁴¹ or where it was determined that it would simply be better for the habits and comfort of a child,⁴² a court could or was required to order that a minor child be bound out as an apprentice to some white person, often the family’s former owner,⁴³ until the child reached the age of majority.⁴⁴

Freedmen’s Bureau agents were swamped with disputes involving the apprenticing of African American children. It was not uncommon for children to be bound out to white planters without their parents’ knowledge, as in some jurisdictions all the notice they were entitled to was posting notices in five public places and calling the parents’ name three times at the courthouse door.⁴⁵ Even with notice, freed men and women

36. SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 117 (1997) (defining “burdened individuality” as the state of “being freed from slavery and free of resources, emancipated and subordinated, self-possessed and indebted, equal and inferior, liberated and encumbered, sovereign and dominated, citizen and subject”).

37. *Id.*

38. *See, e.g.*, Registers of Indentures of Colored Orphans, Aug. 1865–May 1866, at <http://www.freedmensbureau.com/mississippi/orphans.htm> (last visited June 5, 2001).

39. *See, e.g.*, Act of Nov. 22, 1865, ch. 5, 1865 Miss. Laws 86, 86-90 (regulating the “relation of Master and Apprentice, as relates to Freedmen, Free Negroes, and Mulattoes”).

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

41. *See, e.g.*, Act of Dec. 21, 1865, 1865 S.C. Acts 291, 291-304 (establishing and regulating “the Domestic Relations of Persons of Color” and amending “the law in relation to Paupers and Vagrancy”).

42. *See* MD. CODE ANN. art. VI, § 31 (1860) (regarding apprentices).

43. *See, e.g.*, ch. 5, 1865 Miss. Laws at 86.

44. On the apprentice system in Mississippi, see generally NORALEE FRANKEL, *FREEDOM’S WOMEN: BLACK WOMEN AND FAMILIES IN CIVIL WAR ERA MISSISSIPPI* 138-45 (1999).

45. *Id.* at 138; *see also* Letter from Thomas A. Magee, Probate Judge, Franklin County, Miss., to Capt. Platt, Freedmen’s Bureau, Franklin County, Miss. (July 14, 1866), RG 826, Roll 14, at 3-4, National Archives (regarding apprenticeship of Virginia Cain’s two sons to their former master over the objections of their mother).

frequently lost custody of their children regardless of the parents' ability to support them. In December 1865, Nelson Gill, subcommissioner for the Mississippi Freedmen's Bureau, wrote to his command that

I think the apprenticeship act is being used here to the injury of the Freedmen. For instance yesterday a woman complained to me that her daughter had been taken from her and bound to her former owner till she is 18. The woman complaining is young and able bodied. The girl is her only child and is 12 ½ years old and will hire readily for more than her support. The girl was bound on the ground that her mother had not the means to support her the falsity of which was proven by the man to whom the girl was bound offering the mother (in court) *good wages* if she would go and work for him. The mother [s]ays she could not live with (the former owner) because he always abused her and she is very much grieved by the fear that he will misuse her daughter.⁴⁶

In this case, the Freedmen's Bureau agent reported that the family depended upon the daughter's wages for their collective support, thus her removal from the home rendered the entire family substantially worse off. Nevertheless, the law allowed the judge to remove the child even without parental consent.⁴⁷ The agent wrote to the judge who ordered the apprenticeship "protesting against it on the ground that the mother was not proven unable to support her child," but obtained no results.⁴⁸

In addition to the apprenticeship laws enacted during this period, Southern legislatures passed a number of laws regulating the "free" labor of the freedmen. Known as the "contract labor" system, African Americans, now free, were allowed to alienate their own labor for a wage, but according to highly restrictive terms, set first by the Freedmen's Bureau and then by state law. While the details of the contract labor system varied by locality, in most jurisdictions freed men and women were required to be under contract at all times; if found without a signed contract, they could be, and usually were, prosecuted for vagrancy—a crime that could put them in jail and thereby make them subject to the convict leasing system.⁴⁹ Typically, the Freedmen's Bureau, state law, or local custom required that freedmen enter into labor contracts for a term of one year and that their

Proof of posting [notice of the apprenticeship hearing] was made, and she was call [sic] at the courthouse door by the proper officer three times & failing to come forward and contest Mr. Cain's application and he having in all respects conformed to the requirements of the statute in such cases, these minors were apprenticed to him.

Id.

46. Letter from Nelson G. Gill, Office of Assistant Commissioner Freedmen's Bureau, to Lt. E. Barnberger, Holly Springs, Miss. (Dec. 20, 1865), RG 826, Roll 11, at 2-3, National Archives (emphasis altered).

47. On the issue of consent, see WHARTON, *supra* note 25, at 84.

48. Letter from Nelson G. Gill, *supra* note 46, at 3.

49. See generally Mary Church Terrell, *Peonage in the United States: The Convict Lease System and the Chain Gangs*, 62 NINETEENTH CENTURY & AFTER 306 (1907).

wages would be paid out of the profits from the harvest at the end of the year. In bad growing years, this meant that laborers were paid last, and often not at all; and the years immediately following the war tragically saw periods of drought and heavy rain, as well as inundations of army worm, all of which devastated the cotton crop.⁵⁰ Notwithstanding the otherwise unfavorable contracts that freed men and women were forced to sign, Freedmen's Bureau agents and local officials often required that planters take on a contractual obligation to provide food, clothing, shelter, and medical supplies for their workers and their families. Miles Hampton's contract to work for A.P. Morrow included language that the employer "is to furnish said Freedman with plenty of good and substantial food to eat and a home to stay in and with medicines and medical attention during reasonable sickness free of charge to them."⁵¹ In this sense, Joan Williams would be pleased to see that the contract labor system included a recognition of the dependency needs of African American laborers.

Not surprisingly, the contractual obligations of private market actors to assume the costs of African Americans' dependency were observed most often in the breach.⁵² What is more, the interests of planters to reduce their labor costs served to fuel a convergence of interests with state actors who sought to enforce marriage laws against the newly freed men and women. Government officials repeatedly voiced the view 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."⁵³ John Eaton, the official designated by General Grant in 1862 to set up "contraband camps" in Mississippi and Tennessee in order to handle the most urgent needs of fleeing former slaves, observed: "Among the things to be 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."⁵⁴ Thus,

50. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 140–42 (1988); JANET SHARP HERMANN, THE PURSUIT OF A DREAM 131–34 (1981).

51. Contract between Miles Hampton and A.P. Morrow, Columbus County, Miss. (Jan. 1, 1866), RG 105, Box 39, Misc. Papers, National Archives. In exchange for one year's labor by Miles, his wife Milly, and their two sons Elijah and Monroe, Morrow agreed to pay four hundred dollars (\$4,312.67 in today's dollars); however, wages would be deducted for the time that any of them were sick and unable to work. *Id.*

52. Miles Hampton's contract appears in the Freedmen's Bureau records together with other similar contracts appended to a file entitled "Claims against A.P. Morrow." Many freedmen, including Hampton, filed complaints against Morrow with the Freedmen's Bureau because he failed to pay any wages to the people in his employ. *Id.*

53. Testimony of Col. William A. Pile, to the American Freedmen's Inquiry Commission, St. Louis, Mo., Nov.–Dec. 1863, RG 94, M 619, Roll 201, at 123, frame 139, National Archives.

54. Report of John Eaton, General Superintendent of Freedmen, Department of Tennessee (Apr. 29, 1863), RG 94, M 619, Roll 200, at 89–90, National Archives.

while the right to marry was among the most cherished rights afforded the newly freed men and women incident to freedom, marriage was also explicitly regarded by state and federal officials as the institutional site in which freedmen could be civilized and prepared for citizenship.

At the same time, planters sought to enforce marriage laws against African Americans for other, more material, reasons. While they somewhat begrudgingly agreed to take on the costs of supporting their workers' dependents, they sought to cut off the extent of these obligations by forcing their male workers to marry and thereby limit their obligations to a much smaller group of "legal" relatives. "Planters say, that they cannot, even if they would, support so large a number of non-producers," wrote one bureau agent in 1865.⁵⁵ "[M]any of the planters who have lost the male hands from their place threaten to turn off the women and children who will become a burden to the community."⁵⁶ While freed men and women regarded their support obligations to run to much broader kinship network than that plotted by Victorian marriage laws, planters preferred to use a narrow, positive legal definition of marriage to minimize their contractual duties of care.

While the refusal of white planters to contribute to the well-being of the freedmen comes as no surprise to any scholar of the family, I provide these examples to help enrich our understanding of Fineman's and Williams's contributions to this Symposium. First, on more than one occasion I longed for Williams's article, in particular, to be situated within an historical context. Her analysis of domesticity speaks, at best, to the experiences of white men and women of a particular class.⁵⁷ The work/family axis of few, if any, African American women in the nineteenth century fits the description Williams provides.

Secondly, the experiences of African American families in the immediate postbellum period illustrates how performance has always been

55. Report of Thomas Smith Chaplain, Subcommissioner of the Freedmen's Bureau, to Capt. J.H. Weber, Jackson, Miss. (Nov. 3, 1865), RG 826, Roll 12, National Archives.

56. Report of Col. J.L. Haynes to Capt. B.F. Morey (July 8, 1865), RG 826, Roll 10, National Archives.

57. Williams, *supra* note 11, at 1444-45. In addition, I found it curious that Williams draws a distinction between the manner in which gender and race are constitutive of identity. "But gender is different from racism in that it marries oppressive social patterns with elements of what we like about ourselves and want to keep, such as the structure of the erotic or our dreams for our children." *Id.* at 1484. First, it strikes me that the proper comparison is gender and race, or sexism and racism, but not gender and racism. But even if the analogy she seeks to reference is gender and race, surely there are aspects of racial identity and meaning that individuals treasure, despise, embrace, and resist, just as Williams claims we do with gender. The distinction she draws also creates a false sense that gender has a lot to do with the erotic, while race (or racism?) contributes nothing to this important dimension of human experience. *See, e.g.*, BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 57-64 (1990).

a part of civic subjectivity. Williams might call it “citizenship in drag,” but the historical evidence demonstrates quite clearly how African Americans were recognized as rights holders only to the extent that they performed what David Scott calls “‘responsibilized’ freedom.”⁵⁸ In this sense, freed men and women became viable social, political, and legal subjects by and through their compliance with the regulatory regimes imposed by and through law—it was law generally and rights specifically that imposed the disciplinary framework that made this subjectivity possible for African Americans. To understand subjectivity performatively is not to undertake a kind of trendy humanism, whereby black people are seen as choosing subjects who don the drag of the citizen each day. This is the critical misreading of Judith Butler’s work that she sought to clarify in *Bodies That Matter*.⁵⁹

While surely the pressing needs of African Americans during the immediate postwar period justified public responsibility for the costs of meeting those needs,⁶⁰ then, as now, the state stepped in not only with economic resources, but with its own agendas and priorities about how dependency should be managed. The structural supports provided to freed men, women, and children during this period took on the odor of a colonial encounter, not unlike that which characterized other sorts of structural adjustments undertaken in other contexts in the late nineteenth and twentieth centuries. My point is not only about strings being attached, but implicates deeper issues concerning the kinds of dependency that the public is willing to recognize, as well as the kinds of subjectivity that public responsibility produces. In this respect, two public projects were mutually and interdependently at stake in the state’s recognition of the dependency needs of African Americans in the immediate postbellum period: civilizing,

58. SCOTT, *supra* note 19, at 87.

59. JUDITH BUTLER, *BODIES THAT MATTER*, at x (1993). I fear that Williams has herself engaged in this misreading of performativity in her use of Butler’s work. Her deployment of the idea that “one performs pursuant to a script,” Williams, *supra* note 11, at 1482, and that gender and domesticity are similar to a jazz performance, leave open the question of the subject who is performing the script or playing the music. For Williams, this subject seems to be “mothers,” a set of social subjects who are handed a repertoire of familiar roles and riffs to play, and Williams wants to propose for mothers a new, more egalitarian, score. But this is to reproduce the error that Butler cautioned against in *Bodies That Matter*. For Butler, the subject emerges as a result of a ritualized reiteration of norms; there is no subjectivity prior to the performance, as the subject is the residue or detritus, if you will, of the performance itself. To my mind, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995), represents a classic and elaborate example of the kind of misreading of Butler that Williams reproduces in her use of domesticity as drag. In the end, the subject of Williams’s humanist project—mother—deserves robust critical attention in feminism theory, a project I have sought to take up elsewhere. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

60. This issue is, of course, separate from the important question of reparations owed to formerly enslaved people.

or *making ready*, the freed men and women for citizenship and producing a cheap source of labor to perform the agricultural work previously done by enslaved men and women. These agendas were operationalized explicitly and coercively through the constitution of legally regulated institutions in which black freedom could take place. The family was among the principal sites in which the protocitizen could be disciplined, and the “problem” of dependency could be leveraged to satisfy the labor demands of the rebuilding South.⁶¹

In this sense, African American subjectivity was possible only to the extent that one was willing to be subjected to the discipline the law imposed in virtually every aspect of life. Louis Althusser’s notion of interpellation is particularly helpful in understanding what freedom meant for freed men and women. One is interpellated as a subject when, according to Althusser,⁶² an individual is “hailed” by law or legal authority, for instance, when a police officer hails: “Hey, you there!” For Althusser, when the individual recognizes that it is she who is being hailed, she chooses to turn around; choosing to turn around, she submits to the authority of the hailing. In these productive moments of cultural call and response, a legal subject is created and recognized. In myriad ways, postbellum legal authority called African American subjectivity into being through a reiterative process of power and submission: freed men and women became husbands and wives by conforming their familial lives to the rules of marriage, and one was treated as a free laborer so long as one worked according to the regulatory demands of the contract labor system.

The experiences of African Americans during this period are instructive on many levels, but for present purposes they may help us to think through the utility of social contract theory in projects designed to advance social justice. Fineman observes that “the state may have a responsive or regulating role to play in regard to change,”⁶³ and “[t]he government has a crucial and nondelegatable responsibility to secure that [basic] goods are delivered independent of the market value of any individual labor. This responsibility marks a right of citizenship.”⁶⁴ Yet to successfully invoke a right of citizenship does not usher in a domain of freedom that flourishes in the absence of state power. Freedom, like

61. As I have discussed elsewhere, the enforcement of bigamy, adultery, and fornication laws rather aggressively against African American people, particularly men, served the purpose of populating postbellum prisons with black men who were then leased by the state to planters to perform the agricultural work previously done by slaves. See Franke, *supra* note 23, at 305-07.

62. See, e.g., Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 121, 127-28, 164-70 (Ben Brewster trans., 1971).

63. Fineman, *supra* note 2, at 1435.

64. *Id.* at 1437.

markets or “free trade,”⁶⁵ is not what is left when state power recedes, but instead is a domain, the bounds, terms, and coherence of which, are the product of state power.

Social contract theory has never adequately accounted for the way in which the citizen’s engagement with the state is itself productive: of citizenship, of legal and cultural subjectivity, and of political presence. This is not to say that we should abandon a critique of the “deal” we are provided by the state when it purports to be looking after its citizens.⁶⁶ But rather, the critical project must expose our relationship to the state to a kind of scrutiny that unpacks the way in which the state is doing more than naming needs when it calls out: “Hey you, your needs are next on our agenda.” It strikes me as curious that the new scholarship of the family—a body of work that seeks to enjoin greater state responsibility for the costs of dependency—provides deep, innovative, and comprehensive critiques of the “family,” without providing either a theory or a critique of the state. This project—reconceiving kinship, dependency, and care in light of an explicitly feminist theory of the state⁶⁷—remains to be taken up by one or more of the many able minds working in this field.

That being said, we are all the beneficiaries of a paradigm shift provoked by the contributions that Fineman and Williams have made to the project of reconceptualizing the nature of dependency, the places where it is addressed, and the responsibilities that we all share in meeting those needs.

65. David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, 63 *LAW & COMTEMP. PROBS.* 83, 85-88 (2000).

66. In this regard, Fineman’s analysis would be enhanced by the inclusion of feminist critiques of social contract theory, such as, most prominently, that of Carole Pateman. *See generally* CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

67. Judith Butler’s *Antigone’s Claim* begins to link issues of kinship to a critique of state recognition by suggesting a “post-oedipal” subject. *See generally* JUDITH BUTLER, *ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH* (2000).