# THE HEAD OF THE FAMILY

*Towards A Federal Common Law of the Black Family*

**Part II**

## A PETITION IN GENERAL EQUITY

to the

Federal Government of the United States of America,

Its Courts, Legislature, and Chief Executive,

Regarding the

Plight of African American Fathers, Men, and Boys

In the

United States of America

by

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**Part II**

A Petition in General Equity regarding the Plight of African American Fathers, Men, and Boys in the United States

This is Booklet is a Position Paper that was prepared for the United States Congress; the state courts of the several United States; the United States District Courts; the United States Courts of Appeals; and the United States Supreme Court, pursuant to 42 U.S.C. § 1983. It is designed to supplement the filing of Amicus Curie briefs by churches, para-churches, and clergymen in support of several of the salient legal and constitutional issues that have been discussed herein.

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# TABLE OF CONTENTS

**Contents**

Jurisdictional Statement..... 1

Chapter 1. The 'History and Tradition' of Fundamental Rights .....I

Chapter 2. The 1866 Civil Rights Act and Right to 'Make and Enforce' the Marriage Contract.....II

Chapter 3. The Freedmen's Bureau Courts and the Marriage Contract ..... III

Chapter 4. Black Men as 'Head of the Family' .....IV

Chapter 5. The 1866 Civil Rights Act, *Georgia v. Rachel* (1966), and Family Law Tribunals..... V

Bibliography ..... VI

# JURISDICTONAL STATEMENT

1. 28 U.S.C. § 1443 and Sec. 3 of the 1866 Civil Rights Act – Transfer of action for State Court

2. 28 U.S.C. § 351

(a) FILING OF COMPLAINT BY ANY PERSON.— Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts …. may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

3. 28 U.S.C. § 352 (b) IDENTIFYING COMPLAINT BY CHIEF JUDGE.— In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this chapter and thereby dispense with filing of a written complaint.

4. 28 U.S.C. § 352 (c) TRANSMITTAL OF COMPLAINT.— Upon receipt of a complaint filed under subsection (a), the clerk shall promptly transmit the complaint to the chief judge of the circuit….

5. U.S. Const., FIRST AMENDMENT.— Congress shall make no law… prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

6. U.S. Const., THIRTEENTH AMENDMENT.— Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

7. U.S. Const., FOURTEENTH AMENDMENT.— No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8. 42 U.S.C. § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS.— Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

9. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) .— adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States ratified the treaty Sept. 8, 1992. Article 1.— All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 17.— No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

# PREFACE

May 8, 2024

U.S. Senator Marco Rubio
United States Senate
284 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Rubio:

Please accept this second installment of my pamphlet *Towards a Federal Common Law of the Black Family* © 2023.

This work is titled *The Head of the Family: Towards a Federal Common Law of the Black Family- Part II* © 2024, because its focus is upon an area of American civil rights law and constitutional law which federal courts have evaded, namely, the 1866 Civil Right Act's investiture of the fundamental right to make and enforce "marriage contracts." As you are aware, one of the first acts of the Freedmen's Bureau in Florida, Georgia, and South Carolina was to issue "General Order No. 8," which commenced with the following words:

> Marriage Rules – To correct as far as possible one of **the most cruel wrongs inflicted by slavery**, and also to **aid the freedmen in property appreciating** and **religiously observing the sacred obligation of the marriage state**, the following rules are published for the information and guidance of all connected with this Bureau throughout the States of South Carolina, Georgia, and Florida….

This wartime measure occurred when the freedmen's civil rights were summarily rejected in the regular civil courts of the several Confederate states. This problem state-court rejection has never truly abated. The 39th Congress made the first attempt at abatement when it enacted the 1866 Civil Rights Act, which invests federal courts with original subject matter jurisdiction over state family law matters that include *racial discrimination* against the Black freedmen and their African American descendants. Today, that subject matter jurisdiction can be exercised directly, via 28 U.S.C. § 1331, or indirectly, through the "removal provisions" of Sec. 3 of the 1866 Civil Rights Act or 28 U.S.C. § 1443. However, as you know, U. S. District Courts typically will not hear "domestic relations questions," but this is a grave mistake based upon an irresponsible and inaccurate reading of applicable state and federal law.

## Lack of Enforcement of Equal Protection Clause in State Family Law Cases involving African Americans

Unfortunately, we are not yet completely done with American Slavery or the negative effects of Slavery upon African American families. A major reason is that we have carelessly

analyzed whether Florida's family laws are being applied fairly and equally given the inherent differences in cultural and socioeconomic statuses of whites, blacks, Hispanics, etc.

- Florida's current family law statute, Fla. Stat., Chap. 61 [Dissolution of Marriage; Support; Time-sharing] is a *race-neutral* statute, having several major provisions that were enacted during the antebellum period, to wit:

- Fla. Stat., § 61.011 ("Dissolution in Chancery") was enacted "History. – s. 1, **Oct. 1, 1828**.

- Fla. Stat., § 61.021 ("Residence Requirements") was enacted "History. – s. 1, ch. 522, **1853**.

- Fla. Stat., § 61.031 ("Dissolution from Bonds of Matrimony") was enacted "History. – s. 3, **Feb. 14, 1835**.

- Fla. Stat., § 61.061 ("Proceeding- Non-resident") was enacted "History. – s. 1, **Feb. 4, 1833**.

- Fla. Stat., § 61.08 ("Alimony") was enacted "History. – ss. 7, 12, **Oct. 31, 1828**.

- Fla. Stat., § 61.13 ("Support of Children") was enacted "History. – s. 7, **Oct. 31, 1828**.

Meanwhile, as these statutory provisions were being adopted and applied to Florida's white families, the Slave Code of Florida, together with the innumerable customs and usages that it spawned, prohibited African American slaves from enjoying the benefits of the "marriage contract," or normal familial relations.[1]

The said Slave Code prohibited African American men from being able to function naturally as husbands and fathers. Although the Thirteenth Amendment immediately nullified the Slave Codes and officially ended "customary slave marriages" among African American citizens in Florida and in the several Confederate states, three glaring problems suddenly appeared before the 39th Congress:

---

[1] See, e.g., Florida Supreme Court decisions in *Williams v. Kimball*, 16 So. 783, 784 (Fla. 1895)("customary slave marriage," "slave marriage," "cohabitation," etc.); *Adams v. Sneed*, 25 So. 893 (Fla. 1899)("customary slave marriages"); *Johnson v. Wilson*, 37 So. 179, 48 Fla 76, 77 (1904)("… a customary slave marriage… customary slave marriages," etc.); *Christopher v. Mungen*, 55 So. 273, 278 (Fla. 1911)("slave marriages" "cohabitation"); and see the U.S. Supreme Court in *Hall v. U.S.*, 92 U.S. 27, 30 (1875)("the slave was incapable of entering into any contract, not excepting the contract of marriage." See, also, Joseph Conan Thompson, "Toward A More Humane Oppression: Florida's Slave Codes, 1821 – 1861, *The Florida Historical Quarterly*, Vol. 71, No. 3 (Jan. 1993), pp. 324 – 338, stating:

> Slave marriages, while prohibited by Florida law, were allowed by owners so long as his or her economic circumstances permitted the union. Otherwise the owner could disavow the marriage and separate the couple through sale. [citing Duval, *Compilation of the Public Acts of Florida*].

> First, there was nothing in state statutes that compelled state courts or state judges to take proactive measures, or to take affirmative steps, to interpret and (or) to apply state laws in a manner that took into account (i.e., to remediate) the negative effects of 246 years of enslavement upon African American families and citizens;
>
> Second, there was nothing in state statutes that compelled state courts or state judges to enforce state laws or state criminal sanctions against white ruffians who violated the civil rights of the Black freedmen; and
>
> Third, there was nothing in state family statutes that compelled state courts or state judges to apply "race-neutral" state laws fairly and equally in cases involving the Black freedmen.

Thus, under these conditions, "to leave the Negro in the hands of Southern courts was impossible…. [T]he regular civil courts tended to become solely institutions for perpetuating the slavery of blacks. Almost every law and method ingenuity could devise was employed by the legislatures to reduce the Negroes to serfdom—to make them the slaves of the State, if not of individual owners…."[2] Associate Justice William O. Douglas made the same observation in the case of *Monroe v. Pape*, 365 U.S. 167, 175-177 (1961), stating:

> The legislation -- in particular the section with which we are now concerned -- had several purposes…. The third aim was to provide a federal remedy where the **state remedy, though adequate in theory, was not available in practice**…. While one main scourge of the evil -- perhaps the leading one -- was the Ku Klux Klan, the remedy created was not a remedy against it or its members, but against those who representing a State in some capacity were unable or unwilling to enforce a state law….
>
> Senator Osborn of Florida put the problem in these terms….
>
> > [t]hat the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing…. There was, it was said, **no quarrel with the state laws on the books**. It was their **lack of enforcement** that was the nub of the difficulty….
>
> "Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination:
>
> > '… [b]ut if **the statutes show no discrimination**, yet, **in its judicial tribunals, one class is unable to secure that enforcement of their rights and punishment for their infraction** which is accorded to another, or, if secret combinations of men are allowed by the Executive to band together

[2] W. E. B. Du Bois, "The Souls of Black Folk," *Writings* (New York, N.Y.: The Library of America, 1986), p. 386.

> to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.'

Given this unique constitutional and national history, we are today confronted with the same crisis— albeit a newly disguised crisis – that is perpetuated by the same perpetrators:

> First, Florida's family law statute Fla. Stat., Chap. 61 is a "race-neutral" statutory provision which suffers from the *same statutory defects* as are stated above in *Monroe v. Pape*, supra, pp. 175- 176. E.g., its "state remedy, though adequate in theory, [is not necessarily] available in practice" to African American citizens in Florida, and it contains no self-correcting safeguards to ensure that African Americans are able to receive the applications of its remedies, "as is enjoyed by white citizens."[3]
>
> Second, although Fla. Stat., Chap. 61 is "race neutral," there is not a scintilla of evidence to demonstrate that its antebellum provisions (previously cited) are suitable for most African American families (especially those African Americans who are underprivileged); or that state family law courts or judges have the requisite training, ability, or willingness to apply Fla. Stat., Chap. 61 in an equitable manner that is suitable to the socioeconomic conditions of most African American families.
>
> Third, when the Florida Legislature enacted its antebellum provisions in Fla. Chap. 61 (previously mentioned), that it did so *only* with the benefit and welfare of its white population in mind; and that it did so, simultaneously, with a racially discriminatory intent and motive against its black or African American population in mind.[4]
>
> Fourth, as the holding in *Monroe v. Pape*, supra, pp. 175- 176, asserts: a race-neutral state law, such as Fla. Stat., Chap. 61, may become racially discriminatory in its enforcement, or lack of enforcement. "Senator Osborn of Florida put the problem in these terms…. 'There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty….'"
>
> Fifth, Fla Stat., Chap. 61 has no "equal rights" or an "as is enjoyed by white citizens" provision—as in the 1866 Civil Rights Act – within its text; and so there is nothing to compel a state judge to consider the mitigating factors of the negative effects of slavery and de jure racial segregation upon African American families.

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[3] See Footnote # 1.

[4] Ibid.

Sixth, Fla. Stat., Chap. 61 does not prohibit an honorable and honest state court judge from considering the mitigating factors of the negative effects of slavery and de jure racial segregation upon African American families, and doing complete justice—but, simultaneously, it provides no safeguards against state court judges who are unfamiliar with the history and socioeconomic conditions of the African American people, or against dishonorable and dishonest state court judges who are racially biased against them.

Seventh, there is not a scintilla of evidence to support the present policy of having an *honor system* among Florida state court judges that is based upon a grand assumption that white judges will properly educate themselves about the unique challenges and problems that African American families face as a direct consequence of the present-day negative effects of chattel slavery and de jure racial segregation.

Eighth, Fla. Stat., Chap 61's "race-neutral" statutory scheme ignores the constitutional fact that there is a historic *conflict of interest* between the white working classes and the black working classes that lay at the heart of crisis of Civil War (1861 – 1865) and Reconstruction (1865 – 1877),[5] which made subsequent "race-neutral" juridical decision-making in the state courts—including judicial opinions regarding familial and conjugal matters— highly outcome determinative on the basis of a judge's race and socioeconomic and cultural background.

Ninth, that Fla. Stat., Chap. 61's "honor system" (i.e., ¶ 7) and inherent "conflict of interest" (i.e., ¶ 8) creates a 14th Amendment "Equal Protection" violation, because Chap. 61 naturally benefits the white population and white families, while it simultaneously gravely prejudices and undermines the best interests of African American families, fathers, husbands, wives, children, and extended family members.

Tenth, although the 1866 Civil Rights Act was enacted to secure the right to make and enforce contracts *as is enjoyed by white citizens* (including the "marriage contract"), Fla. Stat., Chap. 61 and its chancery provisions create courts of "limited jurisdiction," whereby the state family law courts are not even permitted to adjudicate federal civil rights claims or federal constitutional claims that are cognizable under the 1866 Civil Rights Act, thereby divesting Florida's African American litigants from interposing their federal statutory rights in the state family courts, in connection with a divorce, child custody, or support proceeding.

Eleventh, Fla. Stat., Chap. 61's "honor system" (i.e., ¶ 7); inherent "conflict of interest" (i.e., ¶ 8); the "Equal Protection Clause" violations (i.e., ¶ 9); and the

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[5] See, generally, W.E.B. Du Bois, *Black Reconstruction in America* (New York, N.Y.: Harcourt, Brace and Co., 1935); see, also, St. Clair Drake and Horace R. Cayton, *Black Metropolis: A Study of Negro Life in a Northern City* (New York, N.Y.: Harcourt, Brace and Co., 1945), pp. 270 – 271 ("The Role of Economic Interest… the freeing of the slaves threw millions of potential competitors into the struggle for jobs and the scramble for western lands.").

inability to enforce the 1866 Civil Rights Act in Florida's family law courts of "limited jurisdiction" (i.e., ¶ 10), contribute to widespread juridical "fraud" and lawyer-sponsored "fraud upon the courts," which peremptorily divest African American family-law litigants of their constitutional right to court access (Fla. Const., Art. I, Sec. 21).

Finally, without an "**equal rights**" or an "**as is enjoyed by white citizens**" provision in Fla. Stat., Chap. 61,[6] and so long as that statute is overwhelmingly adjudicated by state court judges who have little knowledge of, or interest in, the socioeconomic conditions of the African American family structure, then the said state statutory scheme, "as applied," will remain inherently unconstitutional—since, "as applied," it violates the First, Thirteenth, and Fourteenth Amendments to the United States Constitution.[7]

Accordingly, this second installment to *Towards a Common Law of the Black Family* highlights the important fact that the 1866 Civil Rights Act's right to "make and enforce contracts… as is enjoyed by white citizens" guaranteed to African Americans, for the first time after 246 years of brutal enslavement, the right to make **"marriage contracts."** Significantly, this Act established the conjugal rights of African American men as husbands, as fathers, and as "Heads of families," as defined in the common law of England, Great Britain, and in the several states of the United States. See, e.g., 26 Am Jur, Husband and Wife, § 10 Head of Family; 30 Corpus Juris Secundum (1st Ed), Husband and Wife, § 16 Personal Rights and Duties- Head of Family; *Solomon v. Davis*, 100 So.2d 177, 178-179 (Fla. 1958)("… the husband is head of the family.")

Unfortunately, as then-Assistant Secretary of Labor Daniel Patrick Moynihan's "1965 Report on the Negro Family" indicated, a *national assault* upon the conjugal rights of African American men as "Head of the family" ensued immediately after Slavery was ended in 1865; and that *national assault*, which certainly occurs in Florida's state courts and through Florida's state agencies, and with the tacit approval of Florida's state judges and members of the Florida bar, has never been abated. Since the early 1970s, the plight of the African American family in Florida, as in the entire United States, has worsened, because the *national assault* upon it as an institution has only worsened.

The nature of this *national assault* upon the rights of African American fathers and husbands is four-fold.

- First, there is the *economic assault* from labor market discrimination;[8]

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[6] See, e.g., the California Racial Justice Act of 2020 (AB 2542).

[7] See, e.g., Shani M. King, "The Family Law Canon in a (Post?) Racial Era," 72 Ohio St. L.J. 575 (2011), available at http://scholarship.law.ufl.edu/facultypub/232.

[8] See Footnote # 5.

- Second, there is the *political assault* from both liberalism and conservatism since both evade the negative effects of slavery upon the African American family;

- Third, there is the *legal assault* from federal and state courts since both evade the implementation of the Civil War Amendments and the 1866 Civil Rights Act in family law cases that directly affect African American families; and,

- Fourth, there is the *feminist assault,* since it manifestly obscures and prejudices the plight of African American men, fathers, and husbands in their quest to establish themselves as the "Head of the family."[9]

For this reason, the United States Government has an obligation— through the Thirteenth Amendment and the 1866 Civil Rights Act— to enact appropriate federal legislation to vindicate and to protect the *integrity* of the status African American men as "Head of the Family." It can do this with the federal forum being in the United States District Courts, via 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1443 (transfer jurisdiction). Otherwise, a husband's or a father's *duty* of familial financial support and *duty* of familial protection shall remain "traps for the unwary" and become degraded to badges and incidents of slavery through the disguise of state family law— and this is today the awful lot of hundreds of thousands of African American men in Florida and throughout the United States. Without appropriate legal, equitable, and administrative federal remedies in the U.S. District Courts, we shall inevitably witness the systematic re-enslavement of the African American people through the state courts.

Yours Faithfully,

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Chief Judge, U.S. Eleventh Circuit Court of Appeals
Chief Justice, Supreme Court of Florida
Chief Judges, Florida Judicial Circuits (Twenty Judicial Districts in Florida)
Chief Judges, U.S. District Courts (Northern, Middle, and Southern Districts of Florida)

[9] See, e.g., Daniel P. Moynihan, *The Negro family: The Case for National Action*. Washington, DC: Office of Policy Planning and Research, U.S. Department of Labor (March 1965).

# Chapter One

## "The 'History and Tradition' of Fundamental Rights"

By

Rev. Roderick Andrew Lee Ford, J.D., Litt.D., LL.D.

**Contents**

Introduction ..... 1

Part I. U.S. District Courts must look to "History and Tradition" to establish Federal Jurisdiction over Civil Rights complaints Regarding State-Court Racial Discrimination Against Blacks ..... 5

A. *Washington v. Glucksberg*, 521 U.S. 702 (1997)("History and Tradition" as Guideposts) ..... 6

B. Oliver Wendel Holmes, "Use of History in Interpretation of the Common Law" ..... 6

C. The 1866 Civil Rights Act ..... 7

D. The Doctrine of "State's Rights" . ..... 7

E. Reconstruction (1865- 1877) and Black Codes ..... 9

F. Federal Courts Evade Enforcement of Civil Rights of African Americans during 20th Century ..... 10

G. "Race-Neutral" State Laws Can be Racially-Discriminatory in their Application ..... 12

Part II. The Oath of Federal Judges requires Knowledge of "History and Tradition" ..... 14

Conclusion ..... 19

### Introduction

White American perspectives of the Civil War Amendments and their implementing civil rights statutes, particularly the Civil Rights Acts of 1866 and 1871, have *dominated* the field of American constitutional law and American civil rights jurisprudence since 1865. This is true partly because, since 1865, African American litigants have been too poor, or too poorly educated, or too poorly-politically connected, to be able to vindicate their constitutional and civil rights in the state and federal courts of the United States.

This juridical set of circumstances has produced a two-tiered structure of American civil rights jurisprudence. First, there is a "first generation" version of civil rights (i.e. the African American oriented version of civil rights). See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978)(this version civil rights jurisprudence addresses the problem of "bridging the vast distance between members of **the Negro race** and the **white 'majority'**"). Here, the focus is often upon the history and the Congressional purpose for enacting, say, the Civil War Amendments and the Civil Rights Acts of 1866 and 1871.

The second version of civil rights jurisprudence (i.e., the "second generation" of civil rights) focusses on the "broad language" used in the above-mentioned civil rights laws and insists that the civil rights of white persons and, indeed, all other racial and ethnic groups, were meant to be included in those provisions as well. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978)( "'the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.'")[1]

In order to do meaningful and substantial justice for, and between, all groups of American citizens, we have got, now, to carefully distinguish between these two "versions" of civil rights jurisprudence, because it is manifestly unjust to assume, or to apply, that "second version of civil rights jurisprudence" to the African American community, whose unique struggles and circumstances are manifestly and directly tied to 246 years of chattel slavery plus an additional 100 plus years of having been "stigmatized" as inferior because of their unique color and previous condition of involuntary servitude.

Both state and federal court judges are guilty of doing this. When African American civil rights litigants are before the bench, they seldom apply the "African American version of civil rights," because, to be truthful, they are

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[1] This pamphlet surmises that a racially-biased state or federal judge can today easily discriminate against African American civil rights litigants through categorically failed to apply "first generation" civil rights jurisprudence to their case, substituting instead the various histories, rationales, and judicial reasonings that have mushroomed from the "second generation" line of civil rights cases. As a consequence, the Congressional intent for ameliorating the status of African American citizens through the various Civil War enactments may be evaded altogether.

unfamiliar with history, sociology, literature, customs, culture, and traditions of African American institutions, scholars, theologians, writers, jurists, etc.

In other words, a true and authentic "black historical perspective" from the standpoint of the real and practical issues and problems faced by African Americans, have very seldom, if ever, reached the state and federal courts and, thus, they have failed to breathe real life into federal constitutional and civil rights jurisprudence.

A part of the problem is structural. The framers of Reconstruction, the new federal district courts, and the enforcement mechanisms of the new federal civil rights laws created an "honor" system whereby each federal judge could be trusted with balancing the local, Southern interest against the federal constitution and the newly-won civil rights of the local African American population—this created a huge gap between the "ideal" and the "reality" of the actual enforcement of African American civil rights in United States District Courts in the South.

In his article, "The Civil War as a Crucible for Nationalizing the Lower Federal Courts," *Prologue Magazine* Vol. 7, No. 3 (Fall 1975), Kermit L. Hall has correctly observed:

> In bringing forth the Judiciary Act of 1862, congressional Republicans subscribed to three broad ideas about the structure of the federal courts. First, they accepted the traditional notion of judicial representation that committed Supreme Court justices and district court judges to duty in the circuits. Second, they endorsed the idea of molding the federal courts to the dominant regional interests….
>
> [T]he traditional concept of embedding federal district courts in the local constituencies they served made them as potentially responsive to local interests as to the dictates of national authority promulgating a program of reconstruction. The federal courts could as readily serve the interests of ex-Confederates seeking to return to pre-war conditions as they could Republicans concerned with

> building partisan strength and sustaining Unionists and freedmen….
>
> In 1869 a biracial group of memorialists from Paducah, Kentucky, explained that simply giving the federal courts jurisdiction was not enough. Requesting 'greater facilities for applying to the Federal Courts,' the petitioners noted that "the largest proportion of Negroes live more than 200 miles" from the meeting places of the federal courts. 'As a class,' the memorialists reminded Congress, 'the negroes are . . . poor, ignorant & timid. They can poorly afford to, and are not likely, in one case of wrong out of ten, to go with their witnesses 200 or 300 miles to court to contend against their white neighbor for their rights or to prosecute for the wrongs done to them.' …
>
> For their part, the Republicans emerged as at best reluctant nationalizers, willing to extend the jurisdiction of the courts but unwilling to break from more traditional notions of parsimonious government and judicial representation that emphasized local and regional diversity over the assertion of national or central authority.

As a consequence, as this Chapter amply demonstrates, well-to-do White Americans—beginning first with the great American oligopolies of the early 20th-century and, more recently, the well-to-do Women's Movements and LGTBG+ Movements—have been able to rely upon, and to utilize, the "due process" and "equal protection" clauses of the First and Fourteenth Amendments, U. S. Constitution, and, say, the Civil Rights Act of 1871 (42 U.S.C. § 1983), far more effectively than the underprivileged and poorly-educated African American underclass—the most vulnerable group for whom those laws were enacted. They have been able to do this, because, as previously stated, that second version of American civil rights jurisprudence (i.e., "second generation") focusses on "broad language" that includes all American citizens.

At the same time, the first version of American civil rights jurisprudence (i.e., "first generation"), namely, the Thirteenth Amendment and the 1866 Civil Rights Act, is designed to go straight to the heart of the African American social, economic, and political crisis—to the extent that the factors alleged in civil or

criminal actions are directly linked to slavery, badges and incidents of slavery, and racial discrimination. However, since the turn of the 20th century, both state and federal judges systematically evade this "first generation" civil rights jurisprudence. As a consequence, African American-oriented civil rights jurisprudence is a grossly under-developed area of American civil rights and constitutional jurisprudence. I mention this issue first, because the plight of the African American family in the United States is greatly dependent upon a meaningful development and application of "first generation" civil rights.

Today, the only proper way to develop this "African American-oriented" or "first generation" civil rights jurisprudence is through **"History and Tradition."** This is especially true, given the fact that, not until Justice Thurgood Marshall was appointed to the U. S. Supreme Court did an authentic African American voice reach the highest-level Court in the land. Prior to that period, historians such as W. E. B. Du Bois (Harvard Ph.D., 1895); Carter G. Woodson (Harvard Ph.D., 1912); Charles Hamilton Houston (Harvard SJD, 1923); Benjamin Quarles (Wisconsin Ph.D., 1940); and John Hope Franklin (Harvard Ph.D., 1941 ) served as the "functional" equivalents to Blackstone's *Commentaries on the Laws of England*.

Fundamentally, we are concerned here with what historian Gustas Meyers has correctly described in his *A History of the Supreme Court of the United States* as the "emasculation"[2] of the Thirteenth and Fourteenth Amendments, U.S. Constitution (i.e., "first generation" civil rights), as they relate and pertain to the vindication of the civil rights of the African American community and, especially, those familial rights of Black husbands, fathers, and men, while, at the same time, that "second generation" of civil rights flourished.

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[2] Gustavus Myers, *History of the Supreme Court of the United States* (Chicago, IL: Charles H. Kerr & Co., 1912), pp. 676 – 678, stating, "… the Fourteenth Amendment…. Yet for more than twenty years the Supreme Court of this United States, in deference to the demands of the ruling class, had consistently **emasculated it**.")

## I. Federal judges should rely upon "history and traditions" of the United States when interpreting federal statutory civil rights laws and (or) federal constitutional provisions in litigation involving African American litigants.

"History and tradition": When ascertaining what are "fundamental rights" of American citizens, the U. S. Supreme Court has held that "history and tradition" are an appropriate guidepost. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997).[3] This is true, whether the analysis focusses upon "first generation" or "second generation" civil rights:

A. "History and Tradition": See, e.g., Oliver Wendell Holmes, Jr., *The Common Law* (New York, N.Y.: Dover Pub., 1991), p. 3, stating:

> "The life of the law has not been logic: it has been experience…. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics…. We must alternatively consult history and existing theories of legislation."

B. "History and tradition": "First generation" civil rights' history amply demonstrates that the 1866 Civil Rights Act codified certain "fundamental rights" which Black freedmen had previously been denied:

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[3] *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), stating:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. East Cleveland*, 431 U. S. 494, 503 (plurality opinion). ]; *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U. S. 319, 325, 326 (1937).

1. See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883).[4]

2. Specifically, the 1866 Civil Rights Act bequeathed to African American men, fathers, and husbands the "fundamental right" to vindicate (i.e., "to make and enforce") their "marriage contract rights" (i.e., their common law "Head of the family" status), as a race-based civil rights claims, whenever, if ever, those rights are infringed upon by state officials or private parties, because of their race.

C. "History and tradition": "first generation" civil rights history also amply demonstrate very influential white persons in official positions, within state government and while relying upon doctrines such as "State's Rights" — including lawyers and judges (i.e., the bar and bench), legislators and politicians, clergymen and community leaders, and influential private persons serving on juries—have taken proactive measures to divest African Americans in general, and African American men in particular, of the "fundamental rights" guaranteed in the 1866 Civil Rights Act.

D. "History and Tradition": "first generation" civil rights history demonstrates that, during the period of Reconstruction, and throughout the 20th century, the enforcement of the Thirteenth, Fourteenth, and Fifteenth Amendments and the 1866 Civil Rights Act **were successfully challenged** and **blocked** in the state

[4] See, e.g., *Civil Rights Cases*, supra, p. 22, stating "the **Civil Rights Bill of 1866**, passed in view of the Thirteenth Amendment before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous servitude, those **fundamental rights which are the essence of civil freedom**, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens."

legislatures and **in the state courts**,[5] and such efforts were sometimes upheld by the United States Supreme Court.

1. See, also, Gustavus Meyers, *A History of the Supreme Court of the United States* (1912).[6]

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[5] See, e.g., W.E.B. Du Bois, "The Souls of Black Folk," Writings (New York, N.Y.: The Library of America, 1986), p. 386, stating: ("[T]o leave the Negro in **the hands of Southern courts** was impossible…. [T]he **regular civil courts** tended to become **solely institutions for perpetuating the slavery of blacks**. Almost **every law** and **method ingenuity could devise** was employed by the legislatures **to reduce the Negroes to serfdom—**to make them **the slaves of the State**, if not of individual owners….")

[6] See, also, Gustavus Myers, *History of the Supreme Court of the United States* (Chicago, IL: Charles H. Kerr & Co., 1912), pp. 676 – 678, stating:

> The most noteworthy feature, however, in this decision applying to the bakeshop workers [*Lochner v. New York*, 198 U.S. 45 (1905)] was that the law was declared unconstitutional under the Fourteenth Amendment.
>
> Now this amendment had been one of the amendments adopted to secure the full freedom of Negroes, and safeguard them from the oppressions of their former owners. Yet for more than twenty years the Supreme Court of this United States, in deference to the demands of the ruling class, had consistently **emasculated it**. The Supreme Court had refused to define what the rights of Negroes were; it had held that the amendment had no reference to the conduct of individual to individual; it had declined to give the Negroes the protection of the National Government when it decided that 'sovereignty for the protection of rights of life and personal liberty within the States rests alone with the States.' This meant that the former slave States were empowered to abridge the liberty of the Negro as they pleased.
>
> Other decisions, each curtailing the rights of Negroes, followed. On the ground that it was not warranted by the amendment, an Act of Congress giving Negroes the right co-equally with whites of enjoying inns, public conveyances, theaters and other public resorts, was declared unconstitutional. The right of suffrage was neither granted nor protected by the Amendment. [citing *U. S. v. Cruikshank*, 92 U.S. Reports, 542 . ]A State could curtail the right of trial by jury without violating the amendment. [citing *In re Lockwood*, 154 U.S. Reports, 3] It was further held that a State enactment requiring whites and Negroes to ride in separate railroad cars did not violate the amendment. [citing *L. & N. R. R. Co. v. Schmidt*, 177 U.S. Reports, 230].
>
> These are a few of the many decisions of the Supreme Court of the United States, the cumulative effect of which was to allow States to nullify guarantees of freedom for the Negro. That many States did this is common knowledge.

2. *Bell v. State*, 378 U.S. 226 (1964).[7]

3. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).[8]

E. "History and Tradition": "first generation" civil rights history also demonstrates that not until the 1960s did the United States Supreme Court finally admit that for nearly 100 years the Civil War Amendments and many of the Civil War-era statutory legislation had lain dormant, during which period the African American population had existed in a state of semi-enslavement, unable to

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> Finally, the Supreme Court sanctioned the most revolting kind of Negro peonage in the case of *Clyatt* [*Clyatt v. U.S., 198 U.S. Reports, 207*] who had been found guilty in Florida of forcibly keeping Negroes in virtual slavery. Passing on a writ of certiorari, the Supreme Court of the United States ordered the case back for a new trial on the pretext that the trial judge erred in permitting the case to go to the jury….
>
> "Using the Fourteenth Amendment to load the helpless Negro race with the obloquy of prejudicial law and custom, and to snatch away from the white worker what trivial rights he still had, the Supreme Court availed itself of that same amendment to put corporations in a more impregnable position in law than they had ever been before."

[7] See, e.g., *Bell v. State of Md.*, 378 U.S. 226, 247-248 (1964)("The **Black Codes** were **a substitute for slavery**; segregation was a substitute for the Black Codes; the discrimination in these sit-in cases is a relic of slavery...")

[8] See, also, **Justice Ruth Badger Ginsberg** stating in *Timbs v. Indiana*, 139 S. Ct. 682, 688-689 (2019), stating:

> Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. See, e.g. , Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming, *Documentary History of Reconstruction* 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. E.g. , id. § 5; see Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev 671, 681–685 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude"). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 443 (1866); id., at 1123–1124.

enforce their federal civil rights against state incursion or against racially-prejudiced private citizens. See, e.g., Justice Powell's and Justice Marshall's opinions in the case of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).[9] & [10]

F. "History and Tradition": "first generation" civil rights history demonstrates that during this 100 year history of *official evasion* of the civil rights of African Americans, between 1865 and the early 1960s, many "**Confederate monuments**" were erected in state government **statehouse** and **state courthouse** grounds.

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[9] See, e.g., **Justice Lewis F. Powell's** majority opinion in the case of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390-391 (1978), stating:

> The Court's initial view of the Fourteenth Amendment was that its 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.' *Slaughter-House Cases*, 16 Wall. 36, 83 U. S. 71 (1873). The Equal Protection Clause, however, was '[v]irtually strangled in infancy by post-civil-war judicial reactionism.' It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, e.g., *Mugler v. Kansas*, 123 U. S. 623, 123 U. S. 661 (1887); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); *Lochner v. New York*, 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, e.g., *Plessy v. Ferguson*, 163 U. S. 537 (1896).

[10] See, e.g., **Justice Thurgood Marshall's** dissenting opinion in the case of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390-391 (1978), stating:

> The Southern States took the first steps to reenslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and, finally, the white primary. Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts.

1. See, e.g., Deborah R. Gerhardt, "Law in the Shadows of Confederate Monuments," *Michigan Journal of Race & Law*, Vo. 27:1 (2021).[11]

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[11] See, e.g., Deborah R. Gerhardt, "Law in the Shadows of Confederate Monuments," supra, pp. 12-14, 16 stating:

> Most of the tall celebratory Confederate monuments that tower over town squares and roadways were not erected immediately after the Civil War…. [T]he majority of Confederate monuments were installed between 1890 and 1940 during the era of lynching, poll taxes, and Jim Crow laws meant to keep Black citizens in inferior positions of power State capitols and courthouses were the most common locations for placing Confederate monuments, reinforcing the power dynamic as 'white men made laws that served as a cudgel against African American equality.' The halls of justice were often the backdrop for racial violence as courthouse yards were deliberately chosen for public lynchings. Confederate monuments were erected where these violent acts occurred to make it clear who was in charge, who made the laws, who would be protected in court and who would not share these privileges. In 2017, the American Historical Association issued a statement explaining why so many of these monuments were erected:
>
> > Commemorating not just the Confederacy but also the "Redemption" of the South after Reconstruction, this enterprise was part and parcel of the initiation of legally mandated segregation and widespread disenfranchisement across the South. Memorials to the Confederacy were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate them from the mainstream of public life. A reprise of commemoration during the mid-20th century coincided with the Civil Rights Movement and included a wave of renaming and the popularization of the Confederate flag as a political symbol. Events in Charlottesville and elsewhere indicate that these symbols of white supremacy are still being invoked for similar purposes.
>
> While elevating lost cause mythology, Confederate monuments honor figures who fought to keep people enslaved….
>
> Confederate monuments amplify a message of legal inequality. The monuments celebrate a time when our nation's laws validated and ensured that inequality would continue. They affirm and remind viewers of "the late-19th-century effort to deny basic rights of contract and movement to former slaves via murder, rape, arson and intimidation in the decades after the close of the Civil War." They impose constant reminders of the nation's refusal to confront systemic racism.

2. See, also, [citation omitted], 8:22-ap-00202-RCT, filed August 31, 2022, Doc. # 103 ("Certification Regarding Constitutional Claims (42 U.S.C., Sec. 1983)").[12]

G. "History and Tradition": "first generation" civil rights history demonstrates that the administration of so-called "race-neutral" state laws in state courts, in and of themselves, proved to be inadequate safeguards of the civil rights of African American citizens. Such "race-neutral" laws could (a) go unenforced or (b) be manipulated to re-enslave or oppress African American litigants.

1. *Monroe v. Pape*, 365 U.S. 167 (1961).[13]

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[12] See, e.g., **Section II-A,** "**Confederate Monument at Hillsborough County Courthouse and the Black Codes**" at [citation omitted], 8:22-ap-00202-RCT (08/31/2022), Doc. # 103, pp. 12-17.

[13] See, e.g., *Monroe v. Pape*, supra, pp. 175-177, stating:

> The legislation -- in particular the section with which we are now concerned -- had several purposes…. The third aim was to provide **a federal remedy where the state remedy**, **though adequate in theory**, was **not available in practice**….
>
> While one main scourge of the evil -- perhaps the leading one -- was the Ku Klux Klan, the remedy created was not a remedy against it or its members, but against **those who representing a State in some capacity were unable or unwilling to enforce a state law**…. **Senator Osborn of Florida** put the problem in these terms….
>
> > [t]hat the **State courts in the several States** have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing…. **There was, it was said, no quarrel with the state laws on the books**. It was their **lack of enforcement** that was **the nub of the difficulty**….
>
> "Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination:
>
> > '… **[b]ut if the statutes show no discrimination**, yet, **in its judicial tribunals**, **one class** is **unable to secure that enforcement of their rights** and punishment for their infraction which is accorded to another, or, **if secret combinations of men** are allowed by the Executive to **band together to deprive one class of citizens of their legal rights** without a proper effort to discover, detect, and

2. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982).[14]

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punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.'

[14] See, e.g., *Patsy v. Board of Regents of State of Florida*, supra, p. 503, stating:

> The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power….
>
> As we recognized in *Mitchum v. Foster*,[citation omitted] (1972) (quoting *Ex parte Virginia*, [citation omitted] (1880)), "[t]he **very purpose of § 1983** was to interpose the federal courts between the States and the people, as **guardians of the people's federal rights** -- to protect the people from **unconstitutional action** under color of state law, 'whether that action be executive, legislative, **or judicial**.'"
>
> At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress.
>
> First, in passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights…. The 1871 Congress intended § 1 to **"throw open the doors of the United States courts"** to individuals who **were threatened with**, or who had suffered, the **deprivation of constitutional rights**, id. at 376 (remarks of Rep. Lowe), and to provide these individuals **immediate access to the federal courts notwithstanding any provision of state law to the contrary**. …
>
> A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. See, e.g., Globe 321 (remarks of Rep. Stoughton) ("The **State authorities** and **local courts** are unable or unwilling to check the evil or punish the criminals"); id. at 374 (remarks of Rep. Lowe) ("the local administrations have been found inadequate or **unwilling to apply the proper corrective**")…. ; id. at 459 (remarks of Rep. Coburn); id. at 609 (remarks of Sen. Pool); id. at 687 (remarks of Sen. Shurz); id. at 691 (remarks of Sen. Edmunds); Globe App. 185 (remarks of Rep. Platt). … Of primary importance to the exhaustion question was **the mistrust** that the 1871 Congress held for

## II. *The Code of Conduct for United States Judges* and the Oath of Federal Justices and Judges (28 U.S.C. § 453) require federal judges to honor and uphold the "Civil War Amendments," as reasonably construed through the "History and Tradition" regarding the plight of African American citizens, and not give in to local prejudices or ignore the injustices in the state courts.

1. The problem of mixing "**second generation**" civil rights [i.e., colorblind jurisprudence that sees in the Civil War Amendments and the Civil Rights Acts of 1866 and 1871 the rights of non-black persons whose ancestors had never been enslaved and stigmatized by white slave-owners and influential white public officials] with "**first generation**" civil rights [i.e., civil rights that focuses upon the chattel slavery of African Americans and the linger consequences of that enslavement] is the creation of a constitutional crisis with grave and negative consequences for the African American people, and especially for black families.

2. The U. S. District Courts are committed to "second generation" civil rights, because this includes the sort of problems and issues faced and challenged by white citizens or other non-black citizens. At the same time, U. S. District Courts are not

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the **factfinding processes of state institutions**. See, e.g., Globe 320 (testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) ("The defect lies not so much with the courts as with the juries"); id. at 394 (remarks of Rep. Rainey); Globe App. 311 (remarks of Rep. Maynard). This Congress believed that **federal courts would be less susceptible to local prejudice** and to the existing **defects in the factfinding processes of the state courts**. See, e.g., Globe 322 (remarks of Rep. Stoughton); id. at 459 (remarks of Rep. Coburn). This perceived defect in the States' factfinding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior factfinding ability of the relevant administrative agency. See, e.g., *McKart v. United States*, 395 U.S. at 395 U.S. 192-196.

committed to applying "first generation" civil rights on behalf of African American citizens, because the genre of problems and challenges faced by the typical African American litigant are not typically understood or relatable to a mostly-white federal judiciary.

3. Another problem is that "first generation" civil rights are seldom taught in laws schools or in C.L.E. education for practicing lawyers, and African American litigants find it difficult to find, and pay for, a civil rights attorney who can articulate their "first generation" civil rights claims.

4. And, finally, the U. S. District Courts have a fundamental design defect, in that they are beholden to "local customs and prejudices" which makes it difficult for "first generation" civil rights to take root, develop, and flourish. See, e.g., Kermit L. Hall, "The Civil War as a Crucible for Nationalizing the Lower Federal Courts," *Prologue Magazine* Vol. 7, No. 3 (Fall 1975), to wit:

    a. "Assessing the impact of the Civil War on the ideological and institutional underpinnings of nineteenth-century America presents a formidable historical challenge."

    b. "Certainly the federal judiciary system erected under the Constitution and defined in the Judiciary Act of 1789 embodied one of the obvious manifestations of balancing local and national interests. The three-tiered system of district, circuit, and supreme courts was subjected to a variety of local and regional pressures. These included the placement of district court boundaries within a single state, the recruitment of judges from within the state in which the court was

held, the enactment of legislation requiring district and circuit courts to follow state rules of practice, the use of state facilities, the practice of requiring Supreme Court justices to serve on the circuit courts, and the recruitment of Supreme Court justices from sectional divisions that corresponded to the jurisdictional boundaries of the circuits."

c. "In bringing forth the Judiciary Act of 1862, congressional Republicans subscribed to three broad ideas about the structure of the federal courts. First, they accepted the traditional notion of judicial representation that committed Supreme Court justices and district court judges to duty in the circuits. Second, they endorsed the idea of molding the federal courts to the dominant regional interests. Third, they adopted the traditional view, as expressed by Lincoln, that the Supreme Court should be of "convenient size," in order that the number of justices equal the number of circuits. Taken together these ideas militated against nationalization of federal court structure. **The progress of the war and the process of reconstruction, however, brought new jurisdiction and a new role for federal courts in the South that challenged these traditional notions**."

d. "The necessity of reconstructing the South cast in sharp relief the limitations of the Judiciary Act of 1862 and Republican allegiance to traditional notions about the structure of the federal courts."

e. "The performance of southern state courts in treating Unionists and blacks immediately following the war challenged radical and moderate congressional

Republicans who sought more than token reconstruction…."

f. "A Southampton County, Virginia, physician wrote Lyman Trumbull that the local "proslavery oligarchy" controlled the state courts, confiscating the property of citizens who had supported the Union. The doctor beseeched Trumbull to provide federal courts "where we can get even handed justice, it will do more to bring the secessionists to their senses than any thing you can do."30 Similar pleas came from Unionists in Missouri, Texas, and North Carolina."

g. "Newly freed blacks suffered under the operation of local custom and the Black Codes. An agent of the Freedmen's Bureau in New Orleans, for example, wrote in the summer of 1865 that the rulings of the provisional state courts 'have been such of late, so far as colored citizens are concerned, as to shock every truly loyal man among us.'"

h. "When Congress convened in December 1865 the courts were potentially instruments to assist in Republican reconstruction."

i. "Protection of loyalists and freedmen presented an essentially similar problem: effective federal power, either in the form of judicial or military authority, would have to be brought to bear against pervasive local interests in the South. An augmentation of federal jurisdiction, while imperative, could not of itself provide sufficient protection. For the courts to be effective they had to establish a presence sufficient to afford suitors ready access."

j. "[T]he traditional concept of embedding federal district courts in the local constituencies they served made them as potentially responsive to local interests as to the dictates of national authority promulgating a program of reconstruction. **The federal courts could as readily serve the interests of ex-Confederates seeking to return to pre-war conditions as they could Republicans concerned with building partisan strength and sustaining Unionists and freedmen**."

k. "Even where the federal judiciary made a strong showing it **encountered difficulties in treating prominent ex-Confederates**. Judge John Erskine of Georgia wryly observed that his court usually convicted a 'haggard and miserable looking set of creatures,' while the **'well to do' leaders of the rebellion evaded federal enforcement**."

l. "The changes made in 1862 and 1869, and those proposed in 1866, were more cosmetic than substantial. At least in their institutional structure the **federal courts proved resistant to the impact of the Civil War and the first years of Reconstruction**. For their part, the Republicans emerged as at best reluctant nationalizers, **willing to extend the jurisdiction of the courts** but unwilling to break from more traditional notions of parsimonious government and judicial representation that **emphasized local and regional diversity** over the assertion of national or central authority."

## Conclusion

While relying upon a "second generation" conception of American civil rights white or non-black American judges, lawyers, law professors, professionals, and members of the general public have "crowded out" the "first generation" African American civil rights from American jurisprudence. While there is some overlap between "first generation" and "second generation" civil rights jurisprudence, the application of "second generation" civil rights jurisprudence to socioeconomic and legal challenges that are uniquely African American and uniquely connected to the negative effects of slavery and de jure racial segregation have had very negative and catastrophic consequences for the African American people—and especially the Black family.[15]

Accordingly, this pamphlet focusses the Reader's attention to only one, but very important, aspect of this fundamental problem: the African American family, its structure, its plight, and its "Head of the family" crisis. This is the one problem area where the whole force of the Black Church, the Black college and university, the Black bar and bench, Black professional associations, and similar affiliated minority groups such as Native Americans—i.e., "History and Tradition" — should be brought to bear upon federal jurisprudence and the opinions of U. S. District Court judges. Here, the 1866 Civil Rights Act provides a platform upon which these objectives can be reached.

**--- The End of Chapter One ---**

[15] Hence, when state or federal judges evade this "first generation" civil rights jurisprudence, when there are appropriate issues before the bench that affect African American litigants, there is a violation of the "privileges and immunities" and the "due process" clause of the United States Constitution, as well as the 1866 Civil Rights Act.

# Chapter Two

## "The 1866 Civil Rights Act and The Right to 'Make and Enforce' the Marriage Contract"

By

Rev. Roderick Andrew Lee Ford, J.D., Litt.D., LL.D.

**Contents**

Introduction ..... 1

Part I. Marriage is a "Contract" ..... 6

Part II. Slavery Prohibited Blacks from making "Marriage Contracts" ..... 8

Part III. The Thirteenth Amendment and 1866 Civil Rights Act govern "Marriage Contracts" ..... 9

Conclusion ..... 12

### Introduction

The "first generation" of American civil rights jurisprudence was sufficiently broad enough—through sheer necessity and the exigencies of war—to encompass the vicissitudes and trauma of African American families and family life following the American Civil War (1861 – 1865).

This is important, because there is nothing in the "second generation" line of American civil rights cases that comes remotely close to the African American familial experiences. For instance, the federal jurisprudence regarding the "domestic-relations" and "probate" exceptions to federal diversity jurisdiction, or federal subject matter jurisdiction, does a gross injustice to the fundamental necessities for the implementation of the Thirteenth Amendment and the 1866 Civil Rights Act for the protection of African American family life

Indeed, "second generation" American civil rights jurisprudence has failed to recognize or understand that for 246 years the institution of Slavery shielded

African American families from attaining this knowledge and, even if attained, from putting this knowledge into practice. Moreover, "second generation" civil rights jurisprudence has failed to recognize and understand that the divestiture or derogation of an African American husband's "Head of family" status can be formulated as a violation of the 1866 Civil Rights Act.

The 1866 Civil Rights Act gave African American men the civil right to "make and enforce" the "contract of marriage" with all women, until several state courts eventually restricted such contracts to African American women only. This power "to make" the "marriage contract" had been denied under the Slave Codes; and thus to continue to deny that right was a violation of the Thirteenth Amendment and the 1866 Civil Rights Act.

The question of subject matter jurisdiction in the U. S. District Courts now presents itself as follows: **does the 1866 Civil Rights Act permit an African American husband to "enforce" the terms, conditions, and duties of a "marriage contract," that has been impaired by either his wife or a state official who refuses to acknowledge his "Head of the family" status or other natural rights under a "marriage contract"**?

"Second generation" civil rights jurisprudence has no way to conceptualize the underlying social-cultural meaning of this question—or how to conceptualize the circumstances under which some African American men would seek a remedy in federal court under a civil rights theory, as opposed to a state family law court which has no such remedies available?

"First generation" civil rights [or an African American focused civil rights], however, does have the answers to this question. Under a "first generation" constitutional analysis, and pursuant to the 1866 Civil Rights Act, an African American husband might conceivably contend that, pursuant to "slave custom and usage" and present-day bias faced by African American men, that his African American wife [or wife of another race] has refused or failed to honor his conjugal rights as "Head of the family," and (or) that a state official has failed to enforce his conjugal rights as "Head of the family." Stated differently, chattel slavery, which was enforced through a battery of laws, customs, and socioeconomic forces, divested African American husbands and men of their natural rights to function as "Head of the family." The "first generation" version

of American civil rights jurisprudence can conceptualize a potential constitutional violation when similar such violations reoccur in present-day American life; however, the "second generation" version of American civil rights cannot conceptualize such contentions *as plausible*.[1]

The problem of the dichotomy between "first--" and "second--" generation civil rights is even more acute when we encounter the unwillingness and inability of state or federal courts to honestly assess the unique differences between white Americans and black Americans. For example, Daniel Patrick Moynihan has written that a system of "matriarchy" has been "enforced" upon the African American community, with "crushing" consequences for African American males.[2] Here, "first generation" civil rights jurisprudence (e.g., the

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[1] State and federal judges who disdain "first generation" civil rights jurisprudence not only look with disdain upon African American or other civil rights lawyers who dare to craft legal or constitutional arguments while utilizing this framework, but these judges also tend to seek "sanctions" against such lawyers for asserting "frivolous" claims.

[2] See, e.g., Moynihan, Daniel P. *The Negro family: The Case for National Action*. Washington, DC: Office of Policy Planning and Research, U.S. Department of Labor (March 1965), stating:

> It was by **destroying the Negro family under slavery** that white America broke the will of the Negro people….
>
> "When **Jim Crow** made its appearance towards the end of the 19th century, it may be speculated that it was **the Negro male who was most humiliated** thereby…. Keeping the Negro 'in his place' can be translated as **keeping the Negro male in his place**: the **female was not a threat** to anyone….
>
> In essence, the Negro community has been forced into **a matriarchal structure** which, because it is to out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes **a crushing burden on the Negro male**….
>
> A fundamental fact of Negro American family life is the often reversed roles of husband and wife. **Robert O. Blood, Jr.** and **Donald M. Wolfe**, in a study of Detroit families, note that 'Negro husbands have unusually low power,' and while this is characteristic of all low income families, the pattern pervades the Negro social structure: 'the cumulative result of discrimination in jobs…, the segregated housing, and the poor schooling of Negro men'….
>
> The President's Committee on Equal Employment Opportunity, making a preliminary report on employment in 1964 of over 16,000 companies with nearly 5 million employees, revealed this pattern with dramatic emphasis.

> In this work force, Negro males outnumber Negro females by a ratio of 4 to 1. Yet Negro males represent only 1.2 percent of all males in white collar occupations, while Negro females represent 3.1 percent of the total female white collar work force. Negro males represent 1.1 percent of all male professionals, whereas Negro females represent roughly 6 percent of all female professionals. Again, in technician occupations, Negro males represent 2.1 percent of all male technicians while Negro females represent roughly 10 percent of all female technicians. It would appear therefore that there are proportionately 4 times as many Negro females in significant white collar jobs than Negro males….
>
> Negro females in skilled jobs are almost the same as that of all females in such jobs….
>
> This pattern is to be seen in the Federal government, where special efforts have been made recently to insure equal employment opportunity for Negroes…. However, it may well be that these efforts have redounded mostly to the benefit of Negro women, and may even have accentuated the comparative disadvantage of Negro men….
>
> Among nonprofessional Labor Department employees
>
> — where the most employment opportunities exist for all groups
>
> — Negro women outnumber Negro men 4 to 1, and average almost one grade higher in classification.

The testimony to the effects of these patterns in Negro family structure is wide-spread, and hardly to be doubted.

> Whitney Young: "Historically, in the matriarchal Negro society, mothers made sure that if one of their children had a chance for higher education the daughter was the one to pursue it."
>
> "The effect on family functioning and role performance of this historical experience [economic deprivation] is what you might predict. Both as a husband and as a father the Negro male is made to feel inadequate, not because he is unlovable or unaffectionate, lacks intelligence or even a gray flannel suit. But in a society that measures a man by the size of his pay check, he doesn't stand very tall in a comparison with his white counterpart. To this situation he may react with withdrawal, bitterness toward society, aggression both within the family and racial group, self-hatred, or crime. Or he may escape through a number of avenues that help him to lose himself in fantasy or to compensate for his low status through a variety of exploits."

1866 Civil Rights Act) provides the vehicle whereby African American husbands may articulate their grievances before the U. S. District Courts.

This pamphlet does not address or grapple with "changes" to the definitions of "marriage" and "family" which "second generation" American civil rights jurisprudence tends to grapple with. Indeed, "second generation" civil rights jurisprudence often has no nexus whatsoever to the fundamental problem of alleviating the negative effects of slavery and de jure racial discrimination upon the African American people. "Second generation" civil rights naturally does accommodate *some* African American citizens, under certain limited circumstances, such as, for example, an African American who is also a member of the LGBTQ+ community. However, state and federal courts do a grave injustice to the Civil War Amendments and to federal civil rights legislation that were enacted during the late 19th-century, when they substitute "second generation" civil rights for "first generation civil rights," and thereby

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**Thomas Pettigrew**: "The Negro wife in this situation can easily become disgusted with her financially dependent husband, and her rejection of him further alienates the male from family life. Embittered by their experiences with men, many Negro mothers often act to perpetuate the mother-centered pattern by taking a greater interest in their daughters than their sons."

**Deton Brooks**: "In a matriarchal structure, the women are transmitting the culture."

**Dorothy Height**: "If the Negro woman has a major underlying concern, it is the status of the Negro man and his position in the community and his need for feeling himself an important person, free and able to make his contribution in the whole society in order that he may strengthen his home."

**Duncan M. MacIntyre**: "The Negro illegitimacy rate always has been high — about eight times the white rate in 1940 and somewhat higher today even though the white illegitimacy rate also is climbing. The Negro statistics are symtomatic [sic] of some old socioeconomic problems, not the least of which are under-employment among Negro men and compensating higher labor force propensity among Negro women. Both operate to enlarge the mother's role, undercutting the status of the male and making many Negro families essentially matriarchal. The Negro man's uncertain employment prospects, matriarchy, and the high cost of divorces combine to encourage desertion (the poor man's divorce), increases the number of couples not married, and thereby also increases the Negro illegitimacy rate….

deny remedies that are articulable only under a "first generation" analysis of American civil rights laws. "History and tradition" requires American jurists to look at the whole history of a civilization and a people— and, in this case, for example, American jurists would have to admit that, the Black Church, which historically bolstered and nourished the Black family structure, in accord with traditional English and American Common Law, and which upholds the doctrine that the husband is the "Head of the family," is at odds with certain fundamental "equal rights" principles that are espoused in the "second generation" analysis of American civil rights laws. This is not to assert that the "first version" and the "second version" of legal analysis of constitutional and civil rights laws may not co-exist—they certainly can—but it does grave injustice to the African American people to deny them remedies which only a "first generation" analysis of civil rights laws can grant to them. This liberal trend of superimposing "second generation" civil rights upon the African American community, while denying them their "first generation" civil rights—if taken to its logical extreme—implicate the *crime of genocide*, as defined by the United Nations in international human rights law.[3]

To that end, this Chapter next turns to the definitions of "*marriage*," "*husband*," and "*Head of the family*" under the English and American common law, because, under the "first generation" analysis of American constitutional law, these definitions are absolutely essential to the application and implementation of the 1866 Civil Rights Act in the everyday real life of the African American people.

## I. Marriage is a "Contract" under the Common Law; but it is more than a "Contract"; It is a "Social Relation," the first step from "Barbarism to Civilization"; and it is the "Most Important Type of Contract ever Formed."

### A. *Via v. Putnam*, 656 So.2d 460 (Fla. 1995)

[3] See Volume One, *Towards a Federal Common Law on the Black Family* (March 2, 2023)(Chapter I. Introduction).

1. The Florida Supreme Court has held in the case of *Via v. Putnam*, 656 So.2d 460, 465 (Fla. 1995) that, "'[t]he **institution of marriage** has been a cornerstone of western civilization for thousands of years and is **the most important type of contract ever formed**.'"

B. *Maynard v. Hill*, 125 U.S. 190, 210-211 (1888)

1. The U. S. Supreme Court has held in *Maynard v. Hill*, supra, at 205 that, "**Marriage**, as creating **the most important relation in life**, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature…."

2. See, also, Id., pp. 210-211 ("It is also to be observed that while marriage is often termed by text writers and in decisions of courts as **a civil contract**, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, **it is something more than a mere contract**. The consent of the parties is, of course, essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change.")

3. See, also, Id., pp. 211-212 ("It is not, then, a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is rather **a social relation** like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, **a relation the most important**, as **affecting the happiness of individuals**, the **first step from barbarism** to **incipient civilization**, the **purest tie of social life**, and the **true basis of human progress**.")

## II. The "law of African Slavery" Prohibited African Americans from Making Marriage Contracts and thus prohibiting them from Creating and Enjoying the Most Important Type of Contractual Relationship, the foundation of Civilized Familial Bonds

A. *Hall v. U.S.*, 92 U.S. 27 (1875).

1. The U. S. Supreme Court has tacitly acknowledged in *Hall v. U.S.*, supra, p. 30, that the institution of African slavery prohibited black slaves from making "the contract of marriage," stating "It was an inflexible rule of **the law of African slavery**, wherever it existed, that the slave was **incapable of entering into any contract, not excepting the contract of marriage**. Stephens on West Ind. Slav., 58; *Hall v. Mullin*, 5 Har. & J. 190; *Gregg v. Thompson*, 2 Const. Ct. Rep. (S. C.) 331; *Jenkins v. Brown*, 6 Humph. 299; *Jackson v. Lewey*, 5 Cow. 397; *Emerson v. Howland*, 1 Mas. 45; *Bland v. Dowling*, 9 Gill & J. 27."

B. *Christopher v. Mungen*, 55 So. 273 (Fla. 1911).

1. Similarly, the Florida Supreme Court has also tacitly acknowledged in *Christopher v. Mungen*, supra, p. 279, that black slaves could not legally contract in marriage, stating, "The children of slave marriages or cohabitations were not in law bastards, but they were generally regarded merely as not having the right of inheritance, their parents not being husband and wife by contract under the law, since as slaves they **could not legally contract even in marriage**."

## III. The Thirteenth Amendment and the 1866 Civil Rights Act expressly invested emancipated African American freedmen with the Right "to Make and Enforce" Marriage Contracts

A. *Adams v. Sneed*, 25 So. 893 (Fla. 1899).

The Florida Supreme Court has expressly acknowledged in *Adams v. Sneed*, supra, pp. 894 that the **Thirteenth Amendment** and (or) the abolition of slavery invested African American freedmen with the right to make and enforce the marriage contract, stating:

> the author contends that children of customary slave marriages were not regarded as illegitimates or bastards in slavery, but occupied a statutes peculiar to that institution; … that **the abolition of slavery destroyed this peculiar status**, and it could never again be occupied by any person, white or black…. [W]ith **the abolition of slavery** all **impediments to future legal marriages** and to the acquisition of inheritable blood by the issue of such future marriages **were swept away**….

B. *Burns v. State*, 48 Ala. 195 (Ala. 1872)

The Alabama Supreme Court held in *Burns v. State*, supra, pp. 197-198, that "marriage is a civil contract" and that the **1866 Civil Rights Act** established the rights of emancipated freedmen "to make and enforce contracts, amongst which is that of marriage."

C. *Hart v. Hoss & Elder*, 26 La. Ann. 90 (La. 1874).

The Louisiana Supreme Court held in the case of *Hart v. Hoss & Elder*, supra, pp. 90-91, that "[o]ur law considers marriage in no

other view than as a civil contract," and, as such, that it was governed by the **1866 Civil Rights Act**, which permitted the freedom to contract in an interracial marriage.

D. Legal Periodicals on the 1866 Civil Rights Act and marriage contracts

1. See, e.g., Darlene Goring, "The History of Slave Marriage in the United States," *Journal Articles,* No. 262 (2006), stating:

> The emancipation of slaves, coupled with ratification of the Thirteenth Amendment, shattered the paradox that slaves were both human and chattel. Thereafter, upon passage of **the Civil Rights Act of 1866**, basic human rights, such as the right to contract, the right to own, sell, and lease real and personal property, were conferred on freed slaves.[4] In this context, **recognition of the slaves' right to marry** was an integral part of their transformation into legally recognized personhood.[5]

2. Megan R. Busby, "Reconstructing the Black Family: How the Freedmen's Bureau Sought to Shape Black Family Structures After Emancipation," stating:

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[4] Citing the following federal statute: "1866 Civil Rights Act, Ch. 31, 14 Stat. 27, (1866) (codified as amended at 42 U.S.C. §§ 1 481-1482 (2000))."

[5] Citing the following reference, stating:

> Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 666 (2001 ). Professor Gross states:
>
> > The household approach to slavery also leads historians to focus on the institution of marriage during Reconstruction as a vehicle for political transformation. Several recent histories of Reconstruction have emphasized African American assertions of the right to marry as a fundamental right of citizenship. As a black corporal in the U. S. Colored Troops declared to his regiment in 1866. 'The Marriage Covenant is at the foundation of all our rights. In slavery we could not have legalized marriage: now we have it… and we shall be established as a people.' This corporal recognized that marriage was 'the entering wedge into a broad range of social privileges,' including property rights and the right to enter into contracts.

> During the Reconstruction era, formerly enslaved peoples secured their freedom, citizenship, and a myriad of legal, social, and political rights, including the right to marry. At the national level, Congress passed the Civil Rights Act of 1866, which extended **the right to make contracts, this included the right to enter into marriages**, to all formerly enslaved peoples. Now that the freedmen and women had the ability to enter into contracts, state governments quickly began to create rules and laws that outlined the requirements for marriage for these new citizens.[6]

E. While 1866 Civil Rights Act permitted emancipated African freedmen "to make and enforce marriage contracts" with other African Americans, both state and federal courts routinely held that the 1866 Civil Rights Act (i.e., "the civil rights bill") did not give them the right to make and enforce marriage contracts with white persons, to wit:

1. *Green v. State*, 58 Ala. 190, 192 (Al 1877) ("[t]he argument in support of this decision was as follows: ' .... **[t]he civil rights bill** now confers.., marriage with any citizen capable of entering into that relation'").

2. *In re Hobbs*, 12 F. Cas. 262, 262-63 (N.D. Ga. 1871) ("The primary, but not the only question presented by the relators for consideration is, whether [the interracial marriage ban] is repugnant to the fourteenth amendment and the **civil rights bill** ....").

3. *State v. Gibson*, 36 Ind. 389, 394 (Ind 1871) ("But it is urged that the **civil rights bill** has abrogated the section of our statute which renders it a felony for a negro to marry a white woman of this State, or for a white man to marry a negro woman.").

[6] Megan R. Busby, "Reconstructing the Black Family: How the Freedmen's Bureau Sought to Shape Black Family Structures After Emancipation" (2021). *Honors Theses and Capstones*. 574. https://scholars.unh.edu/honors/574.

4. *State v. Hairston*, 63 N.C. 451, 453 (NC 1869) ("It was insisted that the **Civil Rights Bill** has declared a different policy and has changed the law.").

5. *Lonas v. State*, 50 Tenn. 287, 306 (TN 1871) ("If the African, in this country, has been elevated to a perfect equality in social, as well as political, rights with the Caucasian; if that race can claim at all the right to marry and be given in marriage with the sons and daughters of our people, it must be claimed alone by virtue of the foregoing amendments and the laws [the Enforcement Act and **Civil Rights Act of 1866**] enacted for their enforcement.").

6. *Frasher v. State*, 3 Tex. App. 263, 272 (Tex. Civ. App. 1877) ("It is urged that the **Civil Rights Bill** has abrogated the section of our statute under which the indictment in this cause was found.").

## Conclusion

Under the "first generation" analysis of American constitutional law and civil rights, the "*perpetuation of African slavery under another name*" has long been the catchphrase to describe the white South's subterfuges and evasions of African American civil rights through the use of "*race-neutral*" schemes and mechanisms: e.g., grandfather clauses, poll taxes, literacy tests, vagrancy laws, breach of contract clauses, financial agreements, etc.

Florida's family laws—Florida Statute, Chapter 61—is an example of a "*race-neutral*" state law, whereby the "*perpetuation of African slavery under another name*" can be achieved, especially without a "first generation" analysis of American constitutional law, civil rights, history, and the custom, culture, and the socioeconomic plight of African American families—in sum, the whole set of factors that constitute the conflict-ridden relationships between Black men and Black women, and how unscrupulous state laws, state agencies, and state officials have only aggravated the plight of the African American family. A race-neutral "second generation" analysis of American constitutional law and civil

rights simply does not help the American bar and bench with attaining any clearer understanding of these issues.

In 1865, to paraphrase W. E. B. Du Bois, African American men came into a "*new birthright*," after having been "*emasculated by a complete system of slavery*."[7] But there is no history that can support any official finding that the damage inflicted upon the African American family—particularly, the divestiture of the Black husband of his "Head of Family" status—was ever repaired immediately after slavery, or at any time during the 20th-century.[8]

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[7] See, e.g., W.E.B. Du Bois, *The Souls of Black Folk*, https://etc.usf.edu/lit2go/203/the-souls-of-black folk/4432/chapter-2-of-the-dawn-of-freedom/ (Chapter Two, "Of the Dawn of Freedom")("Here at a stroke of the pen was erected a government of millions of men,--and not ordinary men either, but black men emasculated by a peculiarly complete system of slavery, centuries old…").

[8] See, e.g., E. Franklin Frazier, *Black Bourgeoisie* (Glencoe, Illinois; The Free Press, 1957), pp. 220-221, stating:

> There is much frustration among black bourgeoisie despite their privileged position within the segregated Negro world. Their 'wealth' and 'social' position can not erase the fact that they are generally segregated and rejected by the white world. Their incomes and occupations may enable them to escape the cruder manifestations of racial prejudice, but they can not insulate themselves against the more subtle forms of racial discrimination. These discriminations cause frustrations in Negro men because they are not allowed to play the 'masculine role' as defined by American culture. They can not assert themselves or exercise power as white men do….
>
> As one of the results of not being able to play the 'masculine role,' middle-class Negro males have tended to cultivate their 'personalities' which enables them to exercise considerable influence among whites and achieve distinction in the Negro world. Among Negroes they have been noted for their glamour. In this respect they resemble women who use their 'personalities' to compensate for their inferior status in relation to men. This fact would seem to support the observation of an American sociologists that the Negro was 'the lady among the races,' if he had restricted his observation to middle-class males among American Negroes.
>
> In the South the middle-class Negro male is not only prevented from playing a masculine role, but generally he must let Negro women assume leadership in any show of militancy. This reacts upon his status in the home where the tradition of female dominance, which is widely established among Negroes, has tended to assign a subordinate role to the male.

The 1866 Civil Rights Act, while utilizing a "first generation" analysis of American constitutional law and civil rights, provides the platform whereby state and federal judges and courts can begin to address the constitutional and statutory "torts" that divest African American husbands and fathers of their rightful "Head of Family" status, which is part of the common law of Florida and many other states.

**--- The End of Chapter Two ---**

# Chapter Three

## "The Freedmen's Bureau Courts and the Marriage Contract"

By

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**Contents**

Introduction ..... 1

Part I. Freedmen's Bureau Courts' Jurisdiction over Marriage Contracts ..... 2

A Freedmen's Bureau Act of 1865 ..... 2

B. Freedmen's Bureau Constitution ..... 3

C. Freedmen's Bureau General Order No. 8 ..... 3

D. Civil Rights Act of 1866 ..... 5

E. Freedmen's Bureau Act of 1866 ..... 5

F. Sec. 1 of the Civil Rights Act and Sec. 14 of the Freedmen's Bureau Act ..... 6

G. Justice Thurgood Marshall, *Regents of Univ. of Cal v. Bakke* (1978) ..... 6

H. Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866* ..... 6

I. W. E. B. Du Bois, "Freedmen's Courts v. Southern Court" *The Souls of Black Folk* (1903) ..... 7

Conclusion ..... 7

## Introduction

A "first generation" analysis of the Thirteenth Amendment and the 1866 Civil Rights Act may include the history, constitution, and function of the Bureau of Refugees, Freedmen, and Abandoned Lands (i.e., the Freedmen's Bureau) which was created by an act of Congress on March 3, 1865.

The primary and fundamental objective of this Freedmen's Bureau centered upon building and sustaining the most basic—and yet most important—civil unit: *the family*. This fact is plainly demonstrated in Freedmen's Bureau General Order No. 8, which stated, for instance, that its objective was "[t]o correct as far as possible one of the most cruel wrongs inflicted by slavery, and also to aid the freedmen in property appreciating and religiously observing the *sacred obligation* of the *marriage state*."

General Order No. 8 was legal and constitutional, because wartime exigencies and, later, Section 2 of the Thirteenth Amendment, had armed Congress with authority to enact federal legislation that would accomplish "all things necessary" to defeat the Rebellion; to subdue the recalcitrant Southern courts; to establish temporary federal courts; to enact new federal legislation as needed; and to supplement the federal jurisdiction of the federal district and circuit courts, in order to protect the federal statutory and constitutional rights of the Black freedmen.

This constitutional history is not a dead letter, nor is it lost upon the general and practical "first generation" civil rights jurisprudence of the nation, as, for example, Justice Thurgood Marshall has frequently referred to this history (including the history of the Freedmen's Bureau) in cases such as *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 397 (1978)(commenting upon the "Freedmen's Bureau Act of 1866" as the basis for affirmative action policies).

## I. The Freedmen's Bureau Acts of 1865 and 1866 invested Freedmen's Bureau Courts with Jurisdiction over Marriage Contracts of African Americans

A. Freedmen's Bureau Act of 1865 (March 3, 1865).[1] A wartime measure.

[1] "CHAP. XC.—An Act to establish a Bureau for the Relief of Freedmen and Refugees. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established in the War Department, to continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands, to which shall be committed, as hereinafter provided, the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states, or from any district of country within the territory embraced in the operations of the army, under such rules and regulations as may be prescribed by the head of the bureau and approved by the President…."

B. The Freedmen's Bureau Constitution issued. (May 19, 1865)[2]

C. The Freedmen's Bureau General Order No. 8 (August 11, 1865),[3] Military Jurisdiction over Marriage and Marriage Contracts of the Freedmen:

**The Freedmen's Bureau General Order No. 8**
(Florida, Georgia, and South Carolina)

"MARRIAGE RULES. To correct as far as possible one of the most cruel wrongs inflicted by slavery, and also to aid the freedmen in property appreciating and religiously observing the sacred obligation of the marriage state, the following rules are published for the information and guidance of all connected with this Bureau throughout the States of South Carolina, Georgia, and Florida:

Section I.

Parties Eligible to Marriage.

1.—All male persons, having never been married, of the age of twenty-one, and all females, having never been married, of the age of eighteen, shall be deemed eligible to marriage.

2.—All married persons who shall furnish satisfactory evidence of either the marriage or divorce of all former companions, according to the usages of slavery, or of their decease, will be eligible to marriage again.

3.—All married persons, producing satisfactory evidence of having been separated from their companions by slavery for a period of three years, and that they have no evidence that they are

[2] W.E. Burghardt Du Bois, "The Freedmen's Bureau," *Atlantic Monthly* 87 (March 1901): 358.

[3] See, also, W.E.B. Du Bois, "The Souls of Black Folk," Writings (New York, N.Y.: The Library of America, 1986), p. 379 ("Forthwith nine assistant commissioners were appointed. They were to… **establish the institution of marriage among ex-slaves, and keep records**…."); W.E.B. Du Bois, *Black Reconstruction in America* (New York, N.Y.: Harcourt, Brace & Co., 1935), p. 226 ("The **judicial work of the Bureau** consisted in protecting the Negro from violence and outrage, from serfdom, and in defending his right to hold property and **enforce his contracts**. It was to see that Negroes had **fair trials** and that their **testimony was received**, and their **family relations respected**.")

alive; or, if alive, that they will ever, probably, be restored to them, may be allowed to marry again.

Section II.

Parties authorized to grant Permits of Marriage.

1.—All religious societies or churches of the freedmen or of other persons, whose organizations are recognized by their respective denominations, are authorized to grant permits for marriage, provided:

First. That they parties are of lawful age, and that neither have never been married.

Second. That if either or both have been married, that such party has complied with the conditions of Sec. I. Rules 2 and 3.

2.-- Any society or church, having an ordained pastor, may delegate to him its power to examine applicants and grant permits for marriage. Such power, however, may be revoked at any time.

3.—Civil officers may give permits for marriages, if the laws of the State provide for the same, and such laws are recognized as in force by the General Government….

Section IV.

First Marriages and Reunions.

1.—The marriage of all parties living together as husband and wife at the time of obtaining freedom, or solemnized since obtaining it, will be acknowledged as legal and binding.

2.—All parties whose marriage was only a mutual agreement between themselves, with no public form or ceremony, are required to have their marriage confirmed by a minister, and obtain a certificate of the same.

3.—No parties having agreed to enter the marriage relation will be allowed to live together as husband and wife until marriage has been legally solemnized.

4.—All parties claiming to have been married, but separated by slavery, and having no certificate of their marriage, must obtain from some society or church a permit for their reunion, before they will be allowed to live together as husband and wife.

Duties of Husband to former Wives. 5.—A wife when restored by freedom to her husband, if he be living with no ther, shall be received by him as his lawful wife except for moral causes, as provided in Sec. III., Rule 3., first.

6.—If a man living without a wife find two wives restored to him by freedom, the one having children by him and the other not, he shall take the mother of his children as he lawful wife, unless he show cause as provided in Sect. III, Rule 4, first.

7.—If a man living without a wife shall refuse to renew the marriage relation with a former wife restored by freedom, who may desire such renewal, there being no moral or legal objection to the same proven by him, he shall be held responsible for the support of such wife, and also if his children by her so long as they remain minors.

8.—No man failing for want of cause proven to obtain to obtain a release from renewing his marriage relations with a former wife, will be allowed to marry another woman so long as such wife may live, or until for just cause she shall have married another.

9.—**Every man marrying a woman having children, shall be responsible for their protection and support so long as they remain minors**.

10.—A husband having a wife, having no children by her, may be permitted to take a previous wife, provided:

First.—He have children by such wife who are still minors.

Second.—That such wife have no other husband known to be living.

Third.—That his present wife assent to such change of their marriage relations.

11.—If a former wife utterly refuse, upon application made by the husband, to renew her former marriage relation with him, he may notify some society or church of the fact of such refusal, and….

D. **Civil Rights Act of 1866**, (April 9, 1866), chap. 31, 14 Stat. 27–30 , "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication."

E. **Freedmen's Bureau Act of 1866**, (July 16, 1866), ch. 200, 14 Stat. 173, Section 14, conferred temporary jurisdiction upon Freedmen's Bureau Courts, where local court jurisdictions had been disrupted.[4]

[4] "SEC. 14. And be it further enacted, That in every State or district where **the ordinary course of judicial proceedings has been interrupted by the rebellion**, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, **the right to make and enforce contracts. to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition,**

F. Sec 1 of the 1866 Civil Rights Act and Sec. 14 of the Freedmen's Bureau Acts of 1866 were patterned after the ad hoc provisions of military commanders and the Freedmen's Bureau Act of 1865.[5]

G. See, e.g., Justice Thurgood Marshall's dissenting opinion describing the Freedmen's Bureau Act of 1866 in Regents of *Univ. of Cal. v. Bakkee*, 438 U.S. 265, 397 (1978)("The bill's supporters defended it not by rebutting the claim of special treatment, but by pointing to the need for such treatment….").

H. See, also, Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary, The*

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**enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery**. And whenever in either of said States or districts the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and until such State shall have been restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States, the President shall, through the commissioner and the officer of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend **military protection** and have **military jurisdiction** over all cases and questions conceiving the free enjoyment of such immunities and rights, and no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offence . **But the jurisdiction conferred by this section upon the officers of the bureau shall not exist in any State where the ordinary course of judicial proceedings has not been interrupted by the rebellion**, and **shall cease in every State when the courts of the State and the United States are not disturbed in the peaceable course of justice**, and after such State shall be fully restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States."

[5] Robert Kaczorowski, *Enforcement of the Civil Rights Act of 1866*, supra, pp. 588, stating, "They justified this legislation [i.e., Sec. 2 and 3 of the 1866 Civil Rights Act] by insisting that **they were merely providing through civil and criminal process the relief that the Union army was offering under military powers**." [Cong. Globe, 39th Cong., 1st Sess 603 (Sen. Wilson); id. at 1119 (Rep. Wilson); id. at 1123-24 (Rep. Cook); id. at 1153 (Rep. Thayer); id. at 1158, 1160 (Rep. Windom); id. at 1263 (Rep. Broomall); id. at 1759 (Sen. Trumbull); id. at 1833-35 (Rep. Lawrence)."

*Review Essay and Comments: Reconstructing Reconstruction*, 98 Yale L. J. 565 (1988-1989).[6]

I. See, also, W. E. B. Du Bois, "The Souls of Black Folk," *Writings* (New York, N.Y.: The Library of America, 1986).[7]

## Conclusion

When ascertaining what are "fundamental rights," together with the Congressional purpose, methods, and measures that were designed to secure those "fundamental rights" on behalf of African American citizens, the U. S.

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[6] Robert Kaczorowski, *Enforcement of the Civil Rights Act of 1866*, supra, pp. 580-581, stating, "The Freedmen's Bureau was particularly important in helping the freedmen enforce their contracts, since **local law enforcement agencies** and **courts** usually **refused to enforce the freedmen's rights**. Following the military's example, the framers provided **for the enforcement of civil rights directly in the federal courts**. They sought to void racially discriminatory state laws which infringed civil rights secured by the Constitution, **eliminate racial and political prejudice** in the administration of civil and criminal justice **in the State courts**, and provide **an alternative system of civil and criminal justice** when individuals **could not enforce or were denied their civil rights in the state courts**."

[7] Du Bois, "The Souls of Black Folk," *Writings*, supra, stating:

*Id*. at 379 (**Freedmen's Bureau** was designed to "act **as courts of law** where there were no courts, or where Negroes were not recognized in them as free; establish the institution of marriage among ex-slaves, and keep records; see that freedmen were free to choose their employers, and help in making fair contracts for them; and finally, the circular said: '**Simple good faith**, for which we hope on all hands for those concerned in the passing away of slavery….'")

*Id*. at 386 ("[T]o leave the Negro in the hands of **Southern courts** was impossible…. [T]he **regular civil courts** tended to become solely institutions for **perpetuating the slavery of blacks**. Almost every law and method ingenuity could devise was employed by the legislatures to reduce the Negroes to serfdom—to make them **the slaves of the State**, if not of individual owners….")

District Courts should look to "first generation" civil rights jurisprudence, i.e., to the unique "history and tradition" that are uniquely specific to the African American people,[8] as appropriate guideposts. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997).[9]

This "history and tradition" clearly demonstrate that all the general or plenary powers of the "civil and criminal" jurisdiction of the state courts—including the power to regulate the familial relationship—were removable to the U.S. District Courts, pursuant to Sec. 3 of the 1866 Civil Rights Act, through sheer "life and death" necessity, for the protection of African American freedmen, as well for those sympathetic white persons who sought to vindicate the rights of those freedmen. In truth, the administration of "race-neutral laws" in the hands of powerful white persons who controlled the state governments and the state courts simply *could not be trusted*. See, generally, Kermit L. Hall, "The Civil War as a Crucible for Nationalizing the Lower Federal Courts," *Prologue Magazine* Vol. 7, No. 3 (Fall 1975).[10]

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[8] See, e.g., Moynihan, Daniel P. *The Negro family: The Case for National Action*. Washington, DC: Office of Policy Planning and Research, U.S. Department of Labor (March 1965), stating:

> It was by **destroying the Negro family under slavery** that white America broke the will of the Negro people….

[9] *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), stating:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. East Cleveland*, 431 U. S. 494, 503 (plurality opinion). ]; *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U. S. 319, 325, 326 (1937).

[10] See, generally, Kermit L. Hall, "The Civil War as a Crucible for Nationalizing the Lower Federal Courts," supra, stating:

> A. "The performance of southern state courts in treating Unionists and blacks immediately following the war challenged radical and moderate congressional Republicans who sought more than token reconstruction…."

B. "Newly freed blacks suffered under the operation of local custom and the Black Codes. An agent of the Freedmen's Bureau in New Orleans, for example, wrote in the summer of 1865 that the rulings of the provisional state courts 'have been such of late, so far as colored citizens are concerned, as to shock every truly loyal man among us.'"

C. "Even where the federal judiciary made a strong showing it **encountered difficulties in treating prominent ex-Confederates**. Judge John Erskine of Georgia wryly observed that his court usually convicted a 'haggard and miserable looking set of creatures,' while the **'well to do' leaders of the rebellion evaded federal enforcement**."

And see, also, *Monroe v. Pape*, 365 U.S. 167, 175-177 (1961):

> While one main scourge of the evil -- perhaps the leading one -- was the Ku Klux Klan, the remedy created was not a remedy against it or its members, but against **those who representing a State in some capacity were unable or unwilling to enforce a state law**….
>
> **Senator Osborn of Florida** put the problem in these terms….
>
> > [t]hat the **State courts in the several States** have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing…. **There was, it was said, no quarrel with the state laws on the books**. It was their **lack of enforcement** that was **the nub of the difficulty**….
>
> "Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination:
>
> > '… [**b]ut if the statutes show no discrimination**, yet, **in its judicial tribunals**, **one class** is **unable to secure that enforcement of their rights** and punishment for their infraction which is accorded to another, or, **if secret combinations of men** are allowed by the Executive to **band together to deprive one class of citizens of their legal rights** without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.'

**--- The End of Chapter Three ---**

# Chapter Four

"Black Men as 'Head of the Family'"

By

Rev. Roderick Andrew Lee Ford, J.D., Litt.D., LL.D.

**Contents**

Introduction ..... 1
Part I. Freedmen's Marriage Contract, "Head of Family" status, and English Common Law ..... 3
A. Ecclesiastical Courts of England and Great Britain ..... 3
B. American Common Law adopts English Marriage Jurisprudence ..... 6
C. Florida's Common Law and the "Head of Family" status ..... 8
D. Florida' Slave Code divested Black Men of "Head of Family" status . ..... 9
E. Florida's Jurisprudence- Slavery was "Inconsistent" with "Husband and Wife" status ..... 12
F. Florida's Slave Code nullified English and American Common Law of Marriage ..... 13
G. "History and Tradition" demonstrate Present-day Effects On Black Family Life ..... 15
Conclusion ..... 19

## Introduction

Tortious actions which have retarded the status of African American men as "Heads of families" since the end of Reconstruction are not cognizable in state and federal courts, without a "first generation" analysis of American constitutional and civil rights jurisprudence. For one thing, while "white" families have received nearly 1,000 years of wholesome and nurturing conjugal guidance, conjugal tutelage, conjugal counseling, and conjugal support from the Church of England, the ecclesiastical courts of England and Great Britain, and comparable state-church institutions in colonial British North America and in the

new United States of America, the African slaves, who were *forcefully* brought to North America *in chains*, were not permitted to make and enforce marriage contracts, or to establish conventional familial relations wherein African American men were established as "Head of the family." African American women were not taught, encouraged, or compelled to acknowledge African American men as "Head of the family." African American women could legally be "raped" by their white owners, and this certainly deprecated the role and status of Black fatherhood. Hence, Frederick Douglass has appropriately commented upon this as follows:

> I say nothing of father, for he is shrouded in a mystery I have never been able to penetrate. Slavery does way with fathers, as it does with families. Slavery has no use for either fathers or families, and its laws do not recognize their existence in the social arrangements of the plantation. When they do exist, they are not the outgrowths of slavery, but are antagonistic to that system. The order of civilization is reversed here.[1]

As a substitute for legal marriage, Florida's Slave Code permitted "slave marriages" or "customary slave marriages," whereby the slave master could disapprove of the marriage, or terminate the marriage at a whim, and (or) sell either the husband or the wife or the children to the said "slave marriage." No rights of inheritance were invested in the children to such marriages, and this legacy is more poignantly still be felt especially among African Americans—but particularly among the African American underclass—during the early part of this twenty-first century.

The American judiciary, the American family law bar, and accredited American law schools have failed to fairly and adequately admit that collectively "secular law," without spiritual, social, cultural, and socio-economic knowledge from trained clergymen, social workers, and historians, has grossly failed the African American population and, as a whole, Black families. The result is often

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[1] Frederick Douglass, "My Bondage and My Freedom," *Autobiographies* (New York, N.Y.: The Library of America, 1995), p. 151.

gross mis-management of, and intentional racial bias against, Black families—and particularly against Black fathers and husbands—in the state courts. Here, the 1866 Civil Rights Act was enacted to appropriately address and remedy in, where needed, the United States District Courts.

## I. The Freedmen's Marriage Contract Rights as "Head of the Family" Were Rooted in the Christian Religion, England's Ecclesiastical Jurisprudence, American Common Law of Marriage—But Had Been Denied during 246 Years of Slavery.

### A. Ecclesiastical Courts of Great Britain and American Common Law of Marriage and Family

1. In general, state court jurisdiction over domestic relations stem from the Church of England's ecclesiastical courts.

    a. *Barber v. Barber*, 62 U.S. 582 (1858).[2]

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[2] *Barber v. Barber*, supra, at pp. 590-591, 592 stating:

> There is, too, another ground of jurisdiction in equity just as certainly established as that is of which we have just spoken. It comprehends the case before us. It is that courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England. Such a jurisdiction is ancient there, and the principal reason for its exercise is equally applicable to the courts of equity in the United States. It is that when a court of competent jurisdiction over the subject matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud.
>
> It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all of the states, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived….

b. *Reynolds v. United States*, 98 U.S. 145 (1878).[3]

c. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930).[4]

d. *William v. Kimball*, 35 Fla. 49, 53, 16 So. 783 (Fla. 1895)[5]

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[T]he jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived."

[3] *Reynolds v. United States*, supra, at pp. 164-165, stating:

> At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England, polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

[4] *Ohio ex rel. Popovici v. Agler*, supra, at pp. 383-384, stating:

> If, when the Constitution was adopted, the common understanding as that the domestic relations of husband and wife and parent and child were matters reserved to the states, there is no difficulty in construing the instrument accordingly, and not much in dealing with the statutes. "Suits against consuls and vice-consuls" must be taken to refer to ordinary civil proceedings, and not to include what formerly would have belonged to the ecclesiastical Courts.

[5] *William v. Kimball*, supra, stating:

> At the parliament [35 Fla. 54] of Merton the clergy proposed to change the law so that antenati legitimated by the marriage of their parents might inherit, but the barons refused to change the law of the realm. Therefore, the statute of Merton, instead of being a new enactment upon the subject, was a legislative declaration of an ancient law. It has been declared to be in force in England, by the British

e. See, also, **Table 1.** "Ecclesiastical Courts of England and Great Britain"

## Ecclesiastical Courts of England and Great Britian

No distinct system of ecclesiastical courts existed in England before the twelfth century. Rather, **bishops of the church were also secular lords**, who exercised their authority through the local assemblies.

> "In the shire court, the **bishop presided with the sheriff**, and it seems that spiritual matters were placed first on the agenda. William I ordered in the 1070s that pleas of bishops and archdeacons should not be heard in the hundred courts, but that the power of the king and the sheriff should be available to compel appearance before the bishop. This was an attempt to prevent **the corrective jurisdiction of the Church**, which generated monetary income, from passing with the hundreds into lay hands. The separation of ecclesiastical and lay pleas at county level probably did not occur until the next century." ( Baker, John H. *An Introduction to English Legal History*, 4th ed. London: Butterworths Lexis/Nexis, 2002 at p.127)

By the end of the twelfth century a machinery of ecclesiastical judicature had developed consisting of a hierarchy of tribunals with the Roman Curia as its apex. As described by Baker,

> "At the lowest level, archdeacons had criminal courts for the correction of moral and disciplinary offenses; appeal lay from archidiaconal courts to episcopal 'courts of audience'. The bishops also had their 'consistory courts', presided over by chancellors learned in Canon law, which heard lawsuits such as **matrimonial** and **defamation cases**. From bishops, appeal lay to one of the two archbishops: in the province of York to the Chancery Court of York, in that of Canterbury to the Court of Arches. From these provincial courts, appeal lay to the pope." (Baker, John H. *An Introduction to English Legal History*, 4th ed. London: Butterworths Lexis/Nexis, 2002 at p.127)

The Church tried cases involving actions of the clergy, articles concerning the church, and cases where the matter was of a spiritual nature. This last included, with respect to the laity, issues of morality, religious behavior, **marriages**, legitimacy, wills, and the

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house of lords, as late as 1839. *Birtwhistle v. Vardill*, 7 Clark & F. 895, 6 Bing. N. C. 385. **It is now, by adoption, the law in this state** (page 708, § 7, McClel. Dig.)

administration of intestate estates. It served as a registry concerning baptisms, **marriages**, and burials.

Most of the records are held in the archives of the various religious houses and diocesan headquarters.

**Source:** University of Southern California, Law Library
https://lawlibguides.usc.edu/c.php?g=777451&p=5590367

f. See, also, **Table 2.** "Marriage Under Traditional English Ecclesiastical and American Common Law"

**Marriage Under Traditional English Ecclesiastical and American Common Law**

See, e.g., *Barber v. Barber*, 62 U.S. 582, 600-601 (1858), defining the institution of marriage as it then existed under English and American common law as follows.

By Coke and Blackstone it said:

> "That by marriage, the husband and wife become one person in law -- that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife depend almost all the rights, duties, and disabilities that either of them acquire by the marriage. For this reason, a man cannot grant anything to his wife nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself, and therefore it is generally true that all compacts made between husband and wife, when single, are voided by the intermarriage." Co. Lit., 112; Bla. Com., vol. 1, 442.

So too, Chancellor Kent, vol. 2, 128:

> "The legal effects of marriage are generally deducible from the principle of the common law by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union."

B. In American jurisprudence, the English common law, which established the **Husband** as the "**Head of the Family**," was adopted.

1. See, e.g., 30 Corpus Juris Secundum (1st Ed), Husband and Wife, § 16 "C. Personal Rights and Duties- **Head of Family**."[6]

2. 26 Am Jur, Husband and Wife, § 10 **Head of Family**.[7]

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[6] Reference states: "The **husband is the head of the family**, and as such the general right at common law to regulate the household, its expenses, and its visitors, and to exercise the general control of family management."

[7] "Head of Family," *American Jurisprudence* (First Edition):

> **§ 10 Head of Family**
>
> The husband, unless incapacitated from executing the authority and performing the duty, is head of the family. This is so, not only at common law, but under the Married Women's Acts. **It is not the purpose of these acts to depose the husband from the position given him by the common law as the head of the family**. It is necessary to the unity and preservation of the family, which is regarded **as the basic of the state, to have a single head with control and power,** and the **husband is made that head and, in return, is made responsible for the maintenance and, at common law, for the conduct of his wife.** Such **fundamental authority** is **necessary to his duty to protect and provide for his wife and children**.
>
> The authority of the husband as the head of the family gives **him the right, acting reasonably, to direct the family's affairs and to determine where and what the home of the family shall be**, and thus, **to establish the matrimonial and family domicile.** The view has been taken that this right of the husband is not limited to the state or country in which the parties live at the time of their marriage, but in these days of easy communication between different countries and different parts of the same country, he may exercise it, where acting reasonably, in a way which will change his citizenship and allegiance. But **he must act with due regard to the welfare, comfort, and peace of mind of his wife, and to her legal status as the mistress of his home, his companion, the sharer of his fortune, and not his servant**. She is under **duty to submit to such reasonable governance of the family by the husband**.
>
> A **husband is responsible to society for the good order and decency of the household**, and this is true under Married Women's Acts endowing married women with separateness and equality of legal responsibility.

3. Raymond J. Margles, "The Extent of a Husband's Obligation to Support His Wife," *St. John's Law Review*, Vol. 13, No. 1 (1938).[8]

C. In Florida, the law of "**Head of the Family**" was inherited from the general common law of England, which was officially adopted by state statute.

1. Fla. Stat., § 2.01.[9]

2. *Banfield v. Addington*, 104 Fla. 661 (Fla. 1932).[10]

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> The wife is the head of the family in so far as the husband is incapacitated from performing the duty.

[8] See, e.g., Raymond J. Margles, "The Extent of a Husband's Obligation to Support His Wife," stating:

> As a necessary incident to the marital relation there is imposed on the husband the duty to support and maintain his wife and family in conformity with his condition and station in life. This duty does not rest on any contractual rights but is based on **considerations of public policy** which demand that **the husband, as the legal head of the family**, fulfill his obligation to those who are naturally dependent upon him for support and protection.

[9] Fla. Stat., Sec. 2.01 (s. 1, Nov. 6, 1829; RS 59; GS 59; RGS 71; CGL 87) states:

> Common law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

[10] See, also, the Florida Supreme Court in *Banfield v. Addington*, supra, p. 673, stating:

> Under section 87, Comp. Gen. Laws, section 71, Rev. Gen. St., the common law of England is in force in this state, but only so far as the rules of the English common law be not 'inconsistent' with the acts of the Legislature of this state. That the common law may be modified indirectly as well as directly, by a statute

3. *Ripley v. Ewell*, 61 So.2d 420 (Fla. 1952).[11]

4. *Solomon v. Davis*, 100 So.2d 177 (Fla. 1958).[12]

5. *Killian v. Lawson*, 387 So.2d 960 (Fla. 1980).[13]

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which is 'inconsistent' with the common law in a particular instance, is a rule which is well settled in our jurisprudence.

[11] See, also, the Florida Supreme Court in *Ripley v. Ewell*, supra, p. 421, stating:

> "It is the statute law of this State that:
>
> > 'The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.' F.S.A. § 2.01."

[12] See, also, the Florida Supreme Court in *Solomon v. Davis*, supra, pp. 178-179, stating:

> The court below recognized at the outset a presumption that where married people live together in a common home, the **husband is the head of the family**…
>
> [W]e find no case in which an able-bodied, continuously employed **husband** has been found to have abdicated his presumptive position as head of the family, where the primary family relationship of husband and wife remains intact with all the attendant duties and obligations thereby imposed upon him under our law.

[13] See, also, the Florida Supreme Court in *Killian v. Lawson*, supra, at p. 962, stating:

> A husband has a common law duty to support his wife. *Contractors Contract NOY 5948 v. Morris*, 154 Fla. 497, 18 So.2d 247 (1944). When alimony or support money is awarded, this duty to support survives dissolution of marriage because public policy requires the doing of that which in equity and good conscience should be done. *Brackin v. Brackin*, 182 So.2d 1 (Fla.1966). As this Court has noted, the

D. Florida's Slave Code divested Black men of "Head of the Family" status. This Code thoroughly regulated cohabitation, sexual relations, and conjugal relations of African American slaves; and it, like the American Slave Code in general, held that the "Husband and Wife" relationship under American common law was inconsistent with the condition of Slavery.

1. Fla Law Digest (2nd Ed), Descriptive Word Index, "Slavery" and "Involuntary Servitude."

2. 29I Fla Law Digest (2nd Ed ), Slaves, § 25 "Legalizing cohabitation and legitimizing issue of former slaves."[14]

3. 8A Fla Law Digest (1st Ed), § 16 "Marriage of Slaves"[15]

4. 38 Corpus Juris Secundum (1st Ed), Marriage

    a. § 9 "Validation of slave marriages"

    b. § 25 "e. Civil Status—(1) Slavery—(a) In General"[16]

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> purpose of alimony is to prevent a dependent party from becoming a public charge or an object of charity. *Aldrich v. Aldrich*, 163 So.2d 276 (Fla.1964)….
>
> In the instant case, respondent's alimony payments constitute his former wife's sole means of support. Even though divorced, respondent must, by court order, continue to support his ex-wife. **This duty arose out of a family relationship and makes him the financial head of a household**.

[14] Reference is made to the following: "For other cases see earlier editions of this digest, the Decennial Digests, and WESTLAW."

[15] Reference is made to C.J.S. "Marriage," §§ 4, 5, 7-9, 14 ("What law governs; essentials; statutory requirements; laws of foreign countries; Indian customs; civil status").

[16] Reference states: "While the institution of slavery existed it was generally held that a valid marriage could not exist between slaves, because of the paramount ownership in them as

5. 30 Corpus Juris Secundum (1st Ed), Husband and Wife

    a. § 5 "2. Unity of Husband and Wife – a. At Common Law"[17]

    b. § 16 "C. Personal Rights and Duties- Head of Family."[18]

6. *Williams v. Kimball*, 16 So. 783 (Fla. 1895)("customary slave marriage," "slaver marriage," and "cohabitation").[19]

7. *Adams v. Sneed*, 25 So. 893 (Fla. 1899).[20]

8. *Johnson v. Wilson*, 48 Fla. 76 (Fla. 1904) ("customary slave marriage," "slaver marriage," and "cohabitation").[21]

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property, their incapacity to make a contract, and the incompatibility of duties and obligations of husband and wife with the condition of slavery…. Slaves were, however, permitted a form of cohabitation which was termed a customary moral marriage or quasi marriage, which while given rise to no civil rights, was a status greater dignity than mere concubinage. As a general rule, the consent of the master was necessary to such a union, and only the master could dissolve it." For "Incapacity of slaves to contract see Slaves [35 Cye 464]" and lists several cases. For "Duties of a married person generally see Husband and Wife §§ 4 – 177."

[17] Reference states: "At common law husband and wife are in legal contemplation but one person, and the husband is that person, the legal existence of the wife being considered for most purposes as suspended during marriage and merged in that of the husband."

[18] Reference states: "The husband is the head of the family, and as such the general right at common law to regulate the household, its expenses, and its visitors, and to exercise the general control of family management."

[19] *Williams v. Kimball*, supra, at p. 784 ("customary slave marriage" and "slave marriage or cohabitation")(" In this state it has been settled for years that the offspring of such marriages, which have never been recognized by the parties thereto after they became free persons, and capable of making such contracts of marriage, have no inheritable blood; they cannot inherit property acquired by their ancestors after emancipation," etc.

[20] *Adams v. Sneed*, supra, generally discussing "customary slave marriages."

[21] *Johnson v. Wilson*, supra, at pp. 76, 78 ("customary slave marriage" and "customary slave marriages," etc).

9. *Christopher v. Mungen*, 55 So. 273 (Fla. 1911).[22]

E. Florida's Slave Code regarding property ownership and slave status rendered Slavery to be inconsistent with the common law duties of "Husband and Wife."

1. 38 Corpus Juris Secundum (1st Ed), Marriage, § 25 "e. Civil Status—(1) Slavery—(a) In General"[23]

2. See, also, Joseph Canon Thompson, "Toward A More Humane Oppression: Florida's Slave Codes, 1821 – 1861" *The Florida Historical Quarterly*, Vol. 71, No. 3 (Jan. 1993), pp. 333-334 ("Slave marriages, while prohibited by Florida law, were allowed by owners so long as his or her economic circumstances permitted

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[22] *Christopher v. Mungen*, supra, pp. 278, ("The **children of slave marriages** or **cohabitations** were not in law bastards, but they were generally regarded merely as not having the right of inheritance, their **parents not being husband and wife by contract under the law**, since as **slaves they could not legally contract even in Marriage**…. Chapter 1469, approved January 11, 1866 (Laws 1865-66), provided that colored persons living together as husband and wife should within nine months be married if they desired that relation to continue, and that the issue of such prior cohabitation should be legitimated by the act of marriage and thenceforth entitled to all the rights and privileges of legitimate offspring. After nine months from the date of the act, such cohabitation without marriage would be a misdemeanor. It is apparent that **this statute had proven ineffectual to do justice to the emancipated slaves** with reference to their status during slavery and the period just subsequent to emancipation. This was doubtless due to the general **lack of acquaintance with law by the freedmen** and their **inability to successfully meet the new conditions** suddenly thrust upon them.")

[23] Reference states: "While the institution of slavery existed it was generally held that **a valid marriage could not exist between slaves**, because of the paramount ownership in them as property, their incapacity to make a contract, and **the incompatibility of duties and obligations of husband and wife with the condition of slavery**…. Slaves were, however, permitted **a form of cohabitation** which was termed a customary moral marriage or quasi marriage, which while given rise to no civil rights, was a status greater dignity than mere concubinage. As a general rule, the **consent of the master was necessary to such a union**, and **only the master could dissolve it**." For "Incapacity of slaves to contract see Slaves [35 Cye 464]" and lists several cases. For "Duties of a married person generally see Husband and Wife §§ 4 – 177."

the union. Otherwise the owner could disavow the marriage and separate the couple through sale.") [Citing, generally, Duval, *Compilation of the Public Acts of Florida*.])

F. Florida's Slave Code (and the Slave Code of the United States) refused to apply the conjugal and familial Christian jurisprudence of England or the Florida Common Law of Marriage and Family to African American slaves, and, thereby, it decimated the status, role, and function of African American fathers and husbands as "Head of the Family."

1. See, e.g., the Roman law of *Partus sequitur ventrem*, which became a part of the municipal slave codes in the North American colonies.[24]

2. See, e.g., Frederick Douglass, "My Bondage and My Freedom," *Autobiographies* (New York, N.Y.: The Library of America, 1995).[25]

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[24] See, e.g., "Partus Sequitur Ventrem," Wikipedia Encyclopedia (Online):

https://en.wikipedia.org/wiki/Partus_sequitur_ventrem, to wit:

*Partus sequitur ventrem* ("[t]hat which is born follows the womb"; also partus) was a legal doctrine passed in colonial Virginia in 1662 and other English crown colonies in the Americas which defined the legal status of children born there; the doctrine mandated that all children would inherit the legal status of their mothers. As such, children of enslaved women would be born into slavery. The legal doctrine of *partus sequitur ventrem* was derived from Roman civil law, specifically the portions concerning slavery and personal property (chattels). The doctrine's most significant effect was placing into chattel slavery all children born to enslaved women. *Partus sequitur ventrem* soon spread from the colony of Virginia to all of the Thirteen Colonies. As a function of the political economy of chattel slavery in Colonial America, **the legalism of *partus sequitur ventrem* exempted the biological father from relationship toward children he fathered with enslaved women, and gave all rights in the children to the slave owner**. The **denial of paternity to enslaved children secured the slaveholders' right to profit from exploiting the labour of children engendered, bred, and born into slavery**. The doctrine also meant that multiracial children with white mothers were born free. Early generations of Free Negros in the American South were formed from unions between free working-class, usually mixed race women, and black men.

[25] Frederick Douglass, "My Bondage and My Freedom," supra, p. 151, stating:

3. See, also, **Table 3**, "Marriage of Enslaved People (United States)"[26]

## Marriage of Enslaved People (United States)

**Francis William Kellogg** states:

> [Slaves] are men, but they **must not read the work of God**; they have no right to any reward for their labor; **no right to their wives**; **no right to their children**; **no right to themselves**! The law makes them **property and affords them no protection**, and what are the Christian people of this country doing about it? Nothing at all!

"**Husbands and fathers**

> Some men and women lived with their children in nuclear families. In most cases, enslaved fathers did not live with their families. In many ways, enslaved couples assumed typically female and male roles within the relationships, except that since their children and wife were subject to enslavers' whims, men had less control in the care of their family than free men with free family members.
>
> In the 19th century, Alexis de Tocqueville found there was a "profound and natural antipathy between the institution of marriage and that of slavery" because a man could not be an authority figure to his wife and children. He could not control their fate, what work they performed, or their privileges."

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> I say nothing of father, for he is shrouded in a mystery I have never been able to penetrate. Slavery does way with fathers, as it does with families. Slavery has no use for either fathers or families, ad its laws do not recognize their existence in the social arrangements of the plantation. When they do exist, they are not the outgrowths of slavery, but are antagonistic to that system. The order of civilization is reversed here.

[26] https://en.wikipedia.org/wiki/Marriage_of_enslaved_people_(United_States).

4. See, e.g., W. E. B. Du Bois, "The Souls of Black Folk," *Writings* (New York, N.Y.: The Library of America, 1986).[27]

G. "History and tradition" also demonstrate that the present-day negative effects of slavery upon the African American family and family structure are painfully distressing, impactful, and significant.[28]

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[27] W.E.B. Du Bois, "The Souls of Black Folk," supra, p. 368, stating,

> The red stain of **bastardy**, which **two centuries of systematic legal defilement of Negro women** had stamped upon his race, meant not only the loss of ancient African chastity, but also the hereditary weight of **a mass of corruption from white adulterers**, **threatening almost the obliteration of the Negro home**.

According to W.E.B. Du Bois, the plight of "Negro home" lay front and center amongst the challenges of Emancipation, as presented in "The Souls of Black Folk," *Writings*, supra, 460- 461:

> The plague-spot in sexual relations is easy marriage and easy separation. This is no sudden development, nor the fruit of Emancipation. It is the plain heritage from slavery. In those days Sam, with his master's consent, 'took up' with Mary. No ceremony was necessary, and in the busy life of the great plantation of the Black Belt it was usually dispensed with. If now the master needed Sam's wok in another plantation or in another part of the same plantation, or if he took a notion to sell the slave, Sam's married life with Mary was usually unceremoniously broken, and then it was clearly to the master's interest to have both of them take new mates. This widespread custom of two centuries has not been eradicated in thirty years. To-day Sam's grandson 'takes up' with a woman without license or ceremony; they live together decently and honestly, and are, to all intent and purposes, man and wife. Sometimes these unions are never broken until a rival suitor, or perhaps more frequently the hopeless battle to upon a family, lead to separation, and a broken household is the result. The Negro church has done much to stop this practice, and now most marriage ceremonies are performed by pastors. Nevertheless, the evil is still deep seated, and only a general raising of the standard of living will finally cure it.

[28] See **"Marriage of Enslaved People (United States),"**
https://en.wikipedia.org/wiki/Marriage_of_enslaved_people_(United_States)

And see **"African American Family Structure,"**
https://en.wikipedia.org/wiki/African-American_family_structure

And see **"Black Matriarchy"**
https://en.wikipedia.org/wiki/Black_matriarchy

1. "History and Tradition": see, e.g., Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (Washington, D.C.: U.S. Department of Labor, 1965).[29]

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[29] See, e.g., Moynihan, Daniel P. *The Negro family: The Case for National Action*. Washington, DC: Office of Policy Planning and Research, U.S. Department of Labor (March 1965), stating:

> It was by **destroying the Negro family under slavery** that white America broke the will of the Negro people….
>
> "When **Jim Crow** made its appearance towards the end of the 19th century, it may be speculated that it was **the Negro male who was most humiliated** thereby…. Keeping the Negro 'in his place' can be translated as **keeping the Negro male in his place**: the **female was not a threat** to anyone….
>
> In essence, the Negro community has been forced into **a matriarchal structure** which, because it is to out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male….
>
> A fundamental fact of Negro American family life is the often reversed roles of husband and wife. **Robert O. Blood, Jr.** and **Donald M. Wolfe**, in a study of Detroit families, note that 'Negro husbands have unusually low power,' and while this is characteristic of all low income families, the pattern pervades the Negro social structure: 'the cumulative result of discrimination in jobs…, the segregated housing, and the poor schooling of Negro men'….
>
> The President's Committee on Equal Employment Opportunity, making a preliminary report on employment in 1964 of over 16,000 companies with nearly 5 million employees, revealed this pattern with dramatic emphasis.
>
> > In this work force, Negro males outnumber Negro females by a ratio of 4 to 1. Yet Negro males represent only 1.2 percent of all males in white collar occupations, while Negro females represent 3.1 percent of the total female white collar work force. Negro males represent 1.1 percent of all male professionals, whereas Negro females represent roughly 6 percent of all female professionals. Again, in technician occupations, Negro males represent 2.1 percent of all male technicians while Negro females represent roughly 10 percent of all female technicians. It would appear therefore that there are proportionately 4 times as many Negro females in significant white collar jobs than Negro males….
> >
> > Negro females in skilled jobs are almost the same as that of all females in such jobs….
> >
> > This pattern is to be seen in the Federal government, where special efforts have been made recently to insure equal employment opportunity for Negroes…. However, it may well be that these efforts have redounded mostly to the benefit

of Negro women, and may even have accentuated the comparative disadvantage of Negro men….

Among nonprofessional Labor Department employees

— where the most employment opportunities exist for all groups

— Negro women outnumber Negro men 4 to 1, and average almost one grade higher in classification.

The testimony to the effects of these patterns in Negro family structure is wide-spread, and hardly to be doubted.

Whitney Young: "Historically, in the matriarchal Negro society, mothers made sure that if one of their children had a chance for higher education the daughter was the one to pursue it."

"The effect on family functioning and role performance of this historical experience [economic deprivation] is what you might predict. Both as a husband and as a father the Negro male is made to feel inadequate, not because he is unlovable or unaffectionate, lacks intelligence or even a gray flannel suit. But in a society that measures a man by the size of his pay check, he doesn't stand very tall in a comparison with his white counterpart. To this situation he may react with withdrawal, bitterness toward society, aggression both within the family and racial group, self-hatred, or crime. Or he may escape through a number of avenues that help him to lose himself in fantasy or to compensate for his low status through a variety of exploits."

**Thomas Pettigrew**: "The Negro wife in this situation can easily become disgusted with her financially dependent husband, and her rejection of him further alienates the male from family life. Embittered by their experiences with men, many Negro mothers often act to perpetuate the mother-centered pattern by taking a greater interest in their daughters than their sons."

**Deton Brooks**: "In a matriarchal structure, the women are transmitting the culture."

**Dorothy Height**: "If the Negro woman has a major underlying concern, it is the status of the Negro man and his position in the community and his need for feeling himself an important person, free and able to make his contribution in the whole society in order that he may strengthen his home."

**Duncan M. MacIntyre**: "The Negro illegitimacy rate always has been high — about eight times the white rate in 1940 and somewhat higher today even though the white illegitimacy rate also is climbing. The Negro statistics are symtomatic [sic] of some old socioeconomic problems, not the least of which are under-

2. "History and Tradition": see, e.g., Justice Thurgood Marshall, dissenting opinion, *Regents of Univ. of Cal. v Bakke*, 438 U.S. 265 (1978).[30]

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> employment among Negro men and compensating higher labor force propensity among Negro women. Both operate to enlarge the mother's role, undercutting the status of the male and making many Negro families essentially matriarchal. The Negro man's uncertain employment prospects, matriarchy, and the high cost of divorces combine to encourage desertion (the poor man's divorce), increases the number of couples not married, and thereby also increases the Negro illegitimacy rate….

[30] *Reg. of U. of Cal v. Bakke*, supra, pp. 395-396, 400, stating,

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.
>
> A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.
>
> When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes
>
> represent 11.5% of the population,] they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.
>
> The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro….
>
> The experience of Negroes in America has been **different in kind**, **not just in degree**, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endure.

3. "History and Tradition": see, e.g., Richard V. Reeves, Sarah Nzau, Ember Smith, "The Challenges facing Black Men and the Case for Action," *Brookings* (Nov. 19, 2020).[31]

4. "History and Tradition": see, e.g., Expert Witness Affidavit of Armon Perry, Ph.D. (University of Louisville)(2022).[32]

5. "History and Tradition": see, e.g., Roderick Ford's "Letter to the United States Senate: A Petition in General Equity" (2023).[33]

## Conclusion

Whereas the "marriage contract" is both a "status" and a "civil contract," it contains definite "terms, privileges, and conditions," including course of dealing, past practices, and reasonable expectations of performance—otherwise it can become illusory, oppressive, impracticable, unintelligible, void (or voidable) and incapable of enforcement in a law court.

For this reason, Florida's antebellum jurisprudence tacitly admitted that the condition of Slavery was inconsistent with that of "Husband and Wife" under English and American common law. Instead, "slave marriages" were permitted, but under such arrangements, there was no way for African American husbands and fathers to function properly as "husbands" or as "Head of the family."

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[31] https://www.brookings.edu/articles/the-challenges-facing-black-men-and-the-case-for-action/

[32] [citation omitted], et al, 8:22-ap-4087-RCT (U.S. Bankruptcy Court, Middle District of Florida (Tampa Division)- Adversary Proceeding) ("Affidavit of Disinterested Party (**Dr. Armon R. Perry**), EXPERT WITNESS AFFIDAVIT, doc # 37.

[33] Roderick Ford, *A Petition in General Equity to the Federal Government of the United States of America, Its Courts, Legislature, and Chief Executive, Regarding the Plight of African American Fathers, Men, and Boys In the United States of America* – Letter to Senator Marco Rubio (March 2, 2023) https://nebula.wsimg.com/6556416efc56e7ff32e8b6808b6c595f?AccessKeyId=CFD051C099636C9F5827&disposition=0&alloworigin=1

Most ominously, the early 20th-century history of the United States indicates that the Black Church reinforced the same wholesome ideals of traditional English and American common law among the Freedmen and their children and grandchildren, but the dominant American culture—i.e., "Jim Crow"—continued to deprecate the status of African American men as "Head of the Family." Today, this legacy is still readily felt among the African American population—as both African American women and African American men have been found to act in utter bad faith, regarding discharging their traditional duties and obligations under the "marriage" contract.

The U. S. District Courts and federal policy have failed to acknowledge that the white population—even the educated and professional white population such as judges and lawyers—are not adequately trained or equipped to adjudicate present-day "conflict-ridden" relations between African American men and women, and thus have a propensity to grossly mismanage the application of state family laws with respect to their application to the African American population. Under these arrangements, the respect and acknowledgement of the "Head of the Family" status of African American men—from the historical understanding that this status has been deprecated, under assault, and misunderstood-- is grossly absent from state family law jurisprudence. Systematic and perennial state-court assaults upon the "Head of Family" status of African American men come in myriad forms—as "badges and incidents" of slavery and as "customs and usages" of racial discrimination. Here, the 1866 Civil Rights Act was enacted to address and to remediate this injustice, when necessary, in the U. S. District Courts.

**--- The End of Chapter Four---**

# Chapter Five

"Section 3 of the 1866 Civil Rights Act,
*State of Georgia v. Rachel* (1966), and the Family Law Tribunals"

By

Rev. Roderick Andrew Lee Ford, J.D., Litt.D., LL.D.

**Contents**

Introduction ..... 1
Part I. Race-Neutral Family Laws and Statutory Schemes May Violate the 1866 Civil Rights Act ..... 5
Part II. Removal Under the Sec. 3 of the 1866 Civil Rights Act ..... 8
Part III. Removal of Family State Law Cases Pursuant to Sec. 3 of the 1866 Civil Rights Act ..... 12
Conclusion ..... 15

## Introduction

Since they are riveted to applying only a "second generation" analysis to present-day civil rights questions, the American bar and bench do not know what to make of the American Slave Codes and Black Codes, and their present-day effects upon the African American community. Even "second generation" gender-based civil rights jurisprudence generally has no meaningful discourse to confront the plain fact that the American Slave Code's family law provisions *systematically emasculated* African American men, husbands, and fathers by divesting them of their natural right to normal, heterosexual familial relations, or to the status as the **"Head of the family."** [1]

[1] See, e.g., W.E.B. Du Bois, *The Souls of Black Folk*, https://etc.usf.edu/lit2go/203/the-souls-of-black folk/4432/chapter-2-of-the-dawn-of-freedom/ (Chapter Two, "Of the Dawn of Freedom")("Here at a stroke of the pen was erected a government of millions of men,--and not ordinary men either, but black men emasculated by a peculiarly complete system of slavery, centuries old…").

The American Slave Codes had so shielded the African American population as to the true extent and meaning of their natural, God-given rights, that, even today, **most African American men are unaware** that, under English and American common law, they have **a divine "birthright"** to the status of **"Head of the family."**

And it is unfortunate that the "No-Fault" divorce laws often shield the true reasons why some African American men opt for divorce, and that reason has to do with almost insurmountable resistance to his status as "Head of the family."[2] Hence, the American civil rights community can no longer ignore the central role of the effects of Slavery upon the African American family.[3]

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[2] See, e.g., E. Franklin Frazier, *Black Bourgeoisie* (Glencoe, Illinois; The Free Press, 1957), pp. 220-221, stating:

> There is much frustration among black bourgeoisie despite their privileged position within the segregated Negro world. Their 'wealth' and 'social' position can not erase the fact that they are generally segregated and rejected by the white world. Their incomes and occupations may enable them to escape the cruder manifestations of racial prejudice, but they can not insulate themselves against the more subtle forms of racial discrimination. These discriminations cause frustrations in Negro men because they are not allowed to play the 'masculine role' as defined by American culture. They can not assert themselves or exercise power as white men do….
>
> As one of the results of not being able to play the 'masculine role,' middle-class Negro males have tended to cultivate their 'personalities' which enables them to exercise considerable influence among whites and achieve distinction in the Negro world. Among Negroes they have been noted for their glamour. In this respect they resemble women who use their 'personalities' to compensate for their inferior status in relation to men. This fact would seem to support the observation of an American sociologists that the Negro was 'the lady among the races,' if he had restricted his observation to middle-class males among American Negroes.
>
> In the South the middle-class Negro male is not only prevented from playing a masculine role, but generally he must let Negro women assume leadership in any show of militancy. This reacts upon his status in the home where the tradition of female dominance, which is widely established among Negroes, has tended to assign a subordinate role to the male.

[3] See, e.g., Moynihan, Daniel P. *The Negro family: The Case for National Action*. Washington, DC: Office of Policy Planning and Research, U.S. Department of Labor (March 1965), stating:

The American bar and bench have failed the African American community because they too often forget that to ameliorate that status of African American men, a Civil War (1861 -1865) had to be fought and won against powerful, entrenched, and influential enemies, and that *the general sentiments which sustained and bolstered the Old Confederacy have never been completely swept away*. Indeed, those general sentiments remained even among the members of the Bar and the Bench throughout the several states of the United States—as the Confederate memorials upon scores of statehouse and courthouse grounds through the South amply attest.[4]

Moreover, the resistance to *any meaningful change* in the slave status of African American men brought about both *open and violent resistance*, as well as *covert and cunning resistance*, that undermined the African American's civil rights in the state courts. At the same time, the enforcement of African American civil rights in the U. S. District Courts became more symbolic rather than substantive and real.[5] Hence, the justification for the Freedmen's Bureau courts—i.e., lack of

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> It was by **destroying the Negro family under slavery** that white America broke the will of the Negro people….

[4] See Chapter One, citing Deborah R. Gerhardt, "Law in the Shadows of Confederate Monuments," *Michigan Journal of Race & Law*, Vo. 27:1 (2021).

[5] See, generally, Kermit L. Hall, "The Civil War as a Crucible for Nationalizing the Lower Federal Courts," supra, stating:

A. "The performance of southern state courts in treating Unionists and blacks immediately following the war challenged radical and moderate congressional Republicans who sought more than token reconstruction…."

B. "Newly freed blacks suffered under the operation of local custom and the Black Codes. An agent of the Freedmen's Bureau in New Orleans, for example, wrote in the summer of 1865 that the rulings of the provisional state courts 'have been such of late, so far as colored citizens are concerned, as to shock every truly loyal man among us.'"

C. "Even where the federal judiciary made a strong showing it **encountered difficulties in treating prominent ex-Confederates**. Judge John Erskine of Georgia wryly observed that his court usually convicted a 'haggard and

substantive justice for Black litigants in the state courts—is the same present-day justification for the need to remove of state family law actions, where African Americans are the primary litigants and where a bona fide claim of racism has been demonstrated, from the state courts to the U. S. District Courts.[6]

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> miserable looking set of creatures,' while the **'well to do' leaders of the rebellion evaded federal enforcement**."

And see, also, *Monroe v. Pape*, 365 U.S. 167, 175-177 (1961):

> While one main scourge of the evil -- perhaps the leading one -- was the Ku Klux Klan, the remedy created was not a remedy against it or its members, but against **those who representing a State in some capacity were unable or unwilling to enforce a state law**….
>
> **Senator Osborn of Florida** put the problem in these terms….
>
> > [t]hat the **State courts in the several States** have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing…. **There was, it was said, no quarrel with the state laws on the books**. It was their **lack of enforcement** that was **the nub of the difficulty**….
>
> "Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination:
>
> > '… [**b]ut if the statutes show no discrimination**, yet, **in its judicial tribunals**, **one class** is **unable to secure that enforcement of their rights** and punishment for their infraction which is accorded to another, or, **if secret combinations of men** are allowed by the Executive to **band together to deprive one class of citizens of their legal rights** without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.'

[6] See, e.g., Robert Kaczorowski, *Enforcement of the Civil Rights Act of 1866*, supra, pp. 580-581, stating, "The Freedmen's Bureau was particularly important in helping the freedmen enforce their contracts, since **local law enforcement agencies** and **courts** usually **refused to enforce the freedmen's rights**. Following the military's example, the framers provided **for the enforcement of civil rights directly in the federal courts**. They sought to void racially discriminatory state laws which infringed civil rights secured by the Constitution, **eliminate racial and political prejudice** in the administration of civil and criminal justice **in the State courts**, and provide **an alternative system of civil and criminal justice** when individuals **could not enforce or were denied their civil rights in the state courts**."

## I. "Race-neutral" state family laws and statutory schemes may be applied in a manner that violate express provisions of the 1866 Civil Rights Act.

The United States Supreme Court in the case of *State of Georgia v. Rachel* (1966) was called upon to adjudicate the following "race-neutral" criminal statute:

> "The statute under which the defendants were charged, Ga. Code Ann. § 26-3005 (1965 Cum. Supp.), provides:
>
> > '*Refusal to leave premises of another when ordered to do so by owner or person in charge.* It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor.'

Notably, this statute did not openly discriminate against African Americans based upon their race or color.

Instead, the said state laws simply criminalized "any person" who was on the premises of another and refused or failed to leave when requested to do so. Given the "race-neutral" nature of this state criminal statute, it presumably did not meet the very stringent and high standards for removing cases from the state courts to the U. S. District Courts, as established in the case of *Strauder v. West Virginia*, 100 U. S. 303 (1880) and its line of cases, which held that there must be a "state statute," which, on its faces, explicitly discriminates against African Americans, as a race.

The *Strauder* case, and its progeny, had rejected the removal of cases from the state courts to the U.S. District Court that were based upon arguments of (a) an anticipation that a person could not receive a fair trial; (b) the alleged prejudiced state officials who were unlikely to treat a litigant fairly; or (c) general contentions that state laws, procedures, and policies violated the "equal protection" or "due process" clauses of the 14th Amendment and § 1983.

The *Strauder* case itself found that West Virginia's statute openly discriminated against African American citizens, stating:

> The statute of West Virginia which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law as jurors because of their color, though qualified in all other respects, is, practically, a brand upon them, and a discrimination against them which is forbidden by the amendment. It denies to such citizens the equal protection of the laws, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is that it is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds.[7]

However, during the same year, the U. S. Supreme Court also clarified its position regarding the question of "when may a case may be removed from a state court to a federal court?" in the case of *Virginia v. Rives*, 100 U.S. 313 (1880).

In *Virginia v. Rives*, the Court stated that in order to justify a removal from the state court to the U. S. District Court, there can only be a "legislative denial" of federal or constitutional civil right—as opposed to a denial wrought by state officials who themselves decide to violate state law[8]-- of the litigants civil rights in the state courts, stating, at p. 321-322, that:

> But inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a "denial or disability to enforce in the judicial tribunals of the State" the rights of colored men, as is contemplated by the removal act. Sect. 641. It is to be observed that act gives the right of removal only to a person 'who is denied, or cannot enforce, in the judicial tribunals of the State his **equal civil rights**.' And this is to appear before trial. When **a statute of the State denies his right**, or **interposes a bar to his enforcing**

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[7] *Strauder v. West Virginia*, 100 U.S. 303 (1880)(syllabus)

[8] But a very strong argument can be made that "removal" pursuant to a racially-discriminatory "custom and usage" is expressly authorized under the express language of Section 3 of the 1866 Civil Rights Act. See, e.g., *Kentucky v. Powers*, 201 U.S. 1, 26-27 (1906)(describing "custom" as an appropriate basis for removal under the 1866 Civil Rights Act).

> **it**, in the judicial tribunals, the **presumption is fair that they will be controlled by it in their decisions**; and, in such a case, **a defendant may affirm on oath what is necessary for a removal**. Such a case is clearly within the provisions of sect. 641. **But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him**, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the State" the rights which belong to him. In such a case, **it ought to be presumed the [state] court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced**. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason -- it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. **The [state] court will correct the wrong**, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of sect. 641. Denials of equal rights in the action of the judicial tribunals of the State are **left to the revisory powers of this Court**.

In the *Virginia v. Rives* case, the African American litigants failed to demonstrate that the Viriginia legislature, through its official enactment of a state statute, had actually violated a federal statutory rights, which they could not enforce in the state court. A general § 1983 claim, contending that the state law or procedure violated the "due process" or "equal protection" clauses of the 14th Amendment, was not suitable under the "removal" provision of [28 U.S.C. § 1443] that authorizes removal to the U. S. District Court.

## II. Removal under Sec. 3 of the 1866 Civil Rights Act, 28 U.S.C. § 1443, and other Federal Removal Statutes

Section 3 of the 1866 Civil Rights Act is the "mother" of federal removal statutes in the United States.[9]

Importantly, the U. S. Supreme Court has given special treatment to Section 3 of the 1866 Civil Rights Act—special treatment which may not be read into 28 U.S.C. § 1443, as it may relate or apply to the 1964 Civil Rights Act or other federal state providing for "equal treatment." In the case of *Kentucky v. Powers*, 201 U.S. 1, 26-27 (1906), Justice Harlan, while speaking for the majority observed that:

> The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression -- but still only when committed under color of some 'law, statute, ordinance,

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[9] See, e.g., *State of Georgia v. Rachel*, supra, pp. 789-791, stating:

> There is no substantial indication, however, that the general language of § 641 of the Revised Statutes was intended to expand the kinds of "law" to which the removal section referred. In spite of the potential breadth of the phrase "any law providing for . . . equal civil rights," it seems clear that, in enacting § 641, Congress intended in that phrase only to include laws comparable in nature to the Civil Rights Act of 1866. Prior to the 1874 revision, Congress had not significantly enlarged the opportunity for removal available to private persons beyond the relatively narrow category of rights specified in the 1866 Act, even though the Fourteenth and Fifteenth Amendments had been adopted and Congress had broadly implemented them in other major civil rights legislation. [Footnote 13] Moreover, § 641 contained an explicit cross-reference at the end of the section to § 1977 of the Revised Statutes, which carried forward the principal rights created in § 1 of the 1866 Act. In addition, the note in the margin of § 641 pointed specifically to the removal provision of the Civil Rights Act of 1866 and to §§ 16 and 18 of the Civil Rights Act of 1870. The latter sections were concerned solely with the reenactment, in somewhat expanded form, of the 1866 Act. Finally, the limitation of § 641 to laws comparable to the Civil Rights Act of 1866 comports with the relatively narrow mandate of the revising commissioners….
>
> The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase "as is enjoyed by white citizens." That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected.

> regulation, **or custom**.' And when that provision in this law, which is transferred to section 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court, against a person who is denied or cannot enforce any of the rights secured by the act, it had reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation, **or custom**.

Here we must acknowledge that "custom" is not necessarily the same as "state statute," and the under federal civil rights jurisprudence, "custom" means widespread practices that is sanctioned by a policy-maker or law-making body. So that, a correct statement of the removal provision of Sec. 3 of the 1866 Civil Rights Act is that, removal is warranted where a "custom" is established, and the said "custom" prevents the litigant from vindicating his or her civil rights in the state court.

In the unique situation in which an African American litigant is a Defendant in a state civil or criminal proceeding—i.e., that they are being sued or prosecuted—<u>for no other reason than because they have exercised their federal statutory rights under the 1866 Civil Rights act</u> [or other "equal rights" statute] such as the Civil Rights Act of 1964, then they are entitled, under Section 3 of the 1866 Civil Rights Act [or 28 U.S.C. § 1443] to have that state action removed to the U. S. District Court.

Hence, the rule of thumb is this:

First, the African American litigant must be able to first demonstrate that he or she engaged in an act that is expressly protected by the 1866 Civil Rights Act [or other federal equal rights statute, such as the 1964 Civil Rights Act].

Second, the African American litigant must be able to then demonstrate that subsequent state-court action—which will ostensibly be prosecuted pursuant to some "race-neutral" state law-- was instituted as reprisal, as punishment, as retaliation, and the like, for having simply and merely engaged in the federally protected actions.

If these two elements are demonstrated, then the African American litigant is certainly entitled to have the action removed to the U. S. District Court.

This is precisely what occurred in the cases of *State of Georgia v. Rachel*,

384 U.S. 780 (1966) and in *New Haven Firefighters Local 825 v. City of New Haven*, 120 F. Supp. 3d 178 (D. Con. 2015).

In the case of *State of Georgia v. Rachel*, the African American litigant had engaged in a civil rights protest. Section 203 of the Civil Rights Act of 1964 made it unlawful to prosecute a person for peaceably seeking service in a place of public accommodation or from refusal to leave in the request to leave was base solely upon race. Since an African American protester had the right exercise his civil rights, via conducting a protest at a place of public accommodation, under Section 203 of the 1964 Civil Rights Act, the state criminal proceeding that was instituted against this African American protester, even pursuant to an ostensibly "race-neutral" state law, could be removed to the U. S. District Court. The Court's reasoning for this removal was thus stated, supra, pp. 804-805, as follows:

> In the narrow circumstances of this case, any proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964…., if the allegations of the removal petition are true. The removal petition alleges, in effect, that the defendants refused to leave facilities of public accommodation, when ordered to do so solely for racial reasons, and that they are charged under a Georgia trespass statute that makes it a criminal offense to refuse to obey such an order. The Civil Rights Act of 1964, however… made clear, protects those who refuse to obey such an order not only from conviction in state courts, but from prosecution in those courts….
>
> Hence, if as alleged in the present removal petition, the defendants were asked to leave solely for racial reasons, then **the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be "denied or cannot enforce in the courts of [the] State"** the right to be free of any "attempt to punish" them for protected activity. **It is no answer in these circumstances that the defendants might eventually prevail in the state court**. The **burden of having to defend the prosecutions is itself the denial of a right** explicitly conferred by the Civil Rights Act of 1964….

Similarly, in the case of *New Haven Firefighters Local 825 v. City of New Haven*, 120 F. Supp. 3d 178 (D. Con. 2015), the District Judge, when applying the

holding in *State of Georgia v. Rachel*, reached the same conclusion, while applying Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981.

In the *New Haven Firefighters Local 825* case, an African American firefighter was sued in the state court after having instituted civil rights employment discrimination actions, pursuant to Title VII and Section 1981, in the U. S. District Court. Thus, contending that the state action was filed for no legitimate reason than to retaliate against him, the African American firefighter removed the state action to the U. S. District Court. The District Court upheld this action as a valid removal under 28 U.S.C. § 1443.

In Court's reasoning in the *New Haven Firefighters Local 825,* supra, pp. 205-206, case was as follows:

> In the quo warranto action before the Connecticut court, Briscoe will be ousted from his present City position if it is not his to occupy *de jure,* and it matters not whether Local 825's motive in seeking Briscoe's ouster by its quo warranto action was selfless and noble (as the Union contends) or ignoble mean-spirited retaliation for Briscoe's protected civil rights activities (as Briscoe contends). If Briscoe's claim of Union retaliation as a bar to his ouster is to be heard at all, it must be in this federal court. For the reasons stated, Briscoe cannot make or enforce that federal claim in the state court quo warranto action: an inability that satisfies the second prong of this § 1443(1) analysis.
>
> The case at bar accordingly falls within the rationale for removal stated by Justice Stewart in *Rachel,* 384 U.S. at 800, 86 S.Ct. 1783, and quoted by Judge Friendly in *Emigrant,* 668 F.2d at 674: 'Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." In the light of the circumstances discussed *supra,* I conclude that Briscoe has shown each of those several elements. The case will remain in this Court.

Therefore, under some circumstances, an African American husband or ex-husband, may find occasion to vindicate certain familial rights as "Head of the family"—rights which are uniquely peculiar within the context of the African American historical experiences, and which may have been, or are in the process of being, divested by private persons and state public officers in the

state courts.

## III. Removal of Family Law Cases to U. S. District Courts pursuant to Sec. 3 of the 1866 Civil Rights Act

First, we begin with the jurisdiction of the U. S. District Courts and the exigent war-time circumstances under which is attained civil-rights jurisdiction. As has been established in Chapter Two, "The 1866 Civil Rights Act and the Right to 'Make and Enforce' Contracts," the 1866 Civil Rights Acts applies to, and governs, the "marital contract," primarily because, after 246 years of chattel slavery, the institution of marriage had been largely denied to the Black race under the most adverse circumstances.[10]

There is no reason why, given the Congressional objectives of the 1866 Civil Rights Act, and the clear examples of "slavery" and the "badges of slavery" that characterized the institution of marriage, or lack thereof, among Black slaves, that African American men may not, under well-articulated sets of material facts, present a cognizable claim in the U. S. District Courts, contending that private persons and state public officers, while acting under color of law, have divested them of their rights "to make and enforce" the "marriage contract," and, particularly the terms, conditions, and privileges under the "marriage contract" which are classified as "Head of the family." Without doubt, this is a federal constitutional right.

Section 3 of the 1866 Civil Rights Act gives the U. S. District Courts exclusive jurisdiction over violations of such acts, and an African American husband, ex-husband, or father, is certainly entitled to avail himself, under appropriate sets of articulable and material facts, that his spouse, or the state government, or state public officials, have violated his "conjugal rights at Head of the family." Specifically, he has to be able "to make and enforce" his rights to "Head of family" status; [11] and "to… enforce" those sacred rights, even

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[10] See, e.g., Moynihan, Daniel P. *The Negro family: The Case for National Action*. Washington, DC: Office of Policy Planning and Research, U.S. Department of Labor (March 1965), stating:

> It was by **destroying the Negro family under slavery** that white America broke the will of the Negro people….

[11] "Head of Family," *American Jurisprudence* (First Edition):

> **§ 10 Head of Family**

against his own spouse if she violates it, and against the state courts, state judges, state officials (in the form of injunctions, etc.), if they violate this sacred right. And he has to be able to take such proactive steps, under the 1866 Civil Rights Act in the U. S. District Courts, through the prosecution of assertive federal complaints.

At the same time, should African American husbands, ex-husbands, or fathers find themselves as "Defendants" or as "Respondents" in the state family law courts, whether in divorce proceedings, support proceedings, custody proceedings, and the like, then the "removal provisions" of Sec. 3 of the 1866 Civil Rights Act should afford them the opportunity to have those cases removed to the U. S. District Courts, where a violation of civil rights through "custom," as is expressly proscribed in Section 1 of the 1866 Civil Act, should be affirmed. See, e.g., *Kentucky v. Powers*, 201 U.S. 1, 26-27

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> The husband, unless incapacitated from executing the authority and performing the duty, is head of the family. This is so, not only at common law, but under the Married Women's Acts. **It is not the purpose of these acts to depose the husband from the position given him by the common law as the head of the family**. It is necessary to the unity and preservation of the family, which is regarded **as the basic of the state, to have a single head with control and power,** and the **husband is made that head and, in return, is made responsible for the maintenance and, at common law, for the conduct of his wife.** Such **fundamental authority** is **necessary to his duty to protect and provide for his wife and children**.
>
> The authority of the husband as the head of the family gives **him the right, acting reasonably, to direct the family's affairs and to determine where and what the home of the family shall be**, and thus, **to establish the matrimonial and family domicile.** The view has been taken that this right of the husband is not limited to the state or country in which the parties live at the time of their marriage, but in these days of easy communication between different countries and different parts of the same country, he may exercise it, where acting reasonably, in a way which will change his citizenship and allegiance. But **he must act with due regard to the welfare, comfort, and peace of mind of his wife, and to her legal status as the mistress of his home, his companion, the sharer of his fortune, and not his servant**. She is under **duty to submit to such reasonable governance of the family by the husband**.
>
> A **husband is responsible to society for the good order and decency of the household**, and this is true under Married Women's Acts endowing married women with separateness and equality of legal responsibility.
>
> The wife is the head of the family in so far as the husband is incapacitated from performing the duty.

(1906)(describing "custom" as an appropriate basis for removal under the 1866 Civil Rights Act).[12]

In the area of state family law, and state court proceedings, race-neutral state family law statutes are sometimes supplemented, not by explicitly racially-discriminatory laws, but rather by racially-discriminatory "customs," which may be directly tied to the institution of slavery and its effects. For this reason, the removal jurisprudence that have been developed from the Strauder and Rachel line of cases may not be wholly on point or appropriate for removal actions that are predicated on Sections 1 and 3 of the 1866 Civil Rights Act.

When addressing the plight of African American husbands, ex-husbands, and fathers, this is an appropriate "distinction" that should be highlighted in any family-law litigation where removal from state court to federal court is being sought.

We now conclude this discussion plainly stating that the *"Head of the family" status inherently includes the several enumerated rights contained within the 1866 Civil Rights Act, namely, the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."* We may thus say that, unless an African American father is able to carry out these enumerated functions, then he cannot hope to properly carry out his duties as a husband and a father. Indeed, this is precisely why the Slave Codes inhibited African American men from being able to carry out these functions.

When the Slave Codes ended, they were replaced with the Black Codes, which were, in turn, replaced with de jure or de facto racial segregation and myriad forms of covert and overt racial discrimination, much of which was uniquely targeted—through custom and usage-- against African American

[12] There are no federal cases where the U. S. District Court or the U. S. Court of Appeals have adjudicated a "removal" case where "custom" was relied upon as the basis for the discriminatory "state law." But Justice Harlan, in his dicta in Kentucky v. Powers, 201 U.S. 1, 26-27 (1906), clearly affirms that "custom" is an appropriate basis for removal, since Section 1 of the 1866 Civil Rights Act specifically designates discriminatory "custom" as a grounds for violating that Act.

men.[13] The statehouses, the state courts, the bar, and the bench have not been immune from such abuses.[14] Under the exigencies of war and rebellion, the Freedmen's Bureau courts were designed to abate such state-court abuses, and the U. S. District Courts stepped into their shoes and must now discharge the same functions. And this is the reason why state family law proceedings must not be construed so as to be completely immune –- as some federal judges often purport or assume--from the application of the 1866 Civil Rights Act to state family law cases.

## Conclusion

There is no justifiable reason today, why African American fathers, husbands, and ex-husbands, should not, under appropriate circumstances, remove state family-law cases to the U. S. District Courts, or file family-law related civil rights actions in the U. S. District Courts pursuant to the 1866 Civil Rights Act. However, further action from the U. S. Congress is necessary to better facilitate this process, so that federal judges and state and local officials are made aware of the crisis of African American family life, of the huge "gap" between certain fundamental assumptions contained in state family law statutes and the actual experiences of African American family life. The sobering reality is that there is a need for greater protection of "conjugal rights" of African American men as "Heads of families," and that means sober, realistic family laws and policies that tacitly acknowledge the effects of slavery and present-day racial discrimination upon African American family life—through a "first generation" analysis of the 1866 Civil Rights Act and similar civil rights laws. Until such policy changes are made in state legislatures and in state courts, then Sec. 3 of the 1866 Civil Rights Act—which permits removal of cases from the state courts to the U. S. District Courts, is certainly justified.

**--- The End ---**

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[13] See, e.g., W.E.B. Du Bois, "The Souls of Black Folk," Writings (New York, N.Y.: The Library of America, 1986), p. 386, stating: ("[T]o leave the Negro in **the hands of Southern courts** was impossible…. [T]he **regular civil courts** tended to become **solely institutions for perpetuating the slavery of blacks**. Almost **every law** and **method ingenuity could devise** was employed by the legislatures **to reduce the Negroes to serfdom**—to make them **the slaves of the State**, if not of individual owners….")

[14] See, e.g., Deborah R. Gerhardt, "Law in the Shadows of Confederate Monuments," *Michigan Journal of Race & Law*, Vo. 27:1 (2021), pp. 12-14, 16. [see Chapter One, of this pamphlet].

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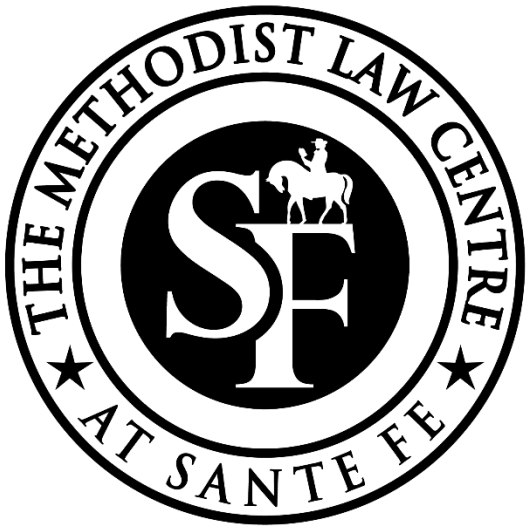
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