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Liberalism's Domesticity: The Common-Law Domestic Relations as Liberal Social Ordering

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Liberalism's Domesticity:
The Common-Law Domestic Relations
as Liberal Social Ordering

by

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The common law, a system of judge-made law that originated in England, was transplanted in the United States and retained its system of domestic relations. The relations between a husband and wife, parent and child, master and slave, guardian and ward, and master and slave, determined status, obligations, and civil disabilities for citizens. These relations were also hierarchical, most notably in the case of married women, for whom status as wife was dictated by the doctrine of coverture, whereby a married woman lost her legal identity and civil rights such as the right to contract and own property. Even when elements of coverture were reformed through statute in the mid-nineteenth century, coverture nevertheless survived. The perpetuation of such common law practices would seem to lie in contrast with the liberal values of individualism and egalitarianism,

also recognized at the time. This dissertation demonstrates, however, that, rather than being at odds with liberalism, the common law has played a role in liberalism by serving as a means of social ordering. The domestic relations provided a domestic sphere of intimacy and obligation perceived as needs of society at the time. Use of the domestic relations is evident in the works of the liberal theorist John Locke and in the discourse of some nineteenth-century political actors who practiced Lockean liberalism. A study of state laws reforming married women's property rights and consideration of these rights at constitutional conventions shows that there were political actors who sought to retain the domestic relations even as they accepted liberal values. This dissertation also suggests that the common law's role in liberal social ordering often goes unrecognized in contemporary scholarship because liberalism in America has developed, and it has come to be defined solely in terms of its abstract ideals. In relying on these ideals to moderate the hierarchy of the common law, liberalism in America has also lost the ability to recognize the uses of the common law and, perhaps, the capacity to provide for social ordering.

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Introduction

Until the middle of the nineteenth century, a man and woman who married one another became one person in the eyes of the law. To effect this fiction of marital unity, women surrendered their legal identity when they entered marriage and were represented in all legal venues by their husbands. This resulted in a loss of rights for married women, such as the rights to own property, to make contracts, to file suits in court, and to choose their own domicile. Marital unity and the resulting civil disabilities were the result of the rules of coverture, a doctrine that governed the status of married women under the domestic relations of the common law.[1] In mid-century, states began to pass statutes allowing married women to own their own property and to hold subsidiary rights, such as the right to contract for that property and own their own businesses. Seldom, however, did these property rights transfer a married woman's status from *feme covert* to *feme sole.* Rather, married women gained rights that were enumerated in statutes, but otherwise they retained their civil disabilities under coverture.

The retaining of coverture even after statutory reform looks puzzling, because it meant that the common-law doctrine of status and hierarchy survived

[1] The common law is a system of law known as "unwritten" or "judge-made" law because it originated in the precedents of court decisions rather than being codified by legislatures. It originated in the British judicial system and was transferred to the American colonies then retained as a system of law when colonies became states. The domestic relations of the common law are comprised of sets of relations of the household—the relations between husband and wife, parent and child, master and servant, and—depending upon who was categorizing the household—guardian and ward and lord and slave. While not all of these relations were familial, they were all considered to lie apart from public relations, and so they comprised the private sphere of the common law.

the conferral of liberal property rights. Some scholars have attributed the survival of coverture to limitations of the reform statutes by conservative state courts, who interpreted the statutes narrowly.[2] Rather than seeing the survival of the common law as the failure of the reform statutes to be realized, however, we can see the survival of the common law as the retaining of liberal social order in a form of liberalism still extant in nineteenth-century America. Coverture was just one use of the common law domestic relations which, rather than being at odds with liberalism, was the means by which a liberal society came to order itself. Relied on in this manner, the retaining of the domestic relations in the face of extension of liberal rights in nineteenth-century America was an expression of Lockean liberalism.

The work of John Locke is known for its priority of the individual. In separating patriarchal power from political power, Locke refuted the divine rights of kings and found a basis for a civil society formed by the consent of free individuals. The government formed out of this society was limited by its commitment to protection of individual rights. Despite this attention to the

[2] Studies that ascribe the limited reform of the married women's property statutes include Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930," *Georgetown Law Journal* 82 (1994): 2127-2225, in which she says, referring to statutes allowing married women to retain their own earnings, that "[c]ourts reformulated a putatively feudal body of status law so that the doctrine of marital service imposed upon the wife the duty to perform such work as is necessary to reproduce the labor force in a modern industrial economy" at 2130; Norma Basch likewise views reform statutes as a failure for failing to usher in a revolution in married women's status. She attributes part of the blame to the piecemeal character of the statutes themselves, but finds that the critical test of the statutes' potential lay in the courts, in which judges proved resistant to the potential of the legislation. See *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Sara Zeigler likewise sees the courts as interpreting the statutes conservatively. See "Uniformity and Conformity: Regionalism and the Adjudication of the Married Women's Property Acts," *Polity* XXVIII (Summer 1996) 467-495.

individual and his liberties, Locke's work also incorporates the domestic relations of the common law, and these relations would incur limitations upon individuals' freedom to live their lives as they chose. One can find in Locke's work reliance upon the relation between husband and wife, parent and child, and master and servant, three of the domestic relations.[3] All were relations of hierarchy, with the husband, parent, and master occupying the dominant position in each of the relations, and all were relations of status, in that each member who entered the relation took on a social identity with attendant obligations. Despite the privilege, obligations and civil disabilities placed upon members of these relations, Locke relied on them to achieve purposes in the ordering of a liberal society.

Social ordering by the domestic relations in Lockean liberal theory has been recognized by some contemporary scholars. Uday Mehta has brought them to bear in viewing the modern liberal individual. Mehta says that we often tend to see the individual as characterized by freedom, equality and rationality. Such a view positions the individual in the abstract and ignores "the myriad of institutions—familial, educational, economic, religious, and hence only partially political—through which the individual hopefully *comes to be* free, rational, and equal in the appropriate manner."[4] Mehta finds in these relations the elements of social order that help to form the liberal individual, and he points to these relations to make the case for the anxiety of the modern liberal individual. Carole

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[3] Locke distinguishes political power from private, patriarchal power by distinguishing the power of a magistrate from the power of a head a household (*Second Treatise,* Ed. Peter Laslett [Cambridge: Cambridge University Press, 1988] 268) and elaborates on the domestic relations in Chapter VI, "Of Paternal Power" and Chapter VII, "Of Political or Civil Society" in *The Second Treatise.*

[4] Uday Mehta, *The Anxiety of Freedom: Imagination and Individuality in Locke's Political Thought* (Ithaca: Cornell University Press, 1992) 85.

Pateman, on the other hand, extracts the gendered aspects from these institutional arrangements to show that social ordering has more than an effect on the psyche of the modern liberal individual; these relations restrict women's freedom in both the private and public spheres. The patriarchal authority that a husband and father enjoys as the dominant partner in the domestic relations entails a sexual contract, in which women remain subordinate to men, and upon which men's civic freedom is predicated. Pateman argues that the subordination of the domestic relations is obscured from prevailing stories of liberalism in which liberalism is presented as the story of freedom.[5]

Both Mehta and Pateman provide inroads to thinking about the domestic relations as the means of ordering a liberal society, Mehta for viewing the liberal individual not only in the abstract but in considering the institutions that give rise to the individual's development, Pateman for drawing attention to the gendered arrangements of these means of social ordering. Pateman's gender analysis would seem to give more guidance in a study of the status of married women and its reform, but there is a problem with incorporating her work: She finds that women are excluded from the public sphere in social contract theory and attributes this exclusion to the theorists' denial of rational capacity to women.[6] This claim is not substantiated by the text of Locke, but one does find the condition of women that Pateman describes in history, specifically, in nineteenth-century America.[7]

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[5] Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).
[6] Pateman looks at other classical social contract theorists as well, hence I refer here to her discussions of theorists, but I am primarily concerned with her reading of Locke.
[7] Mehta makes the similar argument that Pateman's argument is more historical than textual in *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: The University of Chicago Press, 1999) 56-57.

Pateman may not have given us an account of women in Locke's theory so much as she has shed light on the way that Locke's theory has operated in practice. Pateman's analysis thus invites the possibility that liberal practice differs from liberal theory.

One can identify the relation and differences between liberal theory and practice by examining the way that the domestic relations were treated in Locke and in nineteenth-century American political discourse and law. Locke relied on the domestic relations for specific purposes—to provide for civic education, maintenance of the functions of the home, and the retaining of property in the family. In the nineteenth century, political actors, namely state legislators, judges in state-level courts, and members of constitutional conventions, relied on the domestic relations for broader purposes. In addition to the needs identified by Locke, these political actors found in the domestic relations the institutions to retain the home as an intimate sphere in the face of changing social and economic conditions. As society changed, and as the domestic relations themselves changed as the master-servant relation ceased to be thought of as properly domestic, reliance on the remaining domestic relations, particularly the husband-wife relation, became more crucial for social ordering. Thus, at the point at which coverture looked to be on the verge of reform,[8] perceived need for personal relations retained the domestic relations and did so in a way that relied more heavily than previously on the gendered statuses of husband and wife. It is thus

[8] Coverture underwent two significant reforms in the nineteenth century. The first set of reforms were the married women's property reform acts, allowing married women to own their own property, which states began to pass in the 1830s and 1840s. A second wave of reform statutes gave married women the right to retain their own earnings. I focus on the first wave of reform statutes.

owing to the need for social order that we can explain the survival of coverture in the face of reform.

Lockean liberalism has a social order in addition to the principles upholding individual liberty. Lockean liberalism, then, has both abstract and social elements. The abstract elements include the principles commonly associated with liberalism,[9] and the social elements include institutions that are apparently at odds with liberalism, since they have included the domestic relations, which have been based upon hierarchy and status. Locke did not retain these relations because he thought that women were incapable of exercising the rights of individual citizens; rather, he saw women as capable of reason and positioned them as subservient to the husband as head of household out of needs he perceived for maintaining family unity. Hence women are subjugated in Locke in an imposition of the limits of liberal principles rather than in a logical extension of them,[10] and it was a tension latent in Locke's theory.

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[9] What, specifically these ideals are, varies. To cite some of the authors used here, Rogers Smith identifies liberal principles as "limited government, the rule of law protecting individual rights, and a market economy, all officially open to minimally rational adults." ("Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87 [1993]: 563 n.4); Uday Mehta identifies liberalism as "committed to securing individual liberty and human dignity through a political cast that typically involves democratic and representative institutions, the guaranty of individual of individual rights of property, and freedom of expression, association, and conscience, all of which are taken to limit the legitimate use of authority of the state." (*Liberalism and Empire,* 3); Stephen Macedo, who does not purport to use a Lockean liberalism but is treated, *infra,* defines the primary liberal principles as "individual freedom and rights, the rule of law, limited and accountable government." (Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* [Oxford: Clarendon Press, 1990] 2) The principles that come to bear in addressing the historical exclusion of women are individualism (for a classic formulation, see Elizabeth Cady Stanton, "Solitude of Self: Address Delivered by Mrs. Stanton Before the Committee of the Judiciary of the United States Congress, Monday, January 18, 1892," Reprinted from the Congressional Record, 1) and equality, as evinced in suffragist discourse and Supreme Court equal protection doctrine.

[10] To subordinate women out of a logical extension of liberal principles would be to deny them rights because they were seen as incapable of exercising them. Pateman's attributing of Locke's treatment of women to his identification of natural differences between men and women relies on

The tension was susceptible to being exacerbated in practice because the disjuncture between women's subjugation and their rights became more evident in practice. This was compounded by the fact that nineteenth-century political actors in America found even more limits to liberal principles than Locke anticipated (or would admit to). In the mid-nineteenth century, as liberal rights were increasingly recognized and extended to previously marginalized groups, women's civil disabilities under the domestic relations remained, and they were even legitimated with new reasons. The disjuncture between liberalism's ideals and its social ordering became even clearer, and it ultimately became more difficult to sustain. The tension that was present in Locke was ripe to be exploited by the mid-nineteenth century, and this is what reformers of the time did. An active woman's rights movement drew upon the principles of individualism and equality to challenge the retaining of coverture. While not entirely successful in their lifetimes, the woman rights activists were successful ideologically, in that they dissipated the tension by cleaving Lockean liberalism in two. They relied on the abstract principles and juxtaposed them to the hierarchy of coverture. They thereby cast the common law as illiberal, as a premodern doctrine at odds with the progress of liberalism. It is this version of liberalism that has developed in America, and the original Lockean version lost.

Given the effect that this change has had for women, it might seem an unproblematic development. Indeed, if given the choice between the earlier

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this, as women prove incapable of serving as reasonable individuals. Mehta's description of exclusion of the people of India from enjoying liberal freedoms, thus taking on a status equivalent to that of children is also a logical extension of liberal principles. My reading of Locke, on the other hand, will show that Locke subordinated women not because he saw them as unworthy of exercising rights but because he limited the conferral of rights to women in the home.

version or the later, the later version would seem to be the one to be obviously preferred. There are good reasons, however, to recover this earlier Lockean version, not so that the domestic relations be reproduced in today's society but in order to gain purchase on explaining apparently illiberal expressions in liberal societies, to recognize the need to provide for a liberal society, and to render the use of liberal principles more effective in American politics and law. When liberalism becomes understood only in terms of its abstract ideals, then it holds the promise of the realization of those ideals and therefore progress.[11] Liberalism then comes to be seen as progressive and expansive, but when the expected progress is not realized, then puzzles abound. Explanations for the puzzling limitations of liberal progress could then come to lie in the presence of outmoded or contemporary ascriptive traditions, such as the common law. Casting the common law as a doctrine outside of and inconsistent with liberalism has allowed it to serve as explanation for the failure or slow pace of progress. Explaining

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11 The equation of liberal principles with progress can be found in Sir Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* Third American Edition (New York: Henry Holt and Company, 1885; reprint, Tuscon: University of Arizona Press, 1986), in which Maine predicted that society was moving "from Status to Contract," with the unit of politics being the family replaced by the individual. One can easily disprove this by pointing to the survival of coverture. Wendy Brown points out that the theme of progress is fundamental to the modern project, but that the promise of progress has been destabilized in today's late-modern age. She comments that few political thinkers, leaders, or ordinary citizens would say that history is progressive. (Wendy Brown, *Politics Out of History* [Princeton: Princeton University Press, 2001] 5-10) While the scholars I cite here certainly do not think of history as progressive; they do reserve an optimism in progress for liberalism. In the following pages I will show evidence of the presuppositions of liberalism as progressive doctrine in opposition to the common law in the discourse of nineteenth-century suffragists and other woman rights advocates of the nineteenth century. See Edward Mansfield, *The Legal Rights, Liabilities and Duties of Women* (Salem: John P. Jewett & Co., 1845). It is also evident in the literature in American political development, namely Rogers Smith and Karen Orren. None of them think that American political history is progressive, but they all indicate that liberalism is progressive and that the presence of older traditions such as the common law is an illiberal presence and inimical to liberal principles.

impediments to progress in this way, however, does not always resolve the puzzles.

A liberalism defined by its ideals and in opposition to the common law is often employed in the field of American political development, where liberalism has come to be used as the lens for studying American political history. Beginning with Louis Hartz' thesis that the United States is characterized by liberal consensus and later studies refuting that thesis by demonstrating that America has sustained other ascriptive and hierarchical traditions,[12] liberalism has been the lens through which American political history is viewed, and this liberal lens has been understood to be a Lockean liberal lens.[13] When liberalism is understood solely in terms of its abstract ideals, however, then its use as lens is skewed. Practices that do not measure up to the ideals of liberalism come, then, to be cast as illiberal traditions existing at the same time, but in contradiction with, liberal ideals.

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[12] Louis Hartz presented his liberal consensus thesis in *The Liberal Tradition in America* (San Diego: Harcourt & Brace, 1991). Refutations of the Hartzian thesis by locating the presence of other traditions can be found in the recovery of a republican tradition by historians, Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press, 1967) and Gordon Wood, *The Creation of the American Republic* (New York: Norton, 1972). Another challenge to the Hartzian liberal consensus thesis has been to find ascriptive or feudal traditions in American politics. Rogers Smith, "Beyond Tocqueville;" Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991); Anne Norton, *Republic of Signs* (Chicago: The University of Chicago Press, 1994); Michael Rogin, *Ronald Reagan the Movie and Other Episodes in Political Demonology* (Berkeley: University of California Press, 1987).

[13] Hartz' conception of liberalism was drawn from Locke, and it is Hartz' formulation of Lockean liberalism that continues to serve as the from of liberalism that is used (and contested as being the only tradition) in American politics. Rogers Smith explains why he endorses using Hartz' definition of liberalism in "Liberalism and Racism: The Problem of Analyzing Traditions," *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism* ed. David F. Ericson and Louisa Bertch Green (New York: Routledge, 1999).

A problem with generating these contradictions through liberal analysis is that they are lacking in explanatory power. Rogers Smith, for example, has collected ascriptive traditions in the American political experience, including practices that have subjugated women. In identifying the absence of women from the public realm in the colonial period, the exclusion of women from appeals to universal equality by the generation of the American Revolution, and the perpetuation of coverture, Smith identifies various ways in which women were excluded in the course of American history, in the midst of recognition of liberal principles.[14]

For Smith, this exclusion presents a puzzle. Even as the language of human rights was practiced during the American Revolution , and these principles were available to include women, "it is not obvious why he [Locke] and other revolutionaries like [Thomas] Paine were so insensitive to the plain case their principles made for female equality."[15] Smith thus has to summon an explanation for why the universal language of liberal principles was not extended to women. He finds that ascriptive outlooks "have offered creditable intellectual and psychological reasons for many Americans to believe that their social roles and personal characteristics express an identity that has inherent and transcendent worth."[16] Or, he finds that women's exclusion grew out of men's desire to dominate women, and that exclusionary projects in general are generated by elites who construct myths of "A People" in order to foster community and thereby win

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[14] Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997) 67, 77, 111 and 72.
[15] *Civic Ideals,* 110.
[16] Smith, "Beyond Tocqueville," 550.

elections.[17] While these can be plausible explanations for the repeated exclusion of women from American political and civil rights, these explanations do not cast much light on American politics except to show that such sentiments are present. They shed even less light on liberalism itself, and they do not explain why liberal principles were able to sustain such exclusions. Smith can only explain the simultaneous presence of liberal principles and exclusionary practices as multiple traditions that are inconsistent with one another and that routinely conflict with one another.[18]

Uday Mehta has brought our attention to the problems of explaining liberal societies in terms of contradictions by arguing that seeing such exclusions as contradictory to liberalism fails to take liberal ideas seriously. In his study of the British empire, Mehta treats the apparent contradiction between expressed nineteenth-century liberal commitments to liberal values and the presence of the British empire. He cautions against explaining empire as something that lies in contradiction to those values. The tendency for scholars and for liberal thinkers in the nineteenth century was to see the British Empire as a "flagrant violation of liberal principles and that it must therefore have had its raison d-etre in something like conquest, commercial avarice, or a Hobesian quest for glory."[19] This is a problem for liberal analysis, however, because in seeing the empire as contradictory as external to liberal principles, liberal thinkers failed to consider that imperialism and the inferior status accorded colonized peoples was not a

[17] Smith, *Civic Ideals,* 68, 6.
[18] Smith, "Beyond Tocqueville," 558.
[19] Mehta *Liberalism and Empire*, 200.

violation of liberal principles but was, in fact, a logical extension of them: in viewing people of India as unworthy of recognition of rational capacity, for example, these people could be subjugated in accordance with liberal principles, maintaining the equivalent status of children in liberal theory.[20]

Mehta's reconsideration of liberalism and empire has shed light on liberal principles by refusing to see the failure of the universal extension of those principles as a violation of the tenets of liberalism. He resisted the urge to see this practice as contradictory and instead explored the ways in which it might follow from liberal principles. Focusing on contradictions is a mistake, he cautions, because such a focus "does not allow us to take seriously such ideas. In short, it does not give us guidance where guidance is needed. If we are to take liberal ideas seriously and attempt to rejuvenate an edifying vision of human existence...we must see how those ideas touched and molded reality."[21]

A need to take liberal ideas—and nonliberal ideas—seriously is apparent when we consider that the explanatory problems in utilizing a lens of liberalism defined solely by its abstract ideals lead to problems in assigning solutions to past exclusions. In the case of the exclusion of women in American politics, when the explanation for exclusion is attributed to such generalized explanations as misogyny or outmoded stereotypes, then the solution lies in a more enlightened view of women and an extension of rights. This is the way the Supreme Court has treated women's exclusion in its late-twentieth century equal protection doctrine, and it is a course that has not proved satisfying, as feminists would argue

[20] *Ibid.,* 64-76.
[21] *Ibid., 200-201.*

that inequality persists in underlying social arrangements.[22] As I will show in Chapter Five, the Supreme Court effected this insufficient doctrine of equality because it lost sight of social ordering, and thereby lost sight of the cause of women's subordination. It therefore attributed women's historic exclusion to stereotypes and applied the principle of equality to banish the legacies of stereotyping women as inferior, rather than applying the principle to those institutions that had historically subjugated women. One pays more attention to social ordering when one adopts a version of liberalism that sees the common law as playing a role in a liberal order.

One might challenge this alternative version, however, seeing it as too expansive a definition of liberalism. Rogers Smith has complained about such tendencies by arguing that scholars who rely on liberalism to explain American politics can fall into the trap of conflating the American political tradition with liberalism, thereby characterizing the finding of any tradition in American politics—whether antiracist and antisexist as well as racist and sexist—as liberal.[23] When liberalism is defined so expansively, then it merely describes American politics and ceases to be of use as a heuristic device for understanding American politics.[24]

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[22] Some of these arguments that I will treat in the pages ahead include arguments that liberalism contains social structures that inherently subjugate women (Carole Pateman, *The Sexual Contract)*, that the social arrangements under coverture have not been rendered obsolete and continue to inform the status of husbands and wives, albeit in hidden form (Reva Siegel, "She, the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," 115 *Harvard Law Review* [February 2002]: 947; and Joan Williams, "Is Coverture Dead? Beyond a New Theory of Alimony," *Georgetown Law Journal* 82 [September 1994]: 2236), and that the content of liberal principles is itself determined by masculine conceptions of freedom. See Wendy Brown, *States of Injury* (Princeton: Princeton University Press, 1995).

[23] Smith, "Liberalism and Racism," 20, 27.

[24] *Ibid.,* 27.

The impetus behind a recognition of the common law in one's liberal perspective is precisely to illuminate the practices of American politics in a way that the more dominant liberal version cannot. Using an alternative liberal lens, one can discern in the common law a need for social ordering and come to a better understanding of why different traditions have occupied a simultaneous place in American practice.

To return to our initial puzzle, for instance, in which married women's statutory property rights ceased did not abolish coverture, one could use either liberal lens. Using the lens of progressive liberalism, one would see these statutes as having failed to realize their potential, placing the blame for this failure on conservative judges who resisted the expansion of women's rights. Viewed in this manner, the explanation of the puzzle is an incomplete reform. When we use another liberal perspective, however, one in which the common law is recognized as a part of liberalism, then the effects of the reform statutes are not as puzzling. The statutes conferred some property rights upon women but did not touch the other rules of coverture that sustained family relations. The statutes did not abolish coverture because they were not intended to; the conferral of rights was not intended to initiate a snowball effect of other rights but were, in their inception and early application, limited to the matters listed in the statutes. Using this lens of liberalism provides an explanation that resolves the puzzle by rendering it less puzzling in the first place.

In the matter of relying on these lenses to identify solutions, on the other hand, the progressive liberal lens would seem to be more satisfying, because it

holds the perpetuation of coverture as problematic for women and anticipates its demise. This version itself is problematic because it can result in a misapplication of liberal principles, and it can result in a loss of recognition of liberalism's social ordering. Because of the way that liberalism has developed, for the tendency to define liberalism solely in terms of its abstract ideals has resulted in a separation of the common law from understandings of liberalism, and so not just the mechanisms for social ordering have been lost but the recognition that liberalism has a need for social ordering, as well. When coverture fell into disrepute, so too did recognition of its role in liberal social ordering. Using this perspective, the loss of coverture is not something to be merely celebrated, but something to worry about, for if a liberal society lost this means of meeting some perceived social need, then what did it muster to replace it?

When the common law is recognized for its role in liberalism, then we can attribute the survival of coverture not simply to some desire of men to dominate women or to outmoded stereotypes of women but out of a society's need to order itself and to meet perceived needs, and we can articulate better solutions to the civil disabilities that coverture has placed upon women. Thus, although this version is skeptical of prevailing use of liberal principles, finding that liberal principles are limited by social ordering, it does not dispense with the principles of liberalism. After all, social ordering is just one aspect of liberalism, and the ideals remain. Liberal principles may, indeed, be capable of expansiveness, if carried out along another route. One can recognize the need for social ordering and identify the perceived needs. If the needs have historically been filled by

some ascriptive practice that has unduly burdened people based on status, such as has occurred with women in American political history, then one can retain recognition of the need while finding a substitute. In this sense, the progressiveness of liberalism is practiced not along its abstract ideals but along the lines of social ordering.

In order to rely on this alternative version of liberalism both in the study of political history and to assess contemporary reform, one needs to take the common law seriously. I do so in the following chapters, which apply this alternative version of liberalism to the stud of married women's property rights in nineteenth-century America. In the first chapter I begin with a reassessment of the relation between the common law and liberalism by reviewing the work of two exemplars of these doctrines, Sir William Blackstone and Locke, respectively. While the common law and liberalism are often seen as being at odds with one another, my reading of both shows that they were doctrines that could be made compatible with one another. Thinkers in the seventeenth and eighteenth centuries saw the common law not as an archaic and feudal tradition but as protective of freedom and compatible with modernity, and even as he explicated the common law for eighteenth-century readers, Blackstone saw the common law as suitably modern. With such an understanding of the common law in mind, it makes more sense to see how Locke was able to incorporate the domestic relations of the common law in to his liberal theory.

In Chapter Two I identify how nineteenth-century political actors sustained the tension between the ideals of liberalism and the domestic relations

of the common law. Married women's disabilities under the common law underwent reform in the mid-nineteenth century as they were given rights to own their own property separate from their husbands. Despite these reforms, their remaining disabilities under coverture continued unchanged. I attribute the persistence of coverture neither to conservative judges who interpreted the statutes too narrowly nor to severely limited statutes but rather to the operation of an alternative form of liberalism, one that recognized the liberal ideals of rights as well as social relations. I argue that for these liberals, the ideals were not the only consideration; they were also concerned with maintaining a society, and the common law domestic relations were the institution at hand for maintaining social relations and their attendant obligations. I find this by looking at the statutes treating married women' property rights from three states as well as treatment of these rights in state constitutions and their considerations at constitutional conventions. I collected married women's property cases from each state for the period 1870-1889, a period by which the majority of states had passed their major property reform statutes. A Lexis-Nexis guided search produced a large number of cases,[25] and I focused upon the reasoning of the judges rather than just the outcomes of the decisions in order to assess their reasons for retaining the domestic relations. This is particularly important given the questions at hand. To assess these cases by some current standard of equality or progress, such as recording each state's progress in giving women rights to make wills, own their

[25] This search produced 174 cases in Massachusetts, 67 in Maine, 399 in Illinois, 206 in Indiana, 399 in Illinois, 333 in Louisiana and 121 in Kentucky.

separate property and other such contractual rights,[26] would be to assess these statutes by an anachronistic standard and to look to the statutes in anticipation of their progress rather than trying to gauge how they were understood at the time. As I am making the case to resist the contemporary presumptions of liberalism as progressive and defined solely by its ideals, then that should be practiced when one is examining the statutes. This approach yields a portrait of both courts and legislatures that were trying to balance the common-law marital relations with their statutory reform.

In Chapter Three I show that the development in the master-servant relation had an impact on the remaining domestic relations, particularly the husband-wife relation. In the 1870s and 1880s, as economic and social change took place, there was anxiety about these changes and a further split between the public sphere and the private. They were able to alleviate their anxieties by rendering the home an affectionate, intimate place were relations could be preserved in the midst of a disturbingly changing and alienating society. This helps to explain why women's subjugation continued. I thus give some credence to the reasons why coverture continued rather than attributing it to simple misogyny or desire to rule over women.

Even as I show that coverture was able to survive its own reform and that the status of women, in some ways, worsened in that coverture was entrenched and justified with modern language, I also trace the origins of the eventual reform of this status with the suffragist critique of coverture. The Declaration of

[26] This is the approach Joan Hoff takes in her systematic study of the property reform statutes in *Law, Gender and Injustice*: *A Legal History of U.S. Women* (New York: New York University Press, 1991) 130.

Sentiments was written in 1848 and although a formidable document for its time, its grievances took generations to find relief. While the suffragists may not have been immediately successful in their efforts, they were influential in that their use of liberalism came to be understood as the definitive form of liberalism. In the last two chapters I explore the problems with that, first, in Chapter Four, with a critique by Mary Ritter Beard, who criticized the suffragist equality discourse for its abstraction and inattention to social matters. Beard's analysis serves as a heuristic for thinking about liberal principles and social ordering in a different way. In Chapter Five I point out the problems in applying liberal principles to women's historic inequality in the absence of recognition of social ordering. After the Civil War, Congress relied on the civic statuses generated by the marital relations but left the ordering of these relations to the states. By the time the Supreme Court treated women's inequality as a constitutional issue, it appeared that it was owing to these civic statuses, explainable as outmoded stereotypes, rather than to the system of social ordering sustained by the states. The treatment of issues of marriage by the federal government thus represents the institutional disjuncture of liberal principles, applied through constitutional doctrine, from common-law social ordering.

Liberalism has a social ordering, which one can identify by examining the experience of marriage in liberal theory and in American politics. To define liberalism solely in terms of its abstract principles and ignore this social ordering is defeating, because the American polity has relied on this ordering, whether this goes acknowledged or not. The task here is to articulate a theoretical framework

for recognizing the social ordering of liberalism, not in order to reproduce it in the way it has traditionally obtained, but to reconsider the relation between the principles and social ordering and to formulate a version of liberalism that is ultimately more satisfying.

Chapter One: The Common Law and Liberalism

The common law and liberalism have more in common than both being present in the American political tradition; they have a relation with one another. I have suggested that in its study of liberalism and its alternatives in America, the American political development literature tends to rely on a Lockean liberalism that sets other political traditions apart from it. With this formulation of liberalism, the common law is a tradition that has been recognized as being present in American politics, but is more often than not presented as an archaic tradition inimical to liberal principles that can be remedied by liberal progress. This is exemplified by Karen Orren labeling the common-law master-servant relation as a feudal tradition that existed until liberal labor legislation replaced it in the 1930s.[27]

The labeling of the common law as feudal or archaic is nothing new. Throughout American history the common law has been referred to similarly. The nineteenth-century suffragists referred to it as "the old barbarous law of England"[28] because of its hierarchical husband-wife relation that was part of the system of domestic relations that comprised the private sphere in the common law. The legal reform movement for codification in the early nineteenth century also characterized the common law as "sprung from the dark ages,"[29] reserving its

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[27] Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991).
[28] "Lecture by Lucy Stone: On Suffrage for Woman, at the Brooklyn Academy, Dec. 26" *The Revolution*, I, No. 1 (January , 1868): 2.
[29] Robert Rantoul, "All Law Must be Legislation," in *Law in Antebellum Society: Legal Change and Economic Expansion* Ed. Jamil Zainaldin (New York: Alfred Knopf, 1983) 86.

criticism not for the common law's treatment for women but for its association with the courts. The common law originated in British courts and was passed down as unwritten law. By the time the common law was in operation in America, its reputation for being a judicial-dominated system in which law was discovered and made outside of the purview of elected officials rendered it ripe for assail by anti-elite reformers. The codification movement sought to wrest control of the common law away from the courts and place it into the hands of legislatures. Whereas the suffragists would explicitly rely upon liberal values to reform the common law, the codification movement would rely on a more democratic shift to statutory law. For each of these critiques, the barbarous common law and its misogynist and elite orderings could be rectified with liberal and democratic measures.

Such juxtapositions, in casting the common law as archaic, at the same time cast liberalism as progressive and reformist. In this chapter I challenge each of these categorizations by returning to theories of both the common law and liberalism. Rather than conducting an exhaustive study of these doctrines, I choose a representative thinker for each. To study common law theory I look at Sir William Blackstone, the eighteenth-century British jurist whose *Commentaries on the Laws of England* served as a widely-known treatise on the common law and was well known in America. For liberalism I look to the works of John Locke, because it is a Lockean liberalism that I identify in strains of nineteenth-century political discourse. Locke incorporated the common law domestic relations into his liberal theory, and understanding how he was able to

do this without being contradictory helps to reassess the relation between the common law and liberalism. In Locke's theory, the common law was not a barbaric, archaic doctrine but was rather a doctrine compatible with modernity and providing a system of social relations upon which a liberal society could rest. Recognizing the role that the domestic relations played within liberalism can help to reassess Lockean liberalism and identify the limits of its abstract principles. To question the juxtaposition of the common law to Lockean liberalism, therefore, would serve to unsettle the contrast between the common law and liberalism and begin to question the presumptions of progress that this juxtaposition invites.

BLACKSTONE

Blackstone was not the only commentator on the common law, but he is perhaps the best known. Historians have pointed out that Blackstone was not the only expositor of the common law, and he may not have been as influential as the suffragists suggest.[30] Furthermore, critics point out that Blackstone's *Commentaries on the Laws of England* do not tell the whole story of the operation of the common law in America, for married women could seek relief from common law disabilities through courts of equity and by relying on legal manipulations such as marriage settlements. Furthermore, some states had already codified some equitable provisions into their statutes.[31] All of these

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[30] Mary Ritter Beard, *Woman as Force in History: A Study in Traditions and Realities* (New York: Collier Books, 1946; reprint, New York: Octagon Books, 1976); Norma Basch, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," in *Domestic Relations and Law,* Ed. Nancy Cott (Munich, New York: K.G. Saur, 1992) 132-152.

[31] See Mary Ritter Beard; Norma Basch, "Equity vs. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson," *Journal of the Early Republic* 3 (Fall 1983): 297-318; Elizabeth Warbasse, *The Changing Legal Rights of Married Women, 1800-1861* (New York: Garland Publishing, 1987).

critiques point to a gap between the rigid text of Blackstone and the more flexible arrangements of actually living under a common law ordering.[32]

Apart from critiquing the purported influence of the common law there is another means of examining it, and that involves the characterization of the common law as feudal and barbaric. This is a characterization of the common law that was present in the thought of nineteenth-century suffragists and codification reformers, and it remains present in much contemporary scholarship. One can call into question the characterization of Blackstone as archaic in opposition to the progress of liberalism.[33] Just as the common law was seen as being influential in America it was also seen as sustaining archaic feudal principles, perpetuating outmoded forms of hierarchy in the modern age. This was not how Blackstone saw his work, however. He saw his advocacy of the common law as compatible with modernity and freedom. Appreciating Blackstone's self-understanding helps in beginning to reconsider the role of the common law in a modern—and a liberal—society.

As one reads the *Commentaries*, it becomes clear that Blackstone himself was no philosopher,[34] but he did borrow liberally from the philosophers of his

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[32] See also Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2000).

[33] This tendency is evident in the suffragist treatment of Blackstone, discussed in chapter four, and continues up to the present day. For example, one of the striking findings of Karen Orren's study of the master-servant relation in America is that feudalism was present in American law until the 1930s.

[34] One of the most enduring critiques remains that of Jeremy Bentham, who was in attendance at Blackstone's Oxford lectures. See *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England* (Oxford: Clarendon Press, 1928). A more charitable critique that pointed out inconsistencies throughout the *Commentaries* is found in Daniel Boorstin, *The Mysterious Science of the Law* (Boston: Beacon Press, 1958). Herbert Storing acknowledges that Blackstone does not qualify as a philosopher but nevertheless argues that he deserves a place in a history of political philosophy, owing to his use of natural law to

time, sometimes lifting passages right from Locke or Montesquieu.[35] By relying on these philosophers, Blackstone is associating himself with modern thinkers of the time. Commentators have also pointed out enough factual errors to question Blackstone's merits as an historian, as well.[36]

Despite the shortcomings of Blackstone's scholarship, he remains useful for study, because one looks to Blackstone not for an accurate study of the common law but for his understanding of it in his own time. According to Blackstone's self-understanding, the feudalism of the common law was not incompatible with modernity. He arrives at this self-understanding by viewing the common law as a separation from systems of authority in both foreign influence and the Church. Blackstone introduced the lectures that became *Commentaries on the Laws of England* by expressing his concern that the English were relying on civil law so much that they were forgetting their own, British heritage: "[W]e must not carry our veneration [of the civil law] so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the prescript of the Roman emperor, to our own immemorial customs."[37] He wanted to cultivate and make methodical

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avoid inquiry into the convention that lay at the base of society, thus maintaining veneration. Storing says that Blackstone was engaged in a project of modern improvement disguised in a conservative cloak. See "William Blackstone," *History of Political Philosophy,* ed. Leo Strauss and Joseph Cropsey (Chicago: The University of Chicago Press, 1987).

[35] James Stoner reads Blackstone as not just sprinkling his *Commentaries* with a little philosophy but actually trying to improve liberal doctrine. He points out passages in which Blackstone was not only drawing upon but may have been trying to improve upon Locke's theory. *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992).

[36] See Sir William Blackstone, *Commentaries on the Laws of England* ed. William Carey Jones (San Francisco: Bancroft-Whitney Co., 1916) 29, editor's note 10.

[37] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Oxford, 1765; reprint, Chicago: The University of Chicago Press, 1979) 5.

the British law for the sake of British gentlemen, who were unfamiliar with it. In these early exhortations one can already grasp Blackstone's view of the common law—it is distinctly British and it is capable of systematic study.

Touting the common law as British was not simply a nationalistic ploy on Blackstone's part but an attempt to set the common law apart from the traditions of other European nations. The British common law was a break from the hierarchy of other traditions. Even though the common law in England operated by adhering to its own tradition, itself rooted in feudal history, Blackstone reconciled the feudal origins of common law with modernity by shifting the terms of the tension. For Blackstone, the great challenge to modernity was not to shed the feudalism of the past but to wrest governing and law away from the Church, whose influence had been retained through civil law. The civil law was the code of law derived from ancient Roman law and was the form of law used in such Catholic countries as France and Spain. Blackstone thus deflected the problem not by resolving the feudal-modern tensions within common law but rather by resolving the conflict, which he introduced, between civil and common law.[38] Common law's secularism became its modernism.

Blackstone points out, at various points in *The Commentaries*, the common law's distance from the Church. For example, municipal law is intended to govern civil conduct rather than moral conduct.[39] The marriage contract is a

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[38] Norman Cantor points out that there was a widespread conviction, during Blackstone's time, that these two systems of law were antagonistic. Subsequent historical studies have proven their shared lineage. Cantor, *Imagining the Law: Common Law and the Foundations of the American Legal System* (New York: Harper Collins, 1997) 28.

[39] Blackstone, 53-55.

civil contract, not an ecclesiastical contract.[40] He saves his most pressing attacks against the Church for his characterizations of civil law. He dates the revival of Roman law to the discovery of the Justinian pandects in 1137.[41] The civil law then came into vogue in western Europe and "became a favorite of the popish clergy," who brought the civil law to England.[42] Blackstone presents the presence of both civil and common law traditions along a religious/secular dichotomy: The "monkish clergy" adopted the civil law, while the nobility and laity retained the common law. [43] Since the civil law was written it was easily kept alive by the clergy in the universities, while the study of the common law was in danger of falling into disuse. Blackstone explains that the civil law would have taken over the common law if not for a "peculiar incident," the centralization of professors of municipal law in the court of common pleas. A collegiate order developed, and rudimentary law schools, separate from the clergy-run universities, appeared. In these institutions, the rules of the common law were passed down, such rules being "so liberal, so sensible, so manly."[44] The reference to manliness here might seem to betray a masculinist bias in Blackstone's view of the common law, and while that may not be an inaccurate assessment, to focus on the gendered implication of this term would be to miss its attention to character

[40] *Ibid.,* 421.
[41] In his 1915 edition of the *Commentaries*, Jones explains that a manuscript copy of the Pandects was discovered by the Pisans at the sack of Andalfi in 1137. Jones goes on to argue, however, that Roman law was already being studied before 1137.
[42] Blackstone, 17-18.
[43] *Ibid.,* 18. William Carey Jones comments that this distinction between the clergy and laity is not accurate. "It is by 'popish clergymen' that our English common law is converted from a rude mass of customs into an articulate system." [29] The fact that Blackstone is so inaccurate supports the point that he was constructing a religious-secular tension, the diffusion of which would present the common law as a secular, modern freedom from a clerical past.
[44] *Ibid.*, 26.

development. Discerning the rules of the common law is a manly endeavor, one in which those who study the common law had to study it and discern the rules for themselves. They had to apply the work to determine what the law was, rather than have the meaning of the law handed down from some higher authority.

To grasp the importance of this, we can contrast it to the character formation fostered by the Church, exemplified in the Church's treatment of the poor. When monasteries were responsible for administering to the poor, they essentially practiced charity, which was fine so long as it lasted, but when the monasteries dispersed, society was left with a body of poor with habits of indolence and beggary.[45] When the Church's methods were replaced by more distinctly English methods, the results were much improved, according to Blackstone. English custom distinguishes between the disabled poor and the idle poor and administers its relief accordingly. While the "sick and impotent" are given relief, the "idle and sturdy" are aided in finding employment. The poor of the latter group are taught self-reliance. This custom pays heed not just to the individual but to the poor as families. Putting an entire family in the workhouse

> tends to destroy all domestic connexions (the only felicity of the honest and industrious labourer) and to put the sober and diligent upon a level, in point of their earnings, with those who are dissolute and idle. Whereas, …if no children were removed from their parents, but such as are brought up in rags and idleness; and if every poor man and his family were employed whenever they requested it, and were allowed the whole profits of their labour;---a spirit of cheerful industry will soon diffuse itself through every cottage; work would become easy and habitual.[46]

[45] *Ibid.*, 348.
[46] *Ibid.*, 349.

Modern methods thus train the worker to be an active member of a modern commercial economy. The poor worker was freed from authoritarian paternalism and developed his own character through his own industry. One of the many problems with the Church, then, lies in the character formation it fosters. Its command to obey authority breeds idleness and dependence, whereas breaking away from the Church and relying on distinctly British custom fostered resourcefulness on the part of workers and manly practices in interpretation of the law.

In both Roman law and the Church, Blackstone sees subjection. Under these orders, one is a subject and obediently follows the law. In the British, secular common law, on the other hand, judges must discern for themselves what the law is. They must study and work to interpret the law, and in doing so, application of the law becomes a formative project.

This conception of freedom is certainly different from a liberal conception of freedom thought of as liberty from constraints and the freedom to live one's life as one chooses.[47] The point to be made here, however, is not that the common law was liberal but that its adherents did not understand it to be barbaric. According to common law reasoning, the system of the common law offered liberation from authoritative systems of rule, oppressive because they limited the individuals' ability to work for himself and attain his own freedom.

While Blackstone's theory of freedom gives him a number of vantages from which he criticizes the Church, he is careful not to go overboard in his

[47] Isaiah Berlin, *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958).

enthusiasm for the progress that secularism invites. In an anticipation of Burke, he warns against those "rash and inexperienced workmen, operating under all the rage of modern improvement," who destroy the symmetry of custom.[48] He has three reasons for retaining custom. The first lies in it being *English* custom. In the Introduction to the *Commentaries* he explains that he will be providing *British* gentlemen with an education in *their* laws,[49] and I have shown that this was bound up in his theory of freedom. Another reason is that it is built upon its own reasoning that can be traced back to divine law, and thus he places the common law in a natural law tradition.[50]

A third reason for retaining custom is because it "carried with it the internal evidence of freedom."[51] Here he is referring to the freedom inherent in the origins of law, which he justifies by contrasting the common law with the positivism of civil law. Under the Roman law, written law had authority because it was approved by the judgment of the people. With only this as its legitimacy, anything could be written into law, so long as it was procedurally legitimate. Even a tyranny could be legitimate under written law.[52] In contrast, Blackstone

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[48] Blackstone, 10. Note that custom is being misused here by Blackstone. The common law was centralized, while custom might be local and differ in different areas. See Jones, 134, editor's note 9.

[49] John Cairns suggests that this was not exceptional. Universities in various countries had begun to teach national law in addition to civil law at about this time. See "Blackstone: An English Institutionalist: Legal Literature and the Rise of the Nation-State," *Oxford Journal of Legal Studies* 4 (1984) 318.

[50] Blackstone refers to Montesquieu here, and, since both Blackstone and Montesquieu are critical of the Church, it is not clear whether Blackstone is sincere in pointing to the divine origins of natural law. Montesquieu indicates his disrespect for the Church by seeing religion as instrumental to a regime and by rooting natural law in custom and climate rather than in divine origins. Montesquieu, *Spirit of the Laws* ed. Anne Cohler et al. (Cambridge: Cambrisge University Press, 1988) 25, 122, and 477.

[51] Blackstone, 74.

[52] *Ibid.*, 123.

presents the common law as operating within the constraints of a constitutional order. He sees the common law as serving as a kind of constitutional foundation, limiting the substance of legislative statutes that can be legitimately passed. Statutes are thereby limited by the common law, and as the common law "probably was introduced by the voluntary consent of the people," the people's freedom is protected by transient majorities.[53] Thus freedom remains a concern for Blackstone, only this time instead of freedom as the product of individual character formation, freedom is understood in terms of constitutional foundations.

Blackstone's understanding of the common law as a better protection for freedom can be understood within his particular understanding of freedom—freedom within limits. Blackstone refers to Locke to point out "where there is no law, there is no freedom."[54] A system of rules protects one's freedom. In fact, too many rules are better than none at all. Blackstone prefers tyranny to anarchy,[55] and he would rather have law without equity than equity without law.[56] The rules of the law should be understood and followed because embedded in these rules lies the basis for freedom for a society. To fail to heed these laws, therefore, would harmful to freedom. Blackstone places so much stake in the importance of laws that he departs from Locke when it comes to the right of revolution, because a revolution would destroy all law and build on a new foundation. Although he earlier relied on a notion of a social contract to tout common law's constitutionalism, he does not recognize the voluntarism of the

[53] *Ibid.*, 73-74.
[54] *Ibid.*, 122.
[55] *Ibid.*, 123.
[56] *Ibid.*, 62.

contract to justify overthrowing the government when it violates natural rights, as that would destroy foundational structures. While in Locke, consent forms the basis of political freedom and justifies revolution should the government fail to protect that freedom,[57] for Blackstone, consent forms the basis for freedom against which actions of the government are judged, but once consent has been secured, grievances against the government do not warrant the uprooting of fundamental structures.

Blackstone thus distinguishes himself as a conservative, not simply for the sake of conserving the past, but because he thinks that that is the best way to protect freedom. It might look like Blackstone is anticipating Burke in these passages. Certainly there is something to be said for that; both share the sense that the common law retains an order tracing back to the natural order of things and to disrupt the common law would be to unsettle foundations.[58] Furthermore, Blackstone's attention to character formation under authoritative rule and the common law is shared by Burke.[59] But to merely categorize these elements as Burkean would be to limit their analysis too soon, for to label Blackstone as

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[57]John Locke, *Two Treatises of Government,* ed. Peter Laslett (Cambridge: Cambridge Universiy Press, 1999), 412-415.

[58] Edmund Burke, *Reflections on the Revolution in France* ed. Conor Cruise O'Brien (New York: Penguin Books, 1986). We will also see such Burkean sentiments in the work of twentieth-century theorists Mary Ritter Beard and Harvey Mansfield, each of whom expresses concern for the threats to society when the common law relations are unsettled too abruptly.

[59] In his "Speech on Moving His Resolutions for Conciliation with the Colonies" in 1775, e.g., Burke expresses an admiration for the liberty of the American colonists, which he sees as sensible because it is a liberty that "inheres in some sensible object." They have rooted their understanding of liberty not in abstract principles but in study of the law, specifically, Blackstone's *Commentaries.* Their study of the common law inculcates manly virtues and "renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resource." In *Select Works of Edmund Burke A New Imprint of the Payne Edition,* Volume 1 (Indianapolis: Liberty Fund, 1999) 237 and 242.

Burkean would be to cast him as a conservative, a category that too easily slides into dismissing the common law as a doctrine resistant to modernity. Certainly there are conservative elements in Blackstone; that would be inevitable when one is dealing with the common law. But Blackstone was not merely conservative. Part of retaining British custom was to rescue England from Roman civil law and the Church. He praises British custom because it liberates from a past ridden with these authoritative orders, just as later liberals would see progress as resting in breaking away form the common law. Blackstone, however, professes to embrace modernity and its advantages—he proudly references Montesquieu's favorable assessment of British commerce, the pursuit that is modern and protects liberty[60]--but he will not embrace modernity at the expense of dismantling those structures upon which modern freedom rests.

While there may be inconsistencies with his reasoning, it becomes clear that Blackstone wants to conserve the past while embracing modernity. In his own way, he finds the common law to be compatible with modernity. This reconciliation on his part helps us to assess his position on those domestic relations that he retained. By the time he addresses the domestic relations at the end of Book I of the *Commentaries*, he has no apologies for maintaining these relations, and he makes no references to their feudal origins. There is, in fact, a tone of pride and enlightenment in these chapters. In his chapter on the master-servant relation, he distinguishes between classes of servants and quickly dismisses any relation based on that lowest class of servant—the slave. The law

[60] Blackstone, 252.

of nature and reason does not condone slavery, and the principles of the laws of England "abhor" it, the spirit of liberty being so strong.[61]

When he reaches the husband-wife relation, he spends time discussing the marriage contract itself, the prohibitions against whom may marry indicating that whoever marries must have sufficient reason to make a contract. Women are thus recognized as possessing the reason needed to enter the marriage contract, but once they do they become *feme covert.* A wife's legal identity is covered by her husband's and they become, for legal purposes, one person. The principle of husband and wife as one person helps to explain the peculiarity of marital customs: once married, husband and wife cannot contract with one another, because she has no separate legal existence; if she is injured, it is he who recovers because she has no legal existence to bring a suit; they cannot testify for or against one another because that would entail testifying against oneself.[62] Blackstone understands all of these customs to be quite logical, so long as one accepts the premise that the husband and wife are one person, a premise he never questions or justifies.

He ends the husband-wife relation chapter with some further pride in his era and his own class. He explains the husband's right to chastise his wife by the fact that he is the one responsible for her misbehavior. Thus there is a logic, even

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[61] *Ibid.*, 412.

[62] Note that there is another logic in the husband-wife relation in tension with the unity thesis. By this logic, the wife is seen as a distinct person but is presumed to act under the coercion of the husband. When the "one-person" standard fell into disuse after the passage of statutory reform of coverture in the nineteenth century, the coercion thesis remained and was used as justification to retain the husband's position as head of household and the wife's status.

to this custom, but he goes on to say that it only be exercised within reason and, furthermore, it is really not a useful custom for enlightened peoples:

> But with us, in the politer reign of Charles the Second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband; or in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their antient privilege: and the courts of law will still permit a husband to restrain a wife in her liberty, in case of any gross misbehavior.[63]

He indicates that there is enlightened use of the common law, and there is base use of it. We are to infer, of course, that he advocates the former. An enlightened common law eschews slavery and wife-beating, but it does not question other disabilities placed upon married women because they fall into a logical design whose very order, as we have seen, implies a system of reason and a link back to the protection of freedom. England should heed this order so that it protects liberty. This is not an argument that would persuade Elizabeth Cady Stanton, who would fight to abolish married woman's disabilities a century after Blackstone wrote the *Commentaries*, but it was an argument that proclaimed itself as modern. It may not persuade those readers of Blackstone today, either, but the point is not that readers be persuaded by Blackstone but that we appreciate how he understood his own project. Blackstone and the common law would be accused by nineteenth-century reformers of being barbaric. The account here shows that he certainly did not think of himself in that way. He saw that the

[63] Blackstone, 433. For a critical account of the use of this self-understanding in history, see Reva Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117-2207. Siegel shows that the state has been able to proclaim itself as progressive when it enforces laws against wife-beating, but in America, this disdain for domestic violence obscured a racialized system in which non-white men were unduly prosecuted for wife-beating, thus casting this as a problem of the lower class and reinscribing racialized social ordering.

common law could provide freedom for a modern society, when modernity is understood as the break from a past marked by the Church and civil law.

Grasping Blackstone's self-understanding can serve to explain, in part, how the common law can be present in Locke's liberal theory. It helps to show that the common law at the time could be seen not as barbaric but as compatible with modernity. There remains Blackstone's denial of freedom to women in the domestic relations, and Locke adopts that as well. Even if we can accept that an eighteenth-century jurist could see this as modern, it does not fully explain how a seventeenth-century liberal could reconcile the domestic relations to liberal principles such as consent, individualism, and equality. This look at Blackstone helps to show that the common law was not a barbaric doctrine at odds with modernity, but we must now look to Locke to see how this doctrine could be seen as compatible with liberal ideals.

LOCKE

While one could possibly explain Blackstone's subjugation of women in the domestic relations by the conservative elements of his doctrine, despite his claim to modernity, the presence of the domestic relations in Locke's liberal theory is more puzzling. Blackstone was writing about the common law, a doctrine that even while proclaiming itself to be modern was conserving a tradition of the past. Locke, on the other hand, was advancing a liberal doctrine, one that broke with the past. Why didn't he free a liberal society from its common law social orderings as well?

Locke shows himself to rely on the feudal arrangements of the common law in theorizing about a liberal society that was much more constitutive than abstract liberal doctrine might lead us to believe. In *An Essay Concerning Human Understanding*, Locke discusses relations, but in a form distinct from the common law. In "Our Idea of Relations" he explains that it is easier to visualize a person when we present him in a relation. Telling us that someone is a man is not telling us much about this particular man. But when we are told that he is a white man, or a husband, or a master, we gather a clearer notion of who this person is. Revealing such characteristics tells us about one person by revealing his relations with another. Members of a particular culture grasp the meaning of these signifiers. In invoking these relations, Locke might appear to be "non-Lockean"[64] in that he is conceding that a person's social identity is not completely under the control of the individual. Rather, one's own identity is determined in relation to others and along given societal constraints.

We are not accustomed to viewing the liberal individual as so situated, but these relations can nevertheless seem familiarly Lockean in that Locke also identifies a liberating potential in these relations: The individual's identity alters as he moves from relation to relation. Hence a single individual may be, at different times, master, servant, father, grandson, etc. Although such relations have historically placed one in a status over which one had no control, Locke's presentation suggests that an individual can move from one to the other, that

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[64] In his study of Locke's *Thoughts Concerning Education,* Nathan Tarcov discovered a "non-Lockean Locke." *Locke's Education for Liberty* (Chicago: The University of Chicago Press, 1984) 210.

neither his identity nor status are fixed. And so these very relations become a source of freedom by virtue of their fluidity.

Such multiple identities come into use in the *First and Second Treatises*. Locke catches Filmer in a contradiction by pointing out that if his conflation of paternal with political power were true, then every father would be a prince, and there would be hundreds of sovereigns.[65] Of course, that is impracticable. On the other hand, the fact that every father will not be a prince is troubling to Locke because fathers would then be political subjects, and he knows that being a subject is not all there is to these fathers. Locke has to come up with some way to allow someone to be subject to the sovereign without being wholly subjected. He does this by distinguishing between the public and private spheres. Just because one is a subject in the public sphere does not mean that that identity completely defines him. In the private sphere, he might take on other identities—father, master, servant, etc. Thus multiple identities serve as a source of freedom—one can be a subject politically but can take on other identities in other relations.

Historically, however, these relations were relations of both hierarchy and status. The hierarchy of the relations is not a problem for Locke; it is a reflection of reality. Locke demonstrates this in expressing his dissatisfaction with Filmer's statement that all subjects are equal in their subjection. In Filmer's formulation, when Adam was father, king and lord over his family, a son, a subject, and a servant or slave were one and the same thing.[66] All were under his absolute power, and all were thus equal in their subjection. Locke knows that in reality all

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[65] Locke, *The First Treatise* 92.
[66] *Ibid.*, 147.

are not equal in their subjection; there are differences among subjects. This might seem to lie in contradiction with Locke's basic presumptions of perfect freedom and perfect equality in the state of nature, but inequalities enter into the state of nature rather quickly:

> God gave the world to Men in Common; but since he gave it them for their benefit, and the greatest Conveniences of Like they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational, (and *Labour* was to be *his Title* to it;) not to the Fancy or Covetousness of the Quarrelsom and Contentious.[67]

The appropriation of property will be the thing that will set individuals apart from one another. Locke is explicit on this point:

> Though I have said above, Chap. II, *That all Men by Nature are equal,* I cannot be supposed to understand all sorts of *Equality*: *Age* or *Virtue* may give Men a just Precedency: *Excellency of Parts and Merit* may place others above the Common Level: *Birth* may subject some, and *Alliance* or *Benefits* others, to pay an Observance to those to whom Nature, Gratitude or other Respects may have made it due; and yet all this consists with the *Equality*, which all Men are in, in respect of Jurisdiction or Dominion one over another, which was the *Equality* I there spoke of, as proper to the Business in hand, being that *equal Right* that every Man hath, *to his Natural Freedom*, without being subjected to the Will or Authority of any other Man.[68]

Various elements may therefore factor in to create inequalities fairly early on. Indeed, even in Locke's presentation of property, servants are already present: In the famous Turfs passage, Locke indicates that one may hire out the labor of another in appropriating property: "Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digg'd in any place where I have a

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[67] *Second Treatise*, 291.
[68] *Ibid.*, 304.

right to them in common with others, become my Property."[69] The servant chose not to acquire his own property because of his own inferiority. In the *First Treatise*, Locke, in refuting divine right, offers inequality as an explanation: "Since the Authority of the Rich Proprietor, and the Subjection of the Needy Beggar began not from possession of the Lord, but the Consent of the poor Man, who preferr'd being his Subject to starving."[70] The poor man did not have the capacity to labor for his own subsistence, and he would have starved had he not found a master. Hence although every man has the right to be free from subjection to another, he can consent to subject himself through contract.

In relying on the doctrine of contract to refute Filmer's argument for divine right, Locke concomitantly justifies inequality in relations, and these different relations, resulting in multiple identities for any single individual, allow for a fluidity of identities. To be a political subject does not preclude other possibilities for that individual. The domestic relations of the common law thus offer liberating, albeit unequal, possibilities for Locke. Thus the hierarchy of these relations is not a problem for the individual, because no one relation should serve to define the individual; the individual can move in and out of these identities.

Historically, however, these relations were not only unequal; they were also relations of status and as such there was not much fluidity between them. A domestic servant, for example, was unlikely to have the life chances to move out of that status, and a wife tended to have both her private and public identities

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[69] *Ibid.*, 289.
[70] *First Treatise*, 170-171.

determined by her status as wife and mother. Hence we might ask why Locke decided to reproduce them in his liberal theory. We can garner an answer by assembling a portrait of each of these domestic relations in the *Treatises* and *Thoughts*.

In the beginning of the *Second Treatise* Locke lists the four domestic relations in showing that that the political power of a magistrate over a subject may be distinguished from that of "a Father over his Children, a Master over his Servant, a Husband over his Wife, and a Lord over his Slave."[71] Each of these relations originates in express or implied contract.

Locke dismisses the basest of these relations, the lord-slave relation. In doing so, he gives us clues as to what comprises the other relations. The lord-slave relation cannot be sustained because no one has power over his own life, and thus he cannot compact to take away his life. As slavery involves the slave being under the absolute, arbitrary power of another, this is a compact which no one can make. So it is clear that the lord-slave relation cannot persist because its origin involves an invalid contract. Locke nevertheless lists the lord-slave relation in his listing of the domestic relations. In doing so he seems to be paying homage to the historical understanding of the household.

The origins of the master-servant relation have already been covered above. Those with fewer or inferior capacities contract to alienate their labor to their masters, who retain the product of their labors. The origin of this relation is inequality of individual abilities. Its duration may be lengthy, but in contrast to

[71] *Second Treatise*, 268.

the slave relation, it involves only an alienation of a part of the servant's personality.

The parent-child relation becomes a focal point in the *Treatises* because of the contention over paternal power. In disputing Filmer's contention that the child is not born free, and therefore that there is no natural freedom, Locke explains that parents have "a sort of rule and jurisdiction" over their children, but it is temporary.[72] He uses a touching metaphor to explain this relation: "The Bonds of Subjection are like the Swadling Cloths they are wrapt up in, and supported by, in the weakness of their Infancy. Age and Reason as they grow up, loosen them till at length they drop quite off, and leave a Man at his own free Disposal."[73] Consent is not the basis of this relation, but only because the point of the relation is to guide the child until he has exercise of his reason to consent on his own. In this case "natural Freedom and Subjection to Parents may consist together."[74] We might think of this as parallel to his plan for multiple identities—an adult may be subject in one relation, dominant in another.

The origins of these three relations are all fairly straightforward. The remaining relation is the husband-wife relation, one that is clearly based on hierarchy and that becomes so contested in subsequent years. Why were the terms of this contract fixed in this manner? Much is made over the origin of the hierarchy in the relation in Locke's placement of the power in the husband because he is abler and stronger, which Carole Pateman understands to mean

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[72] *Ibid.*, 311.
[73] *Ibid.*, 304.
[74] *Ibid.*, 308.

indicates that woman is man's natural subordinate.[75] In this contentious passage, Locke said:

> But the Husband and Wife, though they have but one common Concern, yet having different understandings, will unavoidably sometimes have different wills too; and it therefore being necessary, that the last Determination, i.e., the Rule, should be placed somewhere, it naturally falls to the man's share as the abler and stronger.[76]

While Locke does bring the greater physical strength of men to bear in determining rule in the household, it is not clear that this reliance on physical strength is at the foundation of all of Locke's views on women's inferiority and subjection. One can gain a new appreciation for this statement when one sees how the husband-wife relation is constructed in relation to its position and role in the family, as drawn from Locke's references in *Some Thoughts Concerning Education* and the *Treatises*. This will help us to see how the terms of the marital relation are set and will make clearer the roles that all these relations play and thus why Locke found it useful to maintain these status relations in a modern, liberal society.

The husband and wife have roles to play in the family, and these roles are determined not by their identity as husband and wife but in their capacity as father and mother and maintenance of their children:

> Conjugal Society is made by a voluntary Compact between Man and Woman: and tho' it consists chiefly in such a Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation; yet it draws with it mutual Support, and Assistance, and a Communion of Interest, too, as necessary not only to unite their Care, and Affection, but

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[75] Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) 52-53 and 91.
[76] *Second Treatise,* 321.

> also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves.[77]

The roles of husband and wife are defined by the ends of the relation—procreation, the rearing of the children, and material provisions for the family. The wife's identity is therefore determined not by the terms of the marital contract itself but by the wife's role as mother. One can find this by assembling the domestic relations from the various works of Locke, which reveals that Locke reproduced the domestic relations to maintain conventions that he found important, namely, civic education and retention of family property. It is through these conventions that women's subordination would be justified. Despite the apparent naturalness of the family and home, the household is not an entirely natural sphere. It is filled with both kin and non-kin relations, and there is much in the family that is naturalized. By naturalizing convention, Locke is able to ensure that obligations are met within the home, with their apparently natural character used to ensure that they remain.

The most striking initial impression about the household is how natural it seems in contrast to the public sphere. As Locke has hinted in his discussion of paternal power, there is something intimate and tender about the family. Just as the authority of the parents unravels as slowly and gently as swaddling clothes, so, too, is the site for the education of children chosen for its intimacy. [78] The

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[77] *Ibid.*, 319.

[78] Tarcov, 79. Tarcov points out that this intimacy is evident even in the tone of *Thoughts Concerning Education*. The familiar tone of the work and its overall conversational style suit the familiarity of the home in which education will occur. Tarcov says that the home is chosen precisely because it is *not* the state and thus fulfills the classical liberal model of a private sphere protected from the interference of government.

home has an added advantage in that parents can be counted on to fulfill their duty to educate the child out of the impetus of natural affection. As Locke says in the *Second Treatise*, "God has made it parents' business to care for their offspring, and has placed in them suitable inclinations of tenderness and concern to temper this power."[79] For parents this is not mere duty; it is a delight. In *Essay*, joy is defined by parenting: "Joy is a delight of the mind, from the consideration of the present or assured approaching possession of a good. A father, in whom the very well-being of his children causes delight, is always, for as long as his children are in such a state, in the possession of that good; he needs but to reflect on it, to have that pleasure."[80] In these references, Locke is uncharacteristically touching and sentimental. His language would indicate that he is addressing what is truly intimate and natural to persons.

Despite this natural base, however, the home is not wholly natural. Locke's account of parenting in *Thoughts* reveals an experience in which parents must continually *overcome* their natural affection in order to do what is best for the child. This is made clear in Locke's advice concerning the physical care of the child: It is, perhaps, instinctual, for the parent to keep the child safe, warm and fed. Yet Locke suggests that parents not keep the child *too* warmly clothed, that his shoes be thin, that he be bathed in cold water. Such advice is anathema to parents' sensibilities, and he certainly knows how parents will react to such counterintuitive advice:

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[79] *Second Treatise*, 309.
[80] John Locke, *An Essay Concerning Human Understanding,* ed. Alexander Fraser (Oxford, 1690; reprint, New York: Dover Publications, 1959) 305.

> How fond mothers are likely to receive this doctrine is not hard to foresee. What can it be less than to murder their tender babes to use them thus? What! Put their feet in cold water in frost and snow, when all one can do is little enough to keep them warm?[81]

Locke is not, of course, advising that parents haphazardly expose the child to the elements but rather to begin to accustom the child to the elements as an initial episode of habituation. "Nature can bring itself to many things which seem impossible, provided we accustom ourselves from infancy."[82] Locke's education in the virtues will be one of habit, in which the child will internalize virtuous behavior until it becomes second nature, so to speak. Habituating the child to uncomfortable conditions is not different, in form, to habituating oneself to the sensations which one then reflects upon and transforms into knowledge in *Essay*. These physical habits developed at infancy thus play crucial roles not just in developing stalwart character but in habituating oneself to reasoning and attaining knowledge. Despite the important role of developing habits, as we see in the stark examples of their inculcation, such practices do not always come naturally to parents, and loving parents may balk.

Because of the difficulty that parents may have in overcoming their natural tendencies in order to bring the child to good habits, the establishment of habits provides a source of dissension within the family. "Fond mothers" are unlikely to get past their natural affection for their children, or, at least, they will have a difficult time doing so. They will resist the advice to dress the child in thin clothing out of fear of harm to their child. They will disdain thin shoes because

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[81] *Thoughts*, 13.
[82] *Ibid.*, 11.

they cause the child's feet to get dirty. Locke determines that with such fondness parents can unwittingly sabotage their child's development. For example, they might ruin the child's plain and simple diet, and thus his chances for a strong and healthy constitution, by cramming the child with food. But even worse, such fondness is likely to impede the child's path to reason:

> As the strength of the body lies chiefly, in being able to endure hardships, so also does that of the mind. And the great principle and foundation of all virtue and worth is placed in this, that a man is able to *deny himself* his own desires, cross his own inclinations, and purely follow what reason directs as best though the appetite lean the other way….Parents, being wisely ordained by nature to love their children, are very apt, if reason watch not that natural affection very warily, are apt, I say, to let it run into fondness. They love their little ones, and 'tis their duty; but they often, with them, cherish their faults too….Thus parents, by humoring and cockering them when *little*, corrupt the principles of nature in their children, and wonder afterwards to taste the bitter waters, when they themselves have poisoned the fountain.[83]

Hence parents have to resist their loving tendencies and learn to assume the responsibility of being lord and the absolute governors of their children.[84] Note that Locke does speak of "parents" here. Mothers may not be very good at overcoming their natural affection. Of the two parents, it is the mother who poses a threat to the education of the child and thus provides an opportunity for the father, by virtue of his reason, to assert his patriarchal authority. But it is evident that if the mother comes around and exercises reason over her natural inclinations, then she, too, can lord over the child.

The real dissension over childrearing in the household, in fact, occurs not between father and mother but between parents and servants. In *Thoughts* it is

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[83] *Ibid.*, 25-26.
[84] *Ibid.*, 31.

clear that servants are a constant presence in the family, and this presence reveals that the home is not really the intimate site occupied solely by loving relatives. Servants are present in virtually every aspect of the family's life, and they wield their own sort of influence over the education of the child. In the early part of *Thoughts*, when pointing out the potentially detrimental tendencies of fond mothers, Locke often includes criticisms of the servants as well. While both the mother and servant can set back the child's education, they do so out of different reasons. While the mother overfeeds the child out of fondness, the servant does so out of foolishness.[85] While the mistress opposes thin shoes because they make the child filthy, the maid opposes them because she has to clean his stockings.[86] Even when the mother and servant are allied in their opposition to Locke's advice, then, it is for different reasons. The mother is driven by her natural inclinations, which she can learn to resist. The servant has foolish or self-interested reasons for resisting, and these will not be overcome by the servant. The servant, then, is the one who is more likely to be an ongoing threat in sabotaging the child's education. The father and mother can find their efforts crossed by the "folly and perverseness of servants, who are hardly to be hindered from crossing herein the design of the father and mother. Children, discountenanced by their parents for any fault, find usually a refuge and relief in the caresses of those foolish flatterers, who thereby undo whatever the parents endeavor to establish."[87]

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[85] *Ibid.*, 16.
[86] *Ibid.*, 12.
[87] *Ibid.*, 37.

Locke attributes servants' sabotage of parents' efforts in childrearing not to rebellion but to foolishness and ignorance owing to their lack of good breeding. We see this in servants who offer drink to their young charge:

> [I]n this case it is that servants are most narrowly to be watched, and most severely to be reprehended when they transgress. Those mean sort of people, placing a great part of their happiness in *strong drink*, are always forward to make court to my young master by offering him that which they love best themselves; and finding themselves made merry by it, they foolishly think it will do the child no harm.[88]

Servants are in close contact with children within the home, so there are many opportunities for children to be influenced by them. When a child is disciplined by his parents, servants might try to make the child feel better, thereby lessening the parents' authority:

> And here is another great inconvenience which children receive from the ill examples which they meet with amongst the meaner servants. They are wholly, if possible, to be kept from such conversation for the contagion of these ill precedents, both in civility and virtue, horribly infects children as often as they come within reach of it. They frequently learn from unbred or debauched servants such language, untowardly tricks, and vices as otherwise they possibly would be ignorant of all their lives.[89]

Locke thus presents servants as a constant threat to the parents' efforts, and yet, what's a parent to do? The servants pick up much of the work of the household, dirty though it may be, dirty as in washing dirty socks and dirty as in serving as the agent of the infliction of corporeal punishment: Should whipping be necessary, it should not come from the father's hand; rather, the servant should administer the actual physical punishment. Hence the father has a convenient agent who can carry out his will without damaging his position of authority in the

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[88] *Ibid.*, 19.
[89] *Ibid.*, 45.

eyes of the child. Locke proffers a few suggestions that they might try to cope with this servant problem: they should be conscious of the threat;[90] follow the example of the Romans;[91] keep a close eye against the taint of servants.[92] But nowhere does Locke suggest that the family rid itself of its servants, despite the dissension that servants raise, and so the image of the home as the site of intimacy and agreement is called into question by the presence of servants with views of childrearing much different from the parents.

The position of servants also tells us something important about status relations in the home. Whereas Locke saw multiple identities as capable of being fluid, the uncouth domestic servant looks like she is not going to transcend her status as servant. Her identity as domestic was determined by her upbringing, and her lack of training will keep her there. All of this applies to servants who would be classified as domestics. The tutor, on the other hand, is another servant who acts in the father's stead, but in a much different capacity than the household servant. He takes over the function of education from the father, and so he has an esteemed position. If the father has done a good job and hired a tutor of the best quality, then he is also well bred and knowledgeable of the world, a suitable model of a gentleman for he child to exemplify.

Domestics and tutors were distinct classes of servants. Locke advises that one should be respectful of all servants, but for different reasons—the father treats the tutor with respect so that the child will acknowledge him as a governor. One

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[90] *Ibid.*, 37.
[91] *Ibid.*, 45.
[92] *Ibid.*, 50.

treats domestics civilly, on the other hand, in order to instill sentiments of humanity in the child, with the added benefit of the servants offering "a more ready and cheerful service."[93] The differential treatment of the tutor indicates that there were different classes of servants in the house. The tutor is elevated in his status because he has to be—the child has to view him as an authority while he remains a pupil.

This distinction between servants is important because it shows us that simply being a servant does not determine one's station in life; it depends on what class of servant one was. When Locke speaks of multiple identities, it must be the higher classes of servants to which he is referring, as the domestics prove themselves to be irredeemable. Locke is drawing upon the distinctions between servants that was sustained in the common law. While "servant" was included in Locke's multiple identities, the distinction between domestics and the tutor suggests that it is only the higher classes of servant who enjoy this fluidity; domestics are likely to remain in their status.[94]

As the child becomes a schoolboy and spends more time under tutelage of the tutor, the parents' role changes. We now see no sign of the doting mother. The task left for the father is to learn to interact with the product of his toils. He must, ironically, be told to be familiar with his child.[95] This seems odd. The home is supposed to be the site of intimacy, and parents had erred on the side of

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[93] *Ibid.*, 92.

[94] I will discuss the course of development that these distinctions take in the late nineteenth century in Chapter Three. I am leaving unexplored here the gendered implications of these distinctions—it was more likely than not that domestics were women, while tutors were likely to be males. Hence the opportunity for multiple identities for public servants is made more likely for men.

[95] *Thoughts*, 72.

familiarity when the child was an infant. The father himself developed habits in treating his child reasonably, and now he must unlearn some of that reason in order to get back in touch with his natural feelings, mixed with reason. The parent has to get to know his child again, treating with affection this child who is now approaching full use of his reason. The awkward relationship indicates that socialization of the parents has taken place as they have parented. They have developed habits just as the child has. The parent, in overcoming his natural inclinations, has developed habits of reason so much that now talking familiarly with his child doesn't feel so natural anymore.

We can now alter our vision of the home. The home is known as the site of the natural, emotive family, but we see that it is neither entirely natural nor familial. Within the home are the foreign element of servants. Despite their presence and influence in the home, Locke maintains the fiction of the family as kin-centered, as we see in his advice against public schooling. Locke explains that parents mistakenly send their children off to boarding schools under the belief that socialization there will prepare the child for the public world and advises that they instead educate their child at home among kin, but *Thoughts* shows the reader that the home is not filled *only* with kin. While he advises the parents to avoid the influences of the school, the servants in the home are to be controlled rather than eliminated from the home. Locke thus maintains the fiction of the household as equivalent to kin-centered family, even as he acknowledges and laments the ubiquity and untoward influence of servants.

Locke exposes the natural character of the family as illusory when he taunts Filmer in the *First Treatise*. He points to a sprawling West Indies plantation, with hundreds of servants helping to comprise the family and asks if the head of that household can claim heritage of Adam to justify his authority. Of course not, Locke points out; let us have no illusions--his authority is based on money.[96] This example is extreme, yet its very outlandishness provides a moment of transparency in which one sees that the family is not solely natural. There are conventional aspects to it, although these conventions may be disguised under the natural demeanor of the family. The family looks natural, but many of the relations between the family members have been naturalized, as parents have habituated themselves to the practice of educating children in a way that now looks like second nature but which was initially inimical to their instincts. These conventions are not so readily apparent in the normal family, and yet they are crucial for understanding how the family serves to determine roles for each of its members. Thus far, the mother did not need to be subservient to the husband, so long as she engages in reason over affection in the raising of the child.[97] The second part of parenting, however, introduces the need for authority and subjection of one parent over the other.

The husband begins to assert authority over the wife in a more permanent manner when the issue of property arises in the *Second Treatise*. As Locke mentioned, the maintenance of children includes not only education but material

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[96] *First Treatise,* 237. It is likely that the servants referred to here are slaves, even though Locke rejects the lord-slave relation as one of the domestic relations.

[97] Granted, even in this first instance, there is a presumption that there is less reason in the woman, as it was more difficult for her to overcome her natural tendencies, but nevertheless, Locke does recognize a capacity for reason.

maintenance as well. Such care involves laying up goods for their common issue,[98] and this will include leaving goods to children in inheritance, for self-preservation and inclination to care for children includes not only immediate nourishment but "continuing themselves in their posterity."[99] Thus originate the laws of inheritance, which prevent one's property from returning to the common stock after one's death.[100] One's property remains in one's family, which persists over time. It is the passing on of property that establishes the family as a permanent institution. While the authority over children during the process of education is temporary—"The Power, then, that Parents have over their Children, arises from that duty which is incumbent on them, to take care of their offspring, during the imperfect state of Childhood. To inform the Mind, and govern the Actions of their ignorant Nonage, till Reason shall take its place…"[101]— the institution of family for the sake of passing along property establishes the status of husband and wife as parents long after their children come of age.

It is this status and the imperatives for maintaining the property that alter parents' identity from the short-term caretakers of their children until they come of age to a permanent identity. With this identity comes the wife's permanent subjection. The passing down of property creates an interest that has to be kept in common. The family develops a need for unity; should the wife disagree with her

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[98] *Second Treatise*, 319.
[99] *First Treatise*, 207.
[100] Foster points out that the abolition of primogeniture did much to eliminate the patriarchal family. But note that just the concept of inheritance, which Locke must include in order to justify an individual keeping property out of the common stock after his own personal use of it, is the crucial element in keeping wives subjugated in marriage. See David Foster, "Taming the Father: John Locke's Critique of Patriarchal Fatherhood," *Review of Politics* 56 (Fall 1994): 641-670.
[101] *Second Treatise*, 306.

husband, then the property would be threatened, so the husband—being the abler and stronger—assumes the role as head of a unified family. This status is perpetual and comes to define him not just as father but as husband as well, and as head of the household in general.

Locke claims that the placement of the head of the household in the person of the husband is arbitrary. The husband's physical strength should have no bearing on his capacity to run a household. Locke seems to present it as a toss-up—it could just as easily have gone to the wife. Whether he is sincere in saying this is questionable. Perhaps he had to say it just to be consistent in his argument against Filmer. But one thing is clear: women are subjected not because he thinks they *lack* capacity as civic individuals. In fact, it is the wife's very threat as a reasoning individual that a head of the family is needed. Her reason may cause her to disagree with her husband. In order to maintain unity in the family, Locke determines that the husband needs to have authority with which to counter her reason.

PATEMAN

The hierarchy of the husband over the wife is just one example of the retaining of patriarchal authority in the home that is exhibited in the works of classical liberal theory. In identifying this perpetuation of patriarchy, Carole Pateman employed a feminist critique of social contract theory, in which she pointed out the gender hierarchy in liberal theory and used this critique to reassess fundamental premises of liberalism, namely liberalism's characterization as the

doctrine of freedom.[102] Pateman showed that the freedom of liberalism was limited to the freedom of the public sphere as political power was stripped of its patriarchal moorings. Telling liberalism as the story of freedom, however, has obscured the survival of patriarchy within liberalism—the patriarchy within the family. This has tended to go unnoticed, partly because the private sphere is not seen as politically relevant and so remains hidden and immune from application of liberal principles, but also because it has been obscured through the neutral language of liberalism; liberalism's universal language has implied that its principles apply to all citizens, and so women are presumed to enjoy the liberties of the public sphere, when, in fact, they entered into a sexual contract that limited them to subjection and imprisonment in the private sphere. The original liberal thinkers knew that they were distinguishing among citizens, but the way liberalism has been passed down has been such that this has been forgotten in favor of seeing liberalism in terms of its universal principles.[103] Pateman points out that all of the classic social contract theorists were cognizant of the sexual differentiation between men and women in their theories. It is in the retelling of these theories that this differentiation has been lost; contemporary discussions of the state of nature have taken the neutered individual to be the unit of analysis and so sexual differentiation is rarely discussed and is presumed to have been left behind along with political patriarchy.[104]

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[102] Teresa Brennan and Carole Pateman, "'Mere Auxiliaries to the Commonwealth': Women and the Origins of Liberalism," *Political Studies* XXVII (1977) 183-200; and Pateman, *The Sexual Contract*.

[103] Note that this is the dynamic that I am identifying as well. When liberalism becomes solely defined by its ideals then others aspects of liberalism become forgotten.

[104] Pateman, 41.

Pateman thus recognizes that there is a disjunction between the way that liberalism was originally formulated by its leading theorists and understood today. While liberal thinkers disseminated ideas of freedom and contract, they did not dispense with some of the status relations of the past. In particular, they differentiated citizens on the basis of sex and relied on those status relations in defining freedom. Pateman sees men and women as making a sexual contract in the marital contract, whereby men gain sexual access to their wives and the ability to sire a family and be heads of households. Thus the patriarchy that was dismantled in the public sphere survives in the private sphere. Pateman says that the early liberal thinkers were quite aware that they were implementing this sexual differentiation, and that it has been obscured by the contemporary tendency to define liberalism in terms of its public freedom and treat status relations as if they have no place in modern doctrine. "When feminists follow standard readings of Locke and Filmer, modern society can be pictured as post-patriarchal and patriarchy seen as a pre-modern and/or familial social form."[105]

Pateman is calling into question the reliance on liberal principles by contemporary feminists, who might rely on the principles of freedom in terms of women's rights while being unaware of perpetuating the hidden patriarchy of liberalism. She shows that the common law domestic relations are not some vestige of the past that are only appropriate in pre-modern society but have played a role in modern society, and women have borne the burden.

[105] *Ibid.*, 21.

While I do not disagree with Pateman on this account, I do depart from her analysis in her explanation for why these domestic relations have remained in liberal theory. For Pateman, liberal thinkers saw men and women as naturally different and women as unfit for civil society. To support this, however, she draws some conclusions based more upon history than upon the text. For example, she says that the differentiation of political power from patriarchal power "enables Locke to assume that women are 'naturally' fit only for a restricted role within the family."[106] Women's subjugation in the family emerges as the product of liberal thinkers' views of the natural strength of men and inferiority of women. When it comes to participation in the separate, public sphere, women's identity continues to mark them: "It is women who are seen as 'naturally' lacking in rationality and as 'naturally' excluded from the status of 'free and equal individual,' and so unfit to participate in political life."[107]

Such sentiments are evident in history but are difficult to locate in the text of Locke's works. While Locke does not acknowledge women as present in the public sphere, he does not rule it out, either. Pateman also questions why the marriage contract is constructed so that women are subordinate. Her inquiry reveals a previously unacknowledged conjugal sex right, that men had right to sexual access to their wives' bodies.[108] This is not explicit in the text, but Pateman's point is that Locke hid it.[109]

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[106] Brennan and Pateman, 195.
[107] *Ibid*.
[108] Pateman, 95.
[109] *Ibid.*, 93-94.

My reading of Locke has shown that we should be wary of attributing Locke's treatment of men and women as being natural. Locke relied on the trick of naturalizing conventions so that would come to be seen as natural. Locke certainly does differentiate between men and women, but not much of this is based upon nature. His "abler and stronger" reference is not enough to base an entire order of sexual differentiation. That he did not see significant natural differences comes into play when we assess the significant differential treatments of men and women and account for the presence of the common-law husband-wife relation in liberal theory. While Pateman saw Locke as subjecting women because he doubted their capacity to behave as individuals, by my account, Locke actually recognizes a rational capacity in women.

One should be careful, however, with what one does with this finding that Locke found women do possess rational capacities. One should not be too quick to presume that individual rights and entry into the public sphere can be simply extended to women under Lockean theory. There have been contemporary liberal theorists who see emancipatory possibilities in Locke through an expectation that he left the family patriarchy weak and open to reform.[110] Such readings of Locke draw upon the ideals in his theory and make them applicable to women while ignoring why the subjugation of women was in place, what purpose it was

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[110] R.W.K. Hinton sees Locke as devastating patriarchal power, including the patriarchy of the family, in "Husband, Fathers and Conquerors," *Political Studies* XVI (1968): 55-67; Gordon Schochet sees patriarchy as ending because the position of head of household was attenuated, but he does not look into the retaining of the common law status of husband or father in *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (New York: Basic Books, 1975); Mary Lyndon Shanley sees Locke as a protofeminist who took equality of family members seriously in "Marriage Contract and Social Contract in Seventeenth Century English Political Thought," *Western Political Quarterly* 32 (1979): 87.

serving, and disregarding whether the subjection could be dispensed simply by extending liberal principles. Even though I disagree with Pateman on the source of women's subjection in liberalism, I do agree with her that the response is more complex than simply applying liberal principles to women.

Pateman's other critical claim about Locke is that because he saw women as lacking in lacking in rationality he saw them as incapable of being civic subjects. One is hard pressed to find this expressed in Locke, but as with the origins of the subjection of women, it would be a mistake to read Locke's recognition of women's capacity as opening up the public sphere to them.[111] A different explanation is to find that women are likely to be excluded from the public sphere in Locke, not because he saw them as incapable of its participation but because it was likely that their status as wives and mothers would be fixed in such a way that those identities would be totalizing and restrictive of fluidity between identities. Locke did see individuals as capable of taking on multiple identities. But we also saw, particularly in the case of domestic servants, that some individuals were so identified by their status in the home that they could not move between identities. A domestic servant was likely to have a lack of education and grooming, in Locke's estimation, so as to be utterly defined as being a domestic servant and not being able to assume other identities and status. Such is the case for women, historically. As I will discuss in later chapters,

[111]This claim has been made in Melissa Butler's feminist reading of Locke in which she finds that despite the subjection of women in marriage, they could b seen as suitable for political life, "Early Liberal Roots of Feminism: John Locke and the Attack on Patriarchy," *The American Political Science Review* 72 (1978): 135-150; similar analyses can be found in Chris Nyland, "John Locke and the Social Position of Women," *History of Political* Economy 25:1 (1993) 39-63 and Mary Walsh, "Locke and Feminism on Private and Public Realms of Activities," *Review of Politics* 57 (Spring 1995): 251-277.

women's identity in the home would come to limit their civic identities wither because their preparation for becoming wives limited other life opportunities, or because political rhetoric was such that one could rationalize the exclusion of women from the public sphere by arguing that they were represented by heads of households.

Pateman's critique remains compelling, and yet when Pateman attributes Locke's treatment of women to lack of recognition for women's capacities, we miss a critical point. If Locke simply saw men and women as naturally different in a politically significant way, then that would explain their different status. But if he recognized women's capacities and subjugated them in the domestic relations nevertheless, then this subjugation reveals less about Locke's views toward women than it does about liberalism. That he denied an individual her rights indicates that Locke saw limits to the individual rights of liberalism. Rather than attributing Locke's treatment of women to outmoded presumptions about natural differences between men and women, or to misogyny, we are led into an inquiry of why he would have subjugated women in spite of his recognition of their capacities as individuals. If he was willing to subject individuals in the domestic relations, then we are faced with the limits of liberalism. Locke sees household functions, civic education, and the accumulation of family property dictating that the family relations must be retained regardless of their infringement on individual rights.

Locke was able to impose these limits not by relying on natural differences but rather by naturalizing the conventions that are introduced into the

operations of the family and its relations. As we saw with parents who had to overcome their natural tendencies in order to raise their children according to reason, the conventional behavior becomes that which is made to appear natural, so the veneer of the affectionate family can be maintained while conventional behavior operates.

Locke drew upon the appeal that a family is a site of natural affection to embed social behavior that would serve to educate the future citizenry and to maintain the family as a permanent institution. He knew that women would bear a particular burden in this maintenance, and he reproduced the hierarchical relations of the common law despite finding women capable of rational development. Pateman's critique enables us to view the gendered divisions behind liberalism's commitment to freedom and an institutional arrangement that undergirds it. I have modified Pateman's analysis to see these arrangements not as a logical extension of liberal principles but not at odds with liberalism, either. Rather, they are the limits to liberal principles.

Reading Locke this way invites a reading of a Lockean liberal society as more robust than one that originates in and is committed to the protection of the individual's property. There is a social ordering in the domestic relations that is not derivable from the principles of liberalism but upon which a liberal society depends. Recovering the domestic relations in Locke demonstrates that Locke saw the household as serving purposes for a liberal order. Pateman saw him as constituting this household by relying on natural differences between men and women, but I saw Locke as naturalizing these relations instead.

Locke relies on the mechanism of naturalizing conventions. He saw parents as having to overcome their natural affection for children in order to educate them in reason, but he maintains the veneer of the home as natural. This vision of the home as the site of natural affection is maintained when the home is equated with family, even though there are members of the household who are not part of the family, and even though the family members are bonded not only by any natural affection but by a system of legal ordering. Finally, the role of property of the family is obscured, transparent only in extreme situations, such as the West Indies plantation. Rendering the family natural to hide these conventions is to render these relations unassailable.[112] Locke thereby shielded the domestic relations not just from view but from inquiry.

DEALING WITH LIMITS IN CONTEMPORARY LIBERAL THEORY

This reading of Locke has shown that Locke recognized a set of social institutions in a liberal order, and he did not extend the principles of the public sphere to them. Presentations of a more robust liberalism have appeared in more recent years in response to the liberal-communitarian debate, in which liberalism has been cast as a doctrine fostering atomism in social relations and fostering the individual to live as if he is unencumbered.[113] In response, some liberal theorists have represented liberalism as being more robust than is charged by demonstrating that liberalism is not only based on the individual but that there is a

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[112] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) 138

[113] Charles Taylor, "Atomism," in Taylor, *Philosophy and the Human Sciences: Philosophical Papers* 2 (New York: Cambridge University Press, 1985); Michael Sandel, "The Procedural Republic and the Unencumbered Self," *Political Theory* 12 (February 1984): 81-96.

set of social practices and institutions upon which a liberal society depends. It would appear that such scholarship would capture the social aspects of liberalism, such as that identified in Locke. A problem with this scholarship, however, is that it does not adequately take into account the limits of liberalism. Rather than sustaining an inquiry into the social aspects of liberalism and what they entail for their maintenance, this scholarship demonstrates itself to be too quick to rely upon abstract principles and apply them to the social institutions that it identifies, thus betraying an optimism in the applicability of liberal principles while obscuring the gendered ordering that have been traditionally relied upon to maintain them.

William Galston has developed a more robust conception of liberalism by challenging the thesis that liberalism is neutral in respect to the good. He argues that the neutrality thesis cannot be sustained, among other reasons, because liberal politics appeals to a sense of the good. The good will circumscribe liberalism's commitment to diversity. In addition, a liberal society relies upon political institutions and practices that contribute to the smooth ordering of the liberal society. These practices will include the recognition of excellences and inculcation of (a thin set of) virtues. Galston recognizes the need for these institutions and practices and also that they create a tension within liberalism, as the "processes of forming these virtues will come into conflict with other powerful tendencies of liberal life."[114]

Thus far, Galston's presentation of liberalism properly understood would seem to comport with the liberalism put forward here—that liberalism has both

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[114] William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991) 217.

abstract and social elements that lie in tension with one another even as the maintenance of the abstract principles relies on the sustaining of these social elements. Galston allows the abstract principles to slide into the social elements, however, when he deals with family. Family is an institution that arises in liberal theory either because it lies in tension with the inculcation of liberal principles[115] or because it is the vehicle through which those principles are generated. If a liberal society does rely on liberal virtues, if the institutions of a liberal society would develop pathologies without liberal virtues, as Galston maintains,[116] then the inculcation of virtue is critical to the maintenance of a liberal order. Virtue may be inculcated by the state through its public education institutions, or through the family. It is the latter that Galston recognizes as key to dissemination of these values. In fact, it is strong families that serve as the vehicle for ensuring that these virtues are retained:

> A growing body of evidence suggests that in a liberal society, the family is the critical arena in which independence and a host of other virtues must be engendered. The weakening of families is thus fraught with danger for liberal societies. In turn, strong families rest on specific virtues. Without fidelity, stable families cannot be maintained. Without a concern for children that extends well beyond the boundaries of adult self-regard, parents cannot effectively discharge their responsibility to help form secure, self-reliant young people. In short, the independence required for liberal social life rests on self-restraint and self-transcendence—the virtues of family solidarity.[117]

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[115] An ongoing debate in liberal theory is whether families have the autonomy to resist intrusion into their ways of life in the name of the state providing for the education of children, either to ensure their development as autonomous individuals, or to prepare them to live in a diverse society. See Amy Gutmann, *Deomcratic Edcuation* (Princeton: Princeton University Press, 1987).
[116] Galston, 217.
[117] *Ibid.*, 222.

As Galston points out in this passage, families are not simply institutions established to pass on virtue but rely on their own virtues as well. Families must be strong, and to be strong, they must possess the virtues of fidelity, concern for children, self-restraint and self-transcendence. Galston does not explain how these virtues of the family will be sustained. The farthest he goes in explanation is to admonish parents to exercise self-restraint in regard to their children, as children are their temporary charges until they reach adulthood.

> Your child is at once a future adult and future citizen. Your authority as a parent is limited by both these facts. For example, you are not free to treat your child in a manner that impedes normal development. You may not legitimately starve or beat your child or thwart the acquisition of basic linguistic and social skills…Similarly, you are not free to impede the child's acquisition of a basic civic education—the beliefs and habits that support the polity and enable individuals to function competently in public affairs.[118]

Such advice to parents is not unlike Locke's understanding of parents' role in the education of children as future citizens. In Locke, however, we saw that filling in the role of parent involved much more than restraining oneself from impeding the development of the future citizen; Locke assigned status to parents, and this was a status that he found necessary to sustain even after the single child reaches adulthood. As we saw in Locke, status, initially generated to fulfill certain obligations, could serve to identify citizens beyond the immediate purposes of the relation. While one could argue that that was the way that status operated in the seventeenth century, such concerns should not be dismissed as being present today, especially when scholars invoke a need for "strong families."

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[118] *Ibid.*, 252.

If families are to be strong, who will maintain them? Who will be the one to sacrifice their own aspirations, should the time come, in order to keep the family strong?

Galston has recognized that a family needs its own set of virtues in order to serve as a stable institution to pass on public virtues, but in failing to explore how the virtues of the family are maintained, he fails to address the institutional arrangements that comprise the family. One could fill in this gap by acknowledging that the burden of maintaining strong families has historically fallen to women[119] and that women continue to take on these burdens even in the absence of formal rules requiring them.[120] Galston has therefore invoked a need for strong families but has elided the historical and ongoing gendered construction of the strong family.

Stephen Macedo does address the hierarchy of the family in his own discussion of liberal virtues. Macedo points to liberal virtues in order to demonstrate that liberalism is more robust than critics customarily charge. He acknowledges that there is a set of attitudes and capacities that liberal citizens ought to develop and so, like Galston, he is engaged in generating a theory of substantive liberalism. This is clear in Macedo's repeated claims that he is challenging the rigid distinction between public and private spheres, which would seem to recognize that the values of the public sphere are not divorced from the private sphere. Macedo approaches this study of liberal institutions and values

[119] One could identify this historically by pointing to women's civil disabilities in the domestic relations at issuehere, or by looking at the way that ideology has attached important roles for women in inculcating virtue. See Linda Kerber, "Republican Motherhood: Women and the Enlightenment—An American Perspective," *American Quarterly* 28 (1976): 187-205.
[120] See, e.g., Arlene Hoschild, *The Second Shift* (New York: Avon, 1979).

from within the debates over political liberalism,[121] and so he is concerned not with how private institutions buttress public values but rather how public values can, and should, color one's private values. For Macedo, there can be reasonable disagreement over the good life in a liberal society, but only if the disagreement is reasonable. Hence not all ways of life can be accommodated. One way to ensure that reasonable and thereby acceptable ways of life are pursued privately is to allow public values to infiltrate even the most private of relations. For Macedo, the most private and intimate relation is the family, but it is not immune from being colored by public, liberal values:

> The family and home life may be the paradigm of a private space, where intimate and familial relations are shielded from the influence of outsiders, including the state. But this simple picture is misleading. Public norms do not simply shield but penetrate and shape the relations of persons even in the sphere of family life. A husband cannot treat his wife and children however he wishes, their relations, even their most intimate relations, are structured by public values. And so husbands have been sued by their wives for rape, and domestic violence is a matter of intense concern.[122]

With this view of the family rendered egalitarian by infiltration of liberal values we see that Macedo's attention to the social institutions of liberalism are themselves necessarily influenced by abstract liberal values. The problem with this is not the fact that the family has undergone liberal reform in recent history, with matters such as marital rape finally accepted as appropriate matters of legislation and criminalization, but rather that Macedo's relation between liberal

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[121] By this I mean the debates initiated by the work of John Rawls over how a liberal society can accommodate diverse ways of life and conceptions of the good while maintaining shared public values.

[122] Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990) 264.

values and liberal social institutions involves a one-way passage of exchange. Macedo presumes that institutions such as the family must be free from hierarchy and status, since liberal values hold as a priority the autonomy of the individual, but in failing to address what burdens might be borne by individuals in maintaining these institutions, Macedo's substantive liberalism presumes that the abstract values are always favored over social considerations, and thus it is not clear whether the infiltration of liberal values into the private values is unlimited.

While both Galston and Macedo deal with a robust liberalism that takes into account the institutions and practices that are part of a liberal society along with liberal values, they each fall short of pursuing the individual burdens that might be borne by citizens in maintaining these institutions and practices. They employ the abstract principles of liberalism perhaps too soon, before treating the realities of family life and their gendered ordering. Galston and Macedo offer guidance in thinking about the ways in which liberal practices can be incorporated into liberal theory, but a failure to treat the historical and ongoing gendered ordering, or presuming that it can be rectified by applying liberal principles to the historically hierarchical institution of the family belies an optimistic reliance on the application of liberal principles. Liberal principles may not be so easily extended, especially when we are dealing with institutions with the role of disseminating those principles. If we were to dispense with status and hierarchy of the family so readily, then we are left with egalitarian families, but whether we are left with the strong families that the inculcation of virtue relies upon is another question. This is not to say that strong families cannot be egalitarian, but rather to

acknowledge that historically and even into the present, the perceived need to maintain strong families has entailed reliance upon the hierarchical relations of the common law as well as status, so that husbands and wives are sure to maintain their social roles.

Locke showed himself to limit the expansion of liberal principles to maintain status relations, another reason to be skeptical of a too-hasty resort to liberal principles in equalizing the family. Pateman's account demonstrated the danger of assuming that the principles are extended unproblematically, when one ignores the social relations that have usually remained obscured from view in liberal analysis. Wendy Brown also offers a feminist reading of the problems of relying on liberal principles without accounting for the historical treatment of gender in liberalism by questioning the terms of liberal discourse.[123] With an appreciation for Pateman's identification of the sexual contract, she considers the ways in which this subjugation of women is perpetuated under contemporary conditions. The sexual contract is salient today not because women are still experiencing the common-law husband-wife relation but rather because the terms of liberal discourse are set in such a way that the subjugation of women continues to be obscured in liberalism's language of freedom. Just as Pateman showed that the liberal subject is a male subject, so, too does Brown show that liberal terms are masculinist. This means that both liberal ideals and their opposites obscure the actual gender subordination underlying the discourse. For example, equality is a liberal principle, but it is opposed not to inequality in liberal discourse but

[123] Wendy Brown, *States of Injury,* 135-165.

rather to difference. To be different is to be treated unequally, and so the solution to purported violations of equality is to treat people the same. This reproduces the masculine subject, as the neutral conception of the citizen is the male citizen, and women are different, unless they render themselves the same as the male citizen. Lost in this discourse is the argument that inequality is the opposite of equality. Claims for gender justice must take on the discourse of difference and sameness rather than striking at more direct impediments to equality.

Brown argues that, given the ongoing obfuscation of gender subordination in contemporary liberal discourse, it is not enough to simply expand liberal principles. A woman who relies on liberal ideals may be able to liberate herself from her personal subjection, but she has not liberated the terms of the discourse; she has not struck at the subordination that is hidden by the discourse. Thus a woman who frees herself from the demands of the home has freed herself, but at the price of the subjection of another, to whom she is paying the low wages common in the occupations of childcare and housekeeping.

Brown provides the argument that addressing the historical hierarchy of the home is not a simple matter of extending the ideals of the public sphere into the private sphere. Thus Macedo's attention to the family needs to face up to the traditional source of inequality in the home before resorting to the principle of equality, because he might be using equality as a tool in the wrong place.

Once we recognize that the common law was present in Lockean liberalism and that it served specific purposes as identified by Locke, then the limits of the principles of liberalism become apparent. When contemporary

liberal theorists engage in projects to identify the robustness of liberalism, a failure to take seriously these limits, particularly as they have affected women, can lead to an inability to recognize the need for a society to order itself, as well as an underestimation of the impact on individual citizens in maintaining that ordering. Liberal principles are then susceptible to being applied imprecisely. Despite their commitment to recovering liberal practices, these theories betray a glint of the abstract and therefore fall into the danger of perpetuating the gender hierarchy by failing to address it, since they have not treated social practices and their maintenance seriously.

Chapter Two: The Married Women's Property Statutes and Judicial Interpretation

In nineteenth-century America, married women's rights were determined by the common-law rules of coverture, whereby their legal identity was subsumed under their husbands', and they could not own property, make contracts, sue or be sued. Beginning in the mid-century, some of the disabilities of coverture placed upon married women were relieved through legislation, with statutes passed by state legislatures allowing married women limited property rights and rights to keep their earnings. Coverture nevertheless continued,[124] evident in court cases in which state courts employed the rule of statutory interpretation dictating that statutes passed in derogation of the common law were to be construed narrowly so as not to alter the common law farther than expressed in the statute.[125]

The survival of coverture after statutory reform in a liberal society has puzzled scholars, and they have tended to attribute it to conservative state courts, which interpreted the statutes narrowly and impeded larger reforms for married women. In this chapter, I show that finding this situation puzzling betrays our own contemporary presumptions of liberalism, a liberalism that differed from

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[124] In the 1920s, feminists listed rules of coverture still in operation: the father was still the sole natural guardian in some states, there were still some legal documents which a married women had no power to sign, a husband could divorce a wife for her infidelity, but she could not divorce him for infidelity, a wife's services belonged to her husband, a wife's earnings could be her husband's property, a husband could collect for loss of wife's services in trt cases, and the husband still controlled their jointly-held property in some states. Burnita Matthews, "Legal Discriminations Against Women," *Equal Rights* I (1923): 317.

[125] See Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* Second Edition (1874; reprint, Littleton: Fred B. Rothman & Co., 1980) 267-268.

another version that accommodated the common law and was in operation in the nineteenth century. My reconsideration of liberalism leads me to challenge one of the leading institutional accounts in the field of American political development, the multiple orders thesis.

Much of the scholarship in American political development has been driven by Louis Hartz' thesis of American exceptionalism, if only to challenge his consensus thesis that American had no feudalism and thus no socialism and therefore America is and always has been liberal.[126] While one refutation of the Hartzian thesis is to show that there have been multiple traditions,[127] another is to show how various ideologies obtain institutionally. Orren and Skowronek have developed a multiple orders thesis to show that different institutions have different origins, and so the various traditions have resided in different institutions. The multiple orders thesis helps us to think of politics without the pressure of finding coherence at any given period. It also explains political development, presuming that "any given polity is likely to be composed of different and simultaneously operating institutional systems and it would identify the juxtaposition of these orders as the wellspring of change." [128] The incongruities of the different institutions elicit development as they come into contact and then conflict. [129]

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[126] Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (San Diego: Harcourt Brace & Company, 1991).
[127] Rogers Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87 (1993): 549-566.
[128] Stephen Skowronek, "Order and Change," *Polity* 28 (Fall 1995): 95.
[129] See Skowronek, "Order and Change;" Karen Orren and Stephen Skowronek, "In Search of American Political Development," in *The Liberal Tradition in American Politics,* ed. David Ericson and Louisa Bertch Green (New York: Routledge, 1999) 29-41; Karen Orren and Stephen Skowronek, "Order and Time in Institutional Study: A Brief for the Historical Approach," in

While this account of political development emerges from a refutation of the liberal thesis and explains the incoherence of different traditions, it fails to interrogate liberalism in the American political tradition. Under the multiple orders thesis, the common law domestic relations were set apart from liberalism and viewed for their hierarchy,[130] with the feudal social orderings of the common law seen as residing in the judiciary, and with liberalism lodged in the legislature. Once statutes were passed to reform the common law doctrine of coverture, then, political development should have occurred, because the regulation of marriage shifted from courts to legislatures, and these relations moved from feudalism to liberalism in theory and in institutions. [131]

THE STATUTES

In this section I will trace the passage of married women's property reform statutes in Massachusetts, Indiana and Kentucky. The purpose of this closer look at the passage of the statutes is to displace some of the presumptions present in studies of these statutes, presumptions that have impeded recognition of the form

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Political Science in History ed. James Farr et al. (Cambridge: Cambridge University Press, 1995) 297-317.

[130] The domestic relations are those private relations apart from relations of the citizen to the state. The domestic relations included the relations between husband and wife, between master and servant, between parent and child, between guardian and ward, and between lord and slave. Each relation was hierarchical, involving reciprocal duties and obligations. In the husband-wife relation, for example, the husband and wife were one in law, the wife being under the protection of her husband. The husband's dominance in the relation also brought responsibilities, such as providing necessaries, choosing the domicile for the family. As he would stand trial for (most of) her crimes, he had the right to give his wife "moderate correction." See William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: The University of Chicago Press, 1979), 430.

[131] See Skowronek, "Order and Change," Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991); Sara Zeigler, "Wifely Duties: Marriage, Labor, and the Common Law in Nineteenth-Century America," *Social Science History* 20 (Spring 1996): 63-96.

of liberalism in operation at this time and thus the social imperatives treated by political actors at the time. The most extreme version of the statutes is the suffragist version, which referred to the statutes as the "death blow" to coverture.[132] Historians have since shown that the statutes were never intended to abolish coverture and have found other explanations for the appearance of the early property reform statutes.

Historians have shown that the first wave of married women's property acts occurred in the South, beginning with Arkansas in 1835 and then an increase of activity after Mississippi in 1839. They were a response not to agitation for women's rights but rather to ongoing debtor-creditor problems, precipitated by the Panic of 1837. The economic collapse that followed the Panic of 1837 led to an increase in legislation in bankruptcy, banking, and debtors' rights. In the midst of this economic reform, married women's property acts provided that a married woman's property would be exempt from a creditor's recovery of property should her husband be in debt. The initial wave of property reform statutes appeared in the South because it was the South that was hit particularly hard in the Panic, having had more speculation prior to the economic collapse. The acts thus served as something similar to exemption laws in that they prevented creditors from taking all of a family's property when recovering.[133]

Apart from the economic reasons behind the statutes, it would be hard to say that the first wave of married women's property acts were meant to be a death

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[132] Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, ed., *History of Woman Suffrage* (New York: Fowler & Wells, 1881) 64.

[133] Elizabeth Warbasse, *The Changing Legal Rights of Married Women: 1800*-1861 (New York: Garland Publishing Co., 1987) and Richard Chused, "Married Women's Property Law: 1800-1850," *Georgetown Law Journal* 71 (1983): 1359-1425.

blow to coverture, bringing society out of its feudal past, for in the South, other "feudal" remnants may have motivated the statutes: The wife's property that was of concern was likely to be her slaves. Furthermore, Elizabeth Warbasse sees the acts as a means of reasserting southern chivalry—they served as protection for wives who were threatened with losing everything because of their husbands' poor business practices. The acts thus served to maintain southern traditionalism toward women.

The second wave of property statutes, beginning in 1848 in northern states, went further than the first wave in that they granted separate estates for women. Norma Basch and Peggy Rabkin have shown that these reform statutes are better understood as part of larger trends in legal reform, namely the early nineteenth-century movement for codification and the abolition of primogeniture.[134] Under primogeniture, all of family property passed to the first-born son. With this practice abolished in the United States, fathers had discretion over the distribution of their estates. They could leave their property to any of their children, including their daughters. Any property left to a daughter, however, would pass to the daughter's husband upon marriage, and fathers feared that their family property would be squandered by sons-in-law. Before the advent of reform statutes, fathers could get around this problem by manipulating the laws of coverture and setting up trusts for their daughters. Their daughters could have use of the property but the property would be held by the trustee, usually a trusted friend of the father. The daughter thus had access to the property, but her

[134] Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Peggy Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation* (Westport: Greenwood Press, 1980).

husband, and any creditors seeking to recover from the husband's estate, did not. This arrangement was inadvertently upset by the codification reform movement, a democratic movement that attacked the elitism of courts and discretion of judges. It sought to replace judge-made law with written code passed by legislatures. The movement also had an economic agenda in that it wanted to make land more accessible by making it more alienable through legislation.

Those in the codification movement saw the equitable use of trusts as subject to great abuse. Individuals could defraud creditors if they had access to property but the property could be held in the name of another.[135] With property ownership now clear under statute, there was not a need to resort to courts as often to clear up questions of property ownership. Thus the trust statute achieved its purposes of commercial reform and limiting the participation of courts. An unintended consequence, however, was that it deprived fathers of their prior means of protecting family property from sons-in-law. The trust statute was therefore followed by pressure for a married women's property act. Such a statute made sense in terms of the climate of reform, because the codifications movement harbored hostility towards judicial discretion and was critical of the common law anyway. New York passed its married women's property statute in 1848 and other states followed.

When the origins of the married women's property statute are told from this perspective, then the suffragist account of the statutes appears suspect. The act was not intended to be the "death blow to coverture" and indeed, the rights of

[135] Rabkin, 76.

married women were not of primary concern to the other reformers. The studies of these feminist historians offer an explanation for why the property statutes did not dismantle coverture—they were not designed to. Nevertheless, scholars are reluctant to shed the expectation that the statutes should have ushered in larger reforms in women's status. Even those scholars above who disputed the suffragist version continue to employ presumptions of liberal progress. Norma Basch, for example, who studied the roles of the codification movement and paternalistic efforts to protect family property as the impetus behind the reform statutes in New York, nevertheless sees the critical test of the acts' effectiveness in the courts. Although she ends up discrediting the liberal interpretation of reforms, she admits that, initially, she was puzzled by their limited effects on married women's emancipation. She saw the reforms as raising paradoxes. "The legal fiction of marital unity survived the legislative assaults of the nineteenth century,"[136] she writes, and rather than resolving the paradox by identifying their non-egalitarian purpose she places the blame for their failure to emancipate on the courts. She thus reframes the story as "an egalitarian legislative initiative frustrated by a tradition-bound judiciary."[137] The political scientist Sara Zeigler perceives an activist judiciary resisting the progressive impulses of the statutes.[138]

Historians Joan Hoff and Richard Chused each take a different approach and avoid citing the courts as those who spoiled the possibilities of the reform

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[136] Basch, 38.
[137] Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930," 82 *The Georgetown Law Journal* (1994): 2138.
[138] Sara Zeigler, *Family Service: Labor, the Family and Legal Reform in the United States* unpublished dissertation, UCLA, 1996.

statutes. They acknowledge that the statutes themselves were not emancipatory, but they nevertheless see them as progressive in that they were part of a long, slow process that chipped away at coverture. Chused's study of laws in Oregon shows that while statutes created a special and specific status for women to own property, they nevertheless gave way to egalitarian statutes, not because of egalitarian sentiments about women at the time but because it was too easy for husbands to defraud creditors when wives held separate property. He thus detects a movement in history, "the slow process by which recognition of women moved from special treatment towards equality."[139] Joan Hoff acknowledges that the acts were not interpreted so as to emancipate women in the late nineteenth century, "yet they remain major instruments whereby the legal status of women improved" because over time, they contributed to the demise of coverture.[140] This is closer to the version told by the Supreme Court when it saw the Nineteenth Amendment as the capstone of a long process towards women's equality.

> But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case (p. 421) has continued 'with diminishing intensity.' In view of the great -- not to say revolutionary -- changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.[141]

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[139] Chused, "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures," *American Journal of Legal History* 29 (January 1985): 33, note 77.
[140] Joan Hoff, *Law, Gender and Injustice*: *A Legal History of U.S. Women* (New York: New York University Press, 1991) 134.
[141] *Adkins v. Children's Hospital* 261 U.S. 525 (1923) 553.

I am not taking issue with the reinterpretation of the statutes by which courts eventually came to see them as one of many contributions to the growing recognition that the status of women had to change. Certainly concepts undergo different understandings over time.[142] The problem arises when the researcher adopts this developed view and applies it to her research. To use the standards of equality to view the statutes in terms of their ability to achieve equality for women is to obscure the view of the statutes at the time and to fail to see what was at stake in the perceived threat to status relations. In her study of the master-servant relation, Karen Orren explains the perpetuation of this other common-law relation by trying to view it as the judges at the time saw it, not as we would view it today. Thus she appreciates the gravity they held for this social relation; they felt there was much at stake:

> The opinions in the labor decisions indicate that the judges believed that what was at stake was no less than the moral order of things, not merely the formal division of powers or the privileges of favorite social groups. Their well-known opposition to "class" legislation was based not so much on a sense of insult to republican principles as on their fears that the entire system of society and politics faced imminent demolition should the relation of master and servant be upset.[143]

We cannot know what they saw at stake until we dispense with our own presumptions and standards of the statutes and attempt to see the statutes as they saw them. Viewing the statutes as emancipatory and the courts as the conservative barrier to the attainment of their potential obscures our ability to know what actors at the time saw at stake. Knowing their concerns helps us to

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[142] See J. David Greenstone, "Political Culture and American Political Development: Liberty, Union, and the Liberal Bipolarity," *Studies in American Political Development*1 (1986): 1-49.
[143] Orren, *Belated Feudalism,* 114.

identify the imperatives of their liberal society, and it could help us today in recognizing that these imperatives do not necessarily lie outside of a liberal regime.

Massachusetts Statutes

It is tempting to see Massachusetts statutes granting property rights to married women as products of recognition of women's rights, because it was a state with many politically active movements relying on liberalism's abstract ideals. Massachusetts was a state with a strong activist community, both for abolition and for woman's rights. While woman's activism has been cited as influential in the passage of the earnings statutes in the 1860s and beyond,[144] its influence in the passage of Massachusetts' property statutes should not be overstated. The account of the events in *History of Woman Suffrage*, the multi-volume account of the suffrage movement written by Elizabeth Cady Stanton, Susan B. Anthony, Matilda Joslyn Gage and others, details the activities of both men and women who sought relief of coverture, and it presents the statutes as passed under their pressure. While there is some evidence that the brief period in which the Know-Nothing party gained a majority in the Massachusetts legislature some liberal statues were passed, a look at the statutes passed throughout the period shows that they were not passed with the intention of emancipating women

[144] Reva Siegel, "Modernization of Marital Status Law" and "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor,"103 *Yale Law Journal* (1994): 1073-1217; Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," 75 *The Journal of American History* (September 1988): 471-500 . These scholars show that women's demands were only met halfway; the statutes allowed them to keep their own earnings but did not concede to activists' demands to include household labor as paid labor. Thus Reva Siegel sees the earnings statutes as maintaining the status regime under the common law, as it perpetuated the concept of a woman's household labor as owed to the family.

from coverture. The statutes did intend to relieve married women from some of their disabilities under coverture but they also sought to retain the social orderings of the common law. They thus had to balance rights with status. In Massachusetts they did this by attaching conditions to the conferral of property rights.

Massachusetts passed some early property statutes that codified equitable procedures, such as allowing a married woman to own her separate property in trust and allowing a husband and wife to make antenuptial agreements. In 1853, the Massachusetts constitutional convention confronted issues of woman's rights, primarily because an active, vocal, organized woman's rights contingent put pressure on the convention. The activists bombarded delegates with two other types of petitions, one asking to have the word "male" struck out of the state constitution,[145] and the other requesting that women be able to vote on the proposed constitutional amendments.[146] The activists also targeted coverture and asked the convention to consider a constitutional amendment that would allow married women to own their own property. This question was sent to the Committee on the Frame of Government, chaired by a Charles Allen. The Committee reported back to the convention that married women were, indeed, in need of more protection of their property, but the committee recommended that

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[145] *Journal of the Constitutional Convention of the Commonwealth of Massachusetts* (Boston: White and Potter, 1853) at 35, 44, 61, 78, and 175.

[146] The convention held a hearing on these questions and concluded that the 2,000 signatures of women asking to vote on the amendments implied a silence on the part of women of the state, basing this on the fact that 50,000 women had signed petitions to suppress the sale of intoxicating liquors. See Massachusetts Constitutional Convention, 1853, Committee on the Qualifications of Voters, "Report of the Committee Recommending Suffrage for the Women of Massachusetts," (Boston: The Convention, 1853) in the National American Woman Suffrage Association Collection, Library of Congress.

this matter be left to the legislature, because it had already begun passing reform statutes and also because "the Committee believes that the remedy can be most safely and beneficially applied by the action of the legislature, adjusting, in detail, the somewhat complicated relations, which result from the marriage contract. They there report that it is inexpedient for the Convention to act thereon."[147]

The committee's report indicates that committee members were not unsympathetic to the demands of the woman's rights advocates, and deferring to the legislature was not a way to avoid the issue but to ensure that it would be implemented in a different way. Had married women's property rights been added as a constitutional provision, we could infer that they could have been used as a trump to call into question any status placed upon married women.[148] In deferring to the legislature, the committee (and the convention, implicitly, in its approval) recognized that these relations were "complicated," and while the relations were hierarchical the committee members did not want to sacrifice them to claims of abstract equality. These were relations that denied property rights to married women, and yet that fact alone should not serve to eliminate all of the domestic relations. They determined that the relations should be preserved even as rights were conferred. This was, indeed, a complicated procedure.

The legislature did pass laws conferring more property rights after the convention, and the laws reflect the complicated character of the task. The legislature gave women rights to own property and, later, to make contracts

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[147] Harvey Fowler, Reporter, *Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts* Volume Second (Boston: White and Potter, 1853) 384-385.
[148] This reflects the rights as trumps articulated by Ronald Dworkin. See *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

regarding that property, but the conferral of rights was not absolute. The statutes conferred rights but not the status of a contracting individual. Married women retained the status of married women who exercised a few, limited rights. This is reflected in the impetus behind the statutes and in their conditional character. In the General Statutes of 1859, the rights of a married woman to own property looked much as it did in other states, allowing her to retain both real and personal property as her sole and separate property that would not be attached to her husband's debts. [149] The contractual rights were limited. In 1859, married women could bargain, sell, or convey their separate property, but only their separate property. The ability to contract was not a broad conferral but was limited to contracts made in regard to that separate property.

The limits in right to contract reflect the perceived status of married women. They were not being recognized as autonomous individuals capable and entitled to contract but rather as married women with a few contractual rights. This is reflected in subsequent reform statutes. There are numerous other instances of the conditional character of the rights bestowed on married women by the legislature. A married woman could hold an insurance policy as separate property, *but* she needed a trustee or judge to intervene on her behalf. A married woman could be an administrator, *but* as a probate court deemed fit. A married woman or a minor who was to appear in court as witness could send someone else in their stead. A married woman could run her own business, *but* she needed to file a certificate, and she could not enter into a co-partnership. A married woman

[149] Massachusetts, *The General Statutes of the Commonwealth of Massachusetts* (Boston: W. White, 1860) ch. 108, sec 1. As the work of Chused and Warbasse shows, laws such as this one were passed out of fathers' concern to keep family property out of the hands of their sons-in-law.

could contract to purchase and pay for necessaries, *but* that did not relieve the husband from his marital obligation to support the family. A married woman could contract, *but* a husband and wife could not contract with each other. A married woman could sue and be sued, *but* a husband and wife could not sue one another.[150]

The conditions attached to the conferral of rights indicates that a number of elements of the domestic relations survived. First, a married woman under coverture did have disabilities, and she was likely to have not received the education or experience to fully take advantage of her right to contract. The conditions that a trustee intervene in her gaining of an insurance policy, or that she have to file a certificate to open her own business, provided that someone with more experience would be available to oversee the married woman's exercise of her rights.

In 1864, Sir Henry Maine, in the spirit of evolutionary theory of the day, conducted a history of the law dating back to Roman civil law, identifying the ability of the law to adapt to progressive societies. His famous finding was that the movement of progressive societies has been "from status to contract."[151] He found that under the ancient law, the unit of society was the family. There was a rigid system in place maintaining the patriarchal family, with the head of the family as representative. When that head died, the family lived on. Hence the

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[150] Massachusetts, St. 1864, ch. 197; St. 1869, ch. 409 (the condition that a married woman be joined by her husband in order to be an administratix was repealed by St. 1874 ch. 184, sec 4 and 5); General Statutes 1859, ch. 170, sec. 28; St. 1862 ch. 198 and St. 1863 ch. 165; St. 1869 ch. 304; St. 1874 ch. 184 sec. 1; St. 1874 ch. 184 sec. 3.

[151] Sir Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (Tuscon: University of Arizona Press, 1986) lii.

family was greater than any one of its members, even the head of the family. Maine determined that these status relations were giving way to contractual relations in his day, with the individual becoming the unit of society, an individual who could choose his rights and duties by contract. The study of the statutes in this chapter shows that married women were not making the transition from status to contract but that they were retaining their status as they gained contractual rights. The reason was empirical; a married woman strapped with disabilities would not have the experience to fully exercise those rights. The Massachusetts legislature thus limited women's status not by wholly embracing the common law hierarchy but by applying liberal standards. They were not saying that married women were inherently incapable of being a contracting individual but that their experience rendered them incapable.

The statutes reflected the position of married women and circumscribed them in their new rights. As the expressions at the conventions indicate, the legislature was not hostile to women's rights but saw them as complicated, because it was not willing to confer rights at the expense of status or to deny the possibility that married women were not in a position to fully make use of those rights.

This should all be noted in terms of the prevailing scholarship, which tends to see the statutes as holding the potential for liberation and holding the courts responsible for limiting their potential. My study of the Massachusetts convention and statutes shows that the statutes were limited even before the courts became involved in interpreting them.

Indiana Statutes

A look at the Indiana statutes also demonstrates that the statutes were limited in their conferral of rights and that the court was not responsible for destroying the potential of the statutes. The Indiana legislature displayed little intent of reforming married women's property law in the 1840s, but after married women's property rights became a heated topic at the state's constitutional convention in 1850, reform statutes began to appear in the next legislative session. The first few years of statutes were modest in scope. Given that married women could now own separate property, the statutes set the terms by which married women could acquire, use and convey property, usually requiring that the husband join the wife in the business transactions regarding the wife's property.[152] Other statutes made provisions for married women whose husbands were insane, or whose husbands had deserted them.[153] In was not until 1879 that the Indiana legislature suddenly passed a major reform statute, bringing Indiana up to date with other states.[154] Under the 1879 Act, a married woman could bargain, sell, assign and transfer her separate property as if she were sole, thus eliminating the role of the husband in joining her in her transactions. Section Two of the Act allowed a married woman to keep her own earnings, a trend occurring in other states as well. Furthermore, a married woman could now enter into any contract in reference to her separate estate. In 1881 an even more sweeping reform was passed, stating that "all legal disabilities of married women to make contracts are

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[152] Indiana, *Revised Statutes of the State of Indiana passed at the … Session of the General Assembly* (Inidanapolis: J. F. Chapman, 1852-) St. 1852, ch. 23, sec. 6, sec. 27;
[153] *Ibid.,* St. 1857, ch. 38, ch. 45, ch. 47; St. 1861 ch. 102; St. 1877 ch. 54.
[154] *Ibid.,* St. 1879 ch. 67.

hereby abolished, except as herein otherwise provided."[155] The exceptions included restrictions on her ability to contract for her real property; a prohibition on entering any contracts as surety for another's debt; and while she would be personally liable for her torts, if committed in the presence of her husband, they would be jointly liable. Thus, even though the language of the statutes suggested that these reforms were revolutionary, the exceptions to married women's rights revealed ongoing presumptions that married women needed to be protected in their contracts, and that the presumption of coercion when in the presence of their husbands remained. As in Massachusetts, the Indiana legislature conferred rights but retained status, fixing the status of married woman as incapable of exercising the full rights of a contracting individual.

The Indiana court's reactions to the legislation of 1879 and 1881 indicate that much of the common law survived the statutes. In an 1883 case in which a widow tried to sue her husband's estate for the rents he collected off of her land for many years, the court denied her request on two grounds. First, there was the legal fact that he had begun the practice of managing her property before the statute of 1852 that allowed a married woman to keep the rents derived from her own property, and since he continued to do it afterwards, the court could presume that they both implicitly agreed to their ongoing arrangement. But the court also considered the effect of a suit such as this on the family; he had used the rent money to support the family to provide a dwelling-house and maintain the family. Thus there is a sense that taking this separate property to use for the family's

[155] *Ibid.,* St. 1881 ch. 60, sec. 1.

benefit was justified. Furthermore, the court feared the evil that would result if a wife could make a claim against her deceased husband's estate. It would not let the new rights of married women disrupt family relations.[156]

The court also pointed out that, notwithstanding the expansive language of the 1879 and 1881 statutes, the legislative reforms left many of the common law relations unchanged. Thus the 1879 statute did not abrogate the 1852 statute that the husband must join the wife when she is party to a suit.[157] And while the 1879 statute allowed her to make contracts in reference to her separate trade or business, apart from the conferral of those limited rights, "the statute left married women precisely as before."[158] The court pointed to Massachusetts and New York as states that had arrived at similar positions.

The Indiana court's narrow reading of the 1879 and 1881 statues found many of the common law rules to have survived the reforms. It would be misleading, though, to see the court in the role of conservative seeking to limit the potential of the statutes, because the account above suggests that the legislature intended to confer only limited rights. Furthermore, there are areas in which the court was *more* progressive than the legislature, as in the issue of suretyship. It was common in many states to forbid a wife to use her separate property as surety for her husband's loans, for then she would put herself in the position of using her property to pay his debts, a situation that the early property reform statutes wanted to avoid. In 1885 the Indiana court reviewed the married woman's ongoing

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[156] *Bristor v Bristor*, 93 Ind. 281 (1883).
[157] *Crawford v Thompson* 91 Ind. 266 (1883).
[158] *Haas v Shaw* 91 Ind. 384 (1883).

ability to sign a contract as surety for another's debt. It found that in 1852 the legislature passed an act saying that wife's lands were not liable for the debts her husband, but that the court subsequently held that a mortgage of husband and wife for the husband's debt was valid. The legislature then declared that a wife could not mortgage for a husband's debt, but the court nevertheless held that a joint mortgage for the husband's debt was valid. Finally in 1881 the legislature passed an act that expressly stated that a married woman may not make a contract of suretyship in any manner. The court now complied, reading the legislature's message that it wanted to protect the married woman's property, "not to enable her to contract burdensome obligations that would not protect her property."[159] The misunderstandings regarding suretyship confound the charge that courts were hindering the liberal efforts of legislatures. Here the court was willing to allow a married woman to accept the consequences of her contract. It was recognizing her citizenship not only in rights but in recognition of her capacity to deal with the consequences of her exercise of rights. The court was showing that she was capable of upholding the obligations that stand as the corollary of rights.[160] In putting an end to this recognition, the legislature may have been helping women's short-term interests and property but hindered their status as independent citizens.

The account of the passage and interpretation of statutes in Indiana shows that one cannot assign blame to the courts for inhibiting the potential of the statutes. Rather than seeing one institution as more conservative than the other, it

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[159] *Vogel v Leichner*, 102 Ind. 55 (1885).
[160] See Linda Kerber *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998).

helps to see episodes such as this as indicative of the uncertainty involved in trying to balance status with new rights for married women. Neither the legislature nor the courts could anticipate all of the problems that would arise, and the development of these dual purposes involved uncertainty and experimentation. The relation between the institutions, though, seems to be one that resembles collaboration more than the conflict between a conservative court undoing the advances of a more liberal legislature.

Kentucky Statutes

Reform in Kentucky began with just a few modest changes in married women's property-holding. In the 1840s the legislature made provisions for married women to own property if their husbands abandoned them. This was not significant in content, as married women could seek the same relief under the common law,[161] but it demonstrates some legislative activity in the area of marital status. Kentucky held a constitutional convention in 1849-50. The "big questions" to face the convention involved slavery; elections; the inhibition of the use of credit of the state for internal improvements; the composition of state courts; representation in the legislature; and the public school system.[162] Married women's property and even women's issues do not appear on this list, yet in the legislative session following the convention there was an outpouring of legislation

[161] A married woman could obtain *feme sole* status if her husband "abjured the realm." Blackstone, 431.
[162] George Willis, *Kentucky Constitutions and Constitutional Conventions: A Hundred and Fifty Years of State Politics and Organic Law-Making* (Frankfort, Ky: The State Journal Company, 1930) 32.

regarding marriage, including married women's property rights and rules regarding the marriage contract and divorce.

Despite the increase in legislative activity, the laws regarding married women's property rights continued to be slight in terms of their effect upon the common law. The law in 1851 acknowledged that married women could own real estate or slaves, and that this property was not liable for their husbands' debts. It also stated that despite the married woman's ability to own property, the husband was still liable to provide her and the family with necessaries.[163] Statutes passed over the next few years clarified issues regarding the sale of a married woman's property, allowing for her to sell her land or slaves if joined by her husband or next friend.[164] It was not until 1866 that a more trenchant statute was passed, allowing a married woman to act as *feme sole* in regard to her separate property, provided she submitted a joint petition with her husband before a court of chancery.[165]

Of these three states, the legislature in Kentucky meted out married women's property rights at the slowest pace, removing her disabilities only a little at a time. The Kentucky court actually emerges as more generous towards married women's property rights because in looking to relieve married women from common law disabilities it looked not just to those statues that abrogated common law principles but also to equity. The court did continue to uphold the marital obligations and thus status. Hence the husband was still the head of the

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[163] Kentucky, *Acts of the General Assembly of the Commonwealth of Kentucky* (Lexington: J. Bradford, 1792-) St. 1851, ch. 617, Art. II, sec. 1 and 3
[164] *Ibid.,* St. 1852, Art. V, sec. 1
[165] *Ibid.,* St. 1866, ch. 555, sec. 1

household as evidenced by the court's acknowledgement that he choose the domicile, that he provide necessaries, that he could go to his wife's defense.[166] Despite upholding these common law obligations, the court was also willing to turn to equity in its decisions, even before 1866, when the legislature finally introduced the possibility of a married woman to act as *feme sole*. For example, the court acknowledged that the common law forbade contracts between husband and wife because the law considered them to be one person, but, the court determined, "the rule is otherwise in equity. For many purposes equity treats them as distinct persons, capable of contracting with each other, and their contracts will sometimes be enforced, even against the creditors of the husband."[167] Specifically, "such contracts, when advantageous to the wife, will be upheld inequity for her benefit and protection."[168] The court indicated that it would recur to equitable principles especially when the outcome would be favorable to the married woman, i.e., when it would protect her. The court combined this construal of equity with its rendering of the statutes emerging from the legislature. The purpose of the statutes was to protect the married woman from her husband's creditors and even from her husband, who might try to place his earnings beyond her reach.[169]

The use of equity by the Kentucky supreme court indicates that it was aware that married women might be in need of relief of their common-law

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[166] *McAffee v Kentucky University* 7 Bush 135 (1870); *Gatewood v Bryan* 7 Bush 509 (1870); *Estep v Commonwealth* 86 Ky 39 (1887).
[167] *Campbell v Galbreath* 12 Bush 459 (1876).
[168] *Pope v Shanklin* 79 Ky 231 (1881).
[169] *Franklin, ex parte* 79 Ky 497 (1881) and Moran v Moran 12 Bush 301 (1876).

disabilities, but this is a different matter from abolishing the doctrine of coverture from which those disabilities arose. The accounts of the statutes in all three of these states indicates that legislatures, too, sought to relieve disabilities while retaining the status relations. Thus the description of the legislature-court relation as legislative enactments limited by conservative courts does not hold up to study.

INTERPRETATION BY COURTS

Thus far I have shown that, contrary to the prevailing interpretation, courts and legislatures collaborated in retaining the common law rather than engaging in conflict over reform. When one views the courts' interpretation as judicial resistance to reform statutes, then one tends to presume that the courts were jealousy guarding their domain through narrow interpretation. At the same time, one might miss the ways in which the court was engaged in reframing the status of married women in the face of reform. Sara Zeigler, for example, argues that courts jealously guarded their institutional parameters with conservative interpretation of the reform statutes.[170] She relies on the suffragists' account of the reform statutes from their multi-volume *History of Woman Suffrage*, however, and so she works within the modernist framework of progressive liberalism and conservative courts that I am disputing. In disputing this conservative view of the courts, I also dispute the institutional power approach and instead find that courts actually altered married women's status not by resisting the statutes but by adhering to them. Courts recognized that the statutes gave married women rights of ownership and contract, but they determined that married women were

[170] Zeigler, *Family Service.*

incapable of exercising these newly-gained rights adequately, and thus adopted a paternalistic stance toward women. They monitored married women in their practice of new rights, thus ensuring continued judicial involvement in the rights of married women.

In this section I present the state court decisions in the six states under study and show that courts continued to behave as institutions concerned with maintaining their role in determining married women's status. I show that courts retained a position for themselves not by trying futilely to resist statutory reform but by acknowledging the fraud and division within families and using that recognition to remain involved in married women's use of their property rights. They did this by thoroughly scrutinizing married women in the use of their newly-gained rights. In this section I will also show that this new stance by the courts had implications for married women's status as citizens. After gaining property rights, they were no longer wives without legal identity, but they were not seen as fully autonomous, contracting individuals, either. Rather, they occupied a new status in between, and to some extent, married women were complicit in the generation of this new status. Finally, the family underwent change during this time. Despite the court's recognition that fraud and coercion could be present in the family, the court generated a new notion of family harmony, perhaps to replace the unity of husband and wife of the common law.

State Courts and Married Women

If one were only familiar with the leading constitutional law cases on married women in the late nineteenth century, then one might expect the state

courts to rely on romanticized language of the family and womanhood in order to retain the marital relation. It comes as a surprise, then, to find that the state courts rejected the arguments that women's status and family harmony served as foundations for society and instead were quite willing to recognize fraud and coercion within the family. Fraud was an ongoing concern after passage of married women's property statutes. Husbands used their wives' new rights to own property to their own advantage by putting property in their wives' names and thus shielding it from their own creditors. Courts refrained from elegies to the importance of families for society and instead acknowledged the fraud, deceit, and legal maneuverings occasioned by the reform statutes. For example, Mrs. Fisher held the legal title to a piece of land, but the land had been paid for by her husband. When he subsequently fell into debt, he had a house built on the wife's land, an investment that increased the land's value from $500 to $3,500. The Kentucky court found that this house was not used to house himself and his family but rather served as a pretense for him to transfer his property out of his name in order to defraud his creditors.[171]

In *Virgie v. Stetson*[172] the Maine court reviewed the legislative history of reform statutes to show that legislatures were quite aware of frauds perpetuated by husbands and sought to remedy this problem with further statutes. When married women in Maine were initially given the right to own their separate property, they were left to their own discretion as to its use. But the legislature then had to confront "a custom which had arisen where, 'in numerous instances, the title of

[171] *Heck v. Fisher* 78 Ky. 643 (1880).
[172] 77 Me. 520 (1885).

real estate of married men in embarrassed circumstances was transferred to their respective wives, and thence to third persons, thereby clogging the proof of fraudulent conveyances by this other remove form the fraudulent grantor.'"[173] The reform statute of 1856 limited the wife's ability to convey property received from her husband. Thus the Maine legislature addressed fraud by further limiting the married woman's uses of property received from her husband. Husbands sometimes carried out these fraudulent schemes without the knowledge of the wife. When Mrs. Bennett's husband had proposed marriage to her, he offered to give her some land. She was not aware that Mr. Bennett was in debt when she accepted the deed (or when she agreed to marry him, for that matter).[174]

Invitation to Judicial Scrutiny

The courts responded to evidence of fraud with a stance of protectionism. They sought to protect creditors from being defrauded and they wanted to be sure that women were not being duped out of their property by their husbands. To achieve this protection invited their scrutiny of married women's property transactions. The statutes themselves encouraged a certain level of scrutiny, as when statutes said that married women could contract, but only in regard to their separate property. When Mrs. Robinson and her trustee bought her husband's land at a creditor's auction, the Kentucky court declared the purchase void, not because of the allegations of fraud that she had recovered the land her husband lost to creditors at a low price, but rather because as a married woman she was not capable of making such a contract. "The contract of a *feme covert* unless in

[173] *Virgie v Stetson*, 486, citing *Call v. Perkins* 65 Me. 439.
[174] *Gibson v. Bennett* 79 Me. 302 (1887).

regard to her separate estate, is not only voidable, but absolutely void."[175] Courts wanted to be sure that the married woman used her right to contract only with the enumerated, circumscribed limits.

This was the kind of monitoring that the language of the law encouraged, but the court found many other reasons to scrutinize. Courts closely examined married women's applications to acquire separate property or separate businesses in order to be assured that they were capable of the responsibilities they entailed. Elizabeth Franklin owned 72 acres of land she had inherited from her grandfather, and she and her husband jointly petitioned the circuit court to empower her to act as feme sole in regard to that property. Before conferring that power, the court needed to be persuaded that she had the capacity to manage it.[176] In this case, the court's role looks paternalistic, putting another hurdle in place to assess the abilities of women before placing property in their hands. But in other cases it becomes clear that incapable women might apply for these benefits not because they overestimated their own abilities but rather because they were involved in their husbands' fraudulent schemes. Thus when Mrs. Gross applied for a license to act as a *feme sole* in keeping a tavern, the court's findings that she had no means of her own in undertaking the business, she was not qualified to run the business, she bought no supplies, made no sales, handled none of the money, and spent her time taking care of her children made it rather clear to the court that the

[175] *Robinson & c. v. Robinson's Trustee* 74 Ky. 174 (1874) 178.
[176] *Franklin, ex parte* 79 Ky. 497 (1881).

husband was running the business, using ownership in the wife's name to keep his property out of reach of his creditors.[177]

The married woman's ability to contract also posed threats to established marital obligations. Thus even though Elnora Thomas owned separate property she could not use it to pay for the services provided to her by a physician because her right to contract was limited to the right to deed, mortgage, or improve her separate property. The court knew that Mr. Thomas was "notoriously insolvent and worthless" and the doctor, knowing this, would not accept his credit, so promising to pay out of her own pocket was the only way that Mrs. Thomas could get the doctor to see her. Nevertheless, the court said that it was up to the legislature to change the laws if they were problematic. Until then, the court would limit a married woman's contractual rights and turn to the common law rules. In this case, the husband was responsible for paying the physician.[178]

The husband would also be shirking his marital obligations if the wife were to use her separate property to pay off his debts. In *Bidwell v. Robinson* the court acknowledged that women in Kentucky had been given the right to contract and to sue but that these abilities were limited to the control and management of their separate property. The court refused to enlarge these abilities beyond those stated in the statute, especially when it came to wives trying to hold themselves liable for husbands' debts.[179]

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[177] *Gross, &c., v. Eddinger, &c.* 8 Ky. 168 (1887).
[178] *Thomas et ux. V. Passage et al.* 54 Ind. 106 (1876).
[179] *Bidwell v. Robinson* 79 Ky. 29 (1880).

Courts would also scrutinize in order to be sure that the wife's contract was made free from the influence of her husband. A wife who acted as surety for her husband's debts was likely to be performing "under marital influence." Owing to this possibility the court stated, "whatever the form of the contract, its true character may be inquired into and laid bare."[180]

Whatever the reasons for scrutiny, the result was that the court took a paternalistic stance, keeping themselves closely involved in married women's transactions. This development had implications for the new institutional role of the courts. Institutionally, state courts did not lose involvement in marital relations following the statutes. The historians who have looked into the origins of the statutes have shown that among the reasons the statutes were passed was the codification reform movement, as an effort to transfer power from courts to legislatures. In this sense, the reforms fell short, because the statutes invited courts to scrutinize the transactions of married women to be sure that they adhered to the terms indicated by the statutes, as well as when they sensed that husbands were coercing wives, engaging them in fraud, or that the balance of obligations was being upset.

Married Women's Altered Status and the Coverture Defense

Another result of the scrutiny was that the status of women changed. The scrutiny itself was not new; prior to the statutes, when courts of equity were sued by married women to seek relief from the disabilities of coverture, courts were involved in a similar level of scrutiny. As Marylynn Salmon shows in her study

[180] *Chaffe v. Oliver* 33 La. Ann. 1008 (1881) 1010.

of the equitable property rights of married women in the colonial era and early republic, courts set up a private examination procedure to protect wives from conveying property due to their husbands' coercion. If a married woman wanted to convey real property, she and a judge would go alone into a separate room, where he would read the contents of the deed and be ensured that she understood the meaning of the transaction. Despite the presumptions of coercion and incapacity behind this procedure, Salmon sees it as "a formal statement attesting to the property rights of women" because at least courts were recognizing that the property was the woman's to give away.[181]

When such protective measures reappeared after the reform statutes, however, it is not immediately clear that they altered the civic identity of women from married woman to contracting individual. As I showed in the review of the Massachusetts statutes, women's property rights were conferred with conditions. They could dispose of their lands, but only as stated in the statutes. They could contract, but only in regard to their separate estate. They could convey property but only with the assent of their husbands. They could sue alone in court, but only in a few, limited instances. They were given enumerated rights, but these rights did not confer upon them full, legal autonomy. Rather, they continued to hold the status as wives who were given the right to practice these limited abilities. Even when they practiced these limited rights, this was done under the watchful eye of the courts, with the courts monitoring their practice. Married women remained status-bound actors with a few, limited individual rights.

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[181] Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: The University of North Carolina Press, 1986) 18.

Some married women were complicit in the generation of this new status. Just as husbands accepted the loss in their rights in exchange for the short-term gain of shielding their property from creditors, so too do we find married women complicit in sustaining this intermediate status. Married women who were taken to court found a plausible defense in coverture. When suit was brought against them, it was in their short-term gain to claim that they were not liable by presenting themselves as feeble, incompetent or coerced, in any case, as incapable of standing as an individual against whom suit could be brought.

One novel claim raised in defense was that a married woman who had been made *feme sole* was ignorant of what this meant. Mrs. Sypert had been made a *feme sole* through proper court procedures in 1874 but in 1889 made the claim of ignorance when a creditor tried to recover money from her. The Kentucky court was not persuaded. After all, she had made no complaint all those years that she was *feme sole*, and had been enjoying the privileges and benefits that accompanied that status.[182]

Mrs. Sypert had also claimed that her husband coerced her into applying for *feme sole* status in the first place. Marital coercion was one of the most popular defenses brought by married women. This was a defense that tried to rescind their contract by claiming that they signed the contract under duress, but the source of this defense lies not in contract but in the common law presumption that a married woman acted under the coercion of her husband. A common complaint was that they signed their separate property into debt in order to pay off

[182]*Sypert v. Harrison* 88 Ky. 461 (1889).

their husbands' debt. The presumption, though, could be waived by evidence to the contrary, and courts tended to be persuaded by the evidence. Thus when Mrs. Rush claimed that she was so feeble after the birth of her child that she needed help sitting up to sign the mortgage urged upon her by her husband, the court was not moved. While her sister, nephew and nurse supported her version of the story, the testimony of her doctor and a factor from the lending agency indicated that she was physically and mentally capable of signing the contract. Added to this was the story that a few years earlier she had taken over debt-collection from her husband and extorted money from a man who owed her husband's company. The court saw a shrewd, aggressive businesswoman hiding behind the disabilities of coverture.[183]

A similar case in Louisiana reveals the similarities and differences between the common law and civil law systems. Mrs. Myers obtained the services of an attorney while her husband was in jail, and the attorney sought action against her for payment. The court did not accept her argument that she had signed for their services under marital coercion. Like the other states, there was a presumption of coercion available for defense, and the opportunity for it to be rebutted by evidence. But then the Louisiana court goes on to say that by civil law, she is obligated to her husband in times such as these: "[T]he fees thus earned by these attorneys formed a personal debt of the wife, which she had full power under our laws to contract, in discharge of a duty imposed on her by the law which provides that 'the husband and wife owe to each other mutually,

[183] *Moore v Rush* 30 La. Ann. 1157 (1878).

fidelity, support and assistance.' C.C. Art. 119"[184] The Louisiana Civil Code required mutual obligations of husbands and wives. In common law states, husband and wives each had obligations, but these obligations differed. A husband was obligated to support his wife, but this was not expected to be reciprocated by the wife.

These common law obligations of husbands were exploited by married women against whom suit was brought. Married women could escape liability for their crimes or contractual obligations by reverting to legalities, although they were not always successful. Mrs. Darling wanted to back out of a sale of her property, claiming that her agent was not authorized to make the sale because she had never received proper authorization from the district judge to borrow money and mortgage her property. The court found that the sale did have marital authorization, and so her argument failed.[185]

A more common resort to legality was to recover the common law rules that placed the husband as the head of the household. In Massachusetts, particularly, owing to laws regarding sale of liquor from the home, there are a number of cases in which married women were prosecuted for selling intoxicating liquor from the home. For these women, the ready defense was to claim that they were carrying out the business in the home of their husbands, and in the presence of their husbands, and thus were acting under marital coercion.[186] Since the site

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[184] *Jaffa v. Myers* 33 La. Ann. 406 (1881)

[185] *Darling v. Lehman* 35 La. Ann. 1186 (1883).

[186] There is one area in which the presumption of coercion did not exist—running a house of ill fame. In those cases a married woman was liable for her actions, but this, along with murder and treason, was an old common-law exception to the presumption of coercion. The Massachusetts

of the sale of the liquor was also the home, the home itself was defined by its being the domicile for the family. Since it was the domicile, the husband was considered the head.[187] As head of the household, he was responsible for controlling the members of the family, and so the husband was liable for actions of the wife. These cases represent an intersection between the married woman acting as businesswoman, running her own separate business, and the common law arrangement of husband as head of household. The courts determined that the statutes conferring rights to run a business would not interfere with the common law arrangements. Thus the Massachusetts supreme judicial court found the following instructions of a judge in a lower court correct:

> The statutes which give a married woman the right to carry on business on her separate account do not deprive a husband of his common law right to control his own household; he has the power to prevent his wife from using his house for an illegal purpose;…the fact that the wife owned the house did not abridge the husband's right to control its use while occupied as their home.[188]

Those married women who were held liable for selling intoxicating liquors from the home during this period were in the position of being home alone while the husband was out at sea or whose husband was sick in bed.[189]

A married woman who ran a business from her own home could make the husband liable for all debts because he was the head of the household. The Indiana court wrestled with the matter of a married woman who ran a milliner

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court found a married woman for keeping a house of ill fame in *Commonwealth v. Cheney* 141 Mass 102 (1886).

[187] Leading cases include *Commonwealth v. Wood* 97 Mass 225; *Commonwealth v. Kennedy* 119 Mass 211.

[188] *Commonwealth v. Carroll* 124 Mass 30 (1877) 30.

[189] *Commonwealth v. Roberts* 132 Mass. 267 (1882) and *Commonwealth v. Gormley* 133 Mass. 580 (1882).

shop from the front of the family home. When suit was brought against her to recover for payment of goods sold to her, she claimed coverture as defense, which would transfer liability to her husband, but her husband claimed that she made the transaction without his knowledge. To have believed both of them would have meant that neither was liable, and the creditors would have been unable to recover their debt, leading to an economically unstable situation that the reform statutes were supposed to be addressing in the first place. The Indiana court admitted that it did not know how to rule and only held her liable "after some hesitation, and without any firm conviction that we are right."[190]

The Indiana court's uncertainty is understandable. In trying to balance the married woman's new rights with the obligations of both husband and wife within the marital relation courts had to confront the capacity of the married woman. At times it appeared that she was an individual, capable of making and fulfilling her own contracts, standing trial for her own crimes. At other times, courts had to revert back to the common law and the presumption that a married woman in the presence of her husband acted under his coercion, and that he was expected to be coercive, as he was held responsible for her actions.

In cases such as these, married women appeared willing to take on their common law status, and husbands appeared willing to escape liability by renouncing their privilege—and obligation—as head of household. This set of cases thus brings to the forefront the matter of obligation in the status of the citizen. To be deprived of obligations is a short-term exemption and benefit, in

[190] *Jenkins v. Flinn* 37 Ind. 349 (1871)

that one escapes liability for one's crime, but it also entails a lack of recognition by the state. The historian Linda Kerber has approached the status of women in American history not by identifying the deprivation of rights for women but rather the deprivation of obligation. Such civic duties as voting, jury service, military service were historically limited to men, and what this meant for women depends on one's perspective. At the time, it could be seen as a privilege that women were exempt from these duties, but Kerber shows that these rules indicate a lack of recognition of women's full capacity as citizens. We see a similar dynamic in the coverture defense. There are a number of cases in which the court recognizes the married woman's capacity as one against whom suit can be brought. In so readily accepting evidence that women were capable of signing into debt, e.g., it might look like courts were actually spearheading recognition of married women's capacities. But, in fact, courts did not do away with the presumption of coercion. If recognition were involved here, then the legal rule that one presumes that a wife entering debt either with her husband or for her husband's benefit should have been obsolete.

The Modernization of the Common Law[191]

There were a few other areas in which courts might look progressive in terms of married women's status if only for the fact that the court was declaring itself as such. In an Indiana case, the court ruled that although some disabilities of coverture still existed, enough of them had been eliminated by statute that married women no longer fell into the list of the legally disabled, namely, children, criminals and lunatics.[192] The result of such a stance was one of complacency; women were normatively seen as not being disabled, but this made their remaining disabilities less obvious.

The Kentucky court declared itself to be liberally construing statutes to enlarge the rights of married women. But in that same case it recognizes the need for a court of chancery to declare a married woman as a *feme sole*.[193] Hence it failed to acknowledge that women still needed the participation of the state in the carrying out of their individual rights. Furthermore, this development was nothing new; there had always been a common law remedy for married women

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[191] The title of this section is derived from Reva Siegel's study of another form of statutory reform—the right of married women to retain their own earnings. Siegel shows that the earnings statutes were written and interpreted in such a way that, while a married women could keep the money she earned as wages, women's work within the home became further distanced from paid labor as a result of the statutes, and a woman's work in the home was seen as rendered out of love and duty. Thus Siegel sees statutory reform as paradoxically modernizing the common law of marital status and masking it in modern guise, rather than liberating women from their common-law disabilities. See "Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880" *Yale Law Journal* 103 (1994): 1073, and "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings" *The Georgetown Law Journal* 82 (1994): 2127-2225.

[192] *Vogel v. Leichner* 102 Ind. 55 (1885). In the liberal tradition, these are the classic categories of those who are unable to exercise their reason and thus remain under paternal (or, in the case of criminals, state) power. See John Locke, *Two Treatises of Government* Ed. Peter Laslett (Cambridge: Cambridge University Press, 1988) 308.

[193] *Uhrig v. Horstmann* 71 Ky. 172 (1871).

whose husbands had abandoned them. So this was really just a matter of sustaining the common law but labeling it as modern.

Courts were adhering to the statutes, which were not liberal to begin with. But whereas the statutes were limited in scope to the narrow area of women's separate property issues, the court did more; it redefined women's status. Courts wanted to preserve women's status as wives in the presence of these statutes, but in trying to preserve, they recharacterized what it meant to be a married woman. Before the statutes, there was not much need to justify the disabilities of married women. Now, though, courts had to balance the status of wife with the married woman's ability to own property, contract, sue, etc. The way they chose to do so was in a paternalistic sense, to presume that a wife needed supervision when contracting, the way one treats a child when spending his allowance. Given this paternalism, the statutes can be seen not as the progressive hope as characterized by the suffragists. Women were not making Sir Henry Maine's smooth transition from status to contract but rather were stuck in between, with a new status not of one who is subjugated but one who is in danger of being duped or coerced. Furthermore, the protectionist role of the court allowed for new justifications for the remaining aspects of coverture.

Some of the old practices of the common law needed no explanation. The court provided no justification for the domicile of the wife being that of the husband, the Louisiana court citing only "our law" and the Kentucky court citing only the "general rule."[194] Other practices were more carefully considered and

[194] *Succession of McKenna* 23 La. Ann. 369 (1871) and *McAfee v. Kentucky University* 70 Ky. 135 (1870).

accepted. Indiana recovered the common law property ownership tool of tenants by entireties. This was a type of ownership reserved specifically for married couples, similar to, but markedly different from, joint ownership, for tenancy by entireties included obligations incurred by the marital relation. After allowing married women to own separate estates the legislature had to grapple with how they could receive and dispose of property. There was "too much machinery" involved in the equitable practice of holding a married woman's property in trust and allowing husbands and fathers to deed property directly to a married woman "was attended with baneful and disastrous consequences. It disturbed the peace and harmony of families."[195] The solution lay in reverting back to the little-known common law construction of tenants by entireties, by which husband and wife held property jointly. This provided a middle ground between the husband owning all the family property and the wife owning and having full control over her separate property. It allowed the state to maintain marital status, as tenants by entireties was similar to joint tenancy, distinguished only by the fact that the members of the former construction were a married couple. This was Indiana's way of reconciling the shift from common law status relations to the property-holding wife; it recovered and redefined the purposes of a common law resource.

Family Unity

Judges were involved in retaining status, and with it the obligations that marital status incurred on husband and wife respectively. The family was left intact with a family unity thesis that replaced the common law unity of the

[195] *Chandler v. Cheney* 37 Ind. 391 (1871).

persons of the husband and wife. This is reflected in those rights which, no matter how liberally they were conferred, were not allowed to be exercised within the home. Thus no matter how extensive a married woman's right to contract was, she could not contract with her husband, not because they were still considered one person but because it would "introduce the disturbing influence of bargain into the marital relation."[196] A wife could not use her new ability to sue alone for the purpose of suing her own husband because this ability to sue alone was intended to give the married woman the decision to include her husband, or not. She might want to sue alone to escape his coercion. Thus the right to sue alone was not a recognition of her independence but rather a mechanism to protect the married woman from the interference of her husband.[197] Despite the understood purposes as protecting a wife from a coercive husband, the end result of this prohibition of husband and wife to sue each other contributes to the family harmony thesis, a way to keep litigious and economic arrangements out of the home.

Family harmony was also protected by Massachusetts by protecting the family from the effects of alcohol abuse. Massachusetts passed a law that allowed family members to sue the supplier of alcohol for injury to the family. In so doing, the statute rewrote the family relations into law. In 1879 Massachusetts passed "An act to provide for the recovery of damages for injuries caused by the use of intoxicating liquors."[198] If anyone were injured by an intoxicated person

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[196] *Sims v. Rickets* 35 Ind. 181 (1871).
[197] *Hobbs v. Hobbs* 70 Me. 381 (1879).
[198] Massachusetts, St. 1879, ch. 297.

his or her husband, wife, child, parent, guardian or employer had a right of action for the injury. The Massachusetts court acknowledged the reliance upon the domestic relations contained in the statute: "We think the language itself imports that the relations of husband and wife, parent and child, guardian and ward, employer and employed, are valuable relations; that they are themselves the subject of injury; that those relations themselves may be so affected by the excessive use of intoxicating liquors as to constitute a substantial injury. That is, that drunkenness of a husband may be of substantial injury to the wife; or of the wife to the husband….the Legislature regarded as capable of injury the family and social relations."[199]

Just because the family was harmonious did not mean it was not hierarchical. Within this unified family, the status of husband as head of household remained. That a husband was justified in killing a wife's attacker intimated that self-defense extended to defense of one's wife, thereby recovering the unity of husband and wife as one person.[200] Louisiana's community property cases made it clear that family property belonged to both the husband and the wife, but it made this arrangement look much more like the common law when it declared the husband to be head of that community, with the wife having no claim to it until he died. Until then, she could only hope that he did not squander it.[201] Here again, we see a difference between the civil and common law, for the common law tried to place obligations in the husband and make him responsible

[199] *Moran v. Goodwin* 130 Mass. 158 (1881).
[200] *Estep v. Commonwealth* 86 Ky. 39 (1887).
[201] *Succession of Boyer* 36 La. Ann. 506 (1884).

to her, even while he was in charge. Thus in common law states, with the husband's privilege as head of family went the corresponding obligation to support the family.

CONCLUSION

Given the widespread concern to retain the marital relations, the persistence of coverture following married women's property reform statutes becomes less puzzling. Coverture survived not only because the statutes were never intended to abolish coverture, but because different institutions collaborated to sustain the social orderings of the domestic relations. Married women still retained a status that fell short of full recognition as contracting individual, but this analysis has additionally shown how that status changed. Married women did not simply retain their status as wives under the common law. In recognizing their empirical disabilities, courts constructed a new status of individual incapable of fully exercising rights. This new identity invited courts to scrutinize married women's transactions and thus to retain a position for themselves institutionally. Statutory reform did not see a corresponding shift in power from courts to legislatures because courts remained involved.

Calling the progressive character of the reform statutes into question can displace the prevailing characterization of the common law as a bad, hierarchical doctrine and liberalism as a progressive doctrine free of such feudal vestiges. It calls into question the multiple orders thesis to reveal that both courts and legislatures were interested in balancing the common law domestic relations with liberal ideals and reform. This is not to dispense with the multiple orders thesis,

however, for it captures tension, and tension was certainly a byproduct of this balancing of common law and liberal ideals. There were cases in this chapter in which courts were faced with recognition of women's rights but also imperatives of the household, and courts indicated that they were not sure how to decide. The tension was not across institutions, though, but within an attempt to balance the common law relations with liberal rights.

Adopting this alternative approach also allows one to identify the ways in which married women's status did change. To assume that the statutes were progressive ignores the ways in which they redefined married women's status and limited women's independence under a modern guise. According to the prevailing account, courts retained the old common-law rules regarding married women's disabilities. The approach employed here demonstrates that courts accepted the statutes and in interpreting them generated a new status for married women. Coverture thus continued not because courts' ideological conservatism or institutional imperatives caused resistance to change but because it was reformulated in the light of statutory change.

It remains to be seen what courts, legislatures and constitutional convention members saw at stake in the loss of coverture. The next chapter will consider why they sought to retain pre-modern elements in their modern regimes. In addressing that, I will continue to employ a perspective that resists viewing the common law as feudal and liberalism as the progressive doctrine to remove hierarchy. Coverture was seen as important not because people thought that women did not deserve rights but because limiting the rights of women served as

instrumental to securing other perceived needs of the time. Thus these gendered relations were maintained for reasons having little or nothing to do with gender, but it is a gendered analysis that provides the perspective for answering these questions.

Chapter Three: The Domestic Servant and the Family

In the last chapter I showed that the common law was a concern not just for courts but for various institutions of government in the states. Rather than seeing the common law as perpetuated by conservative courts I identified it as a system of social ordering that some actors were able to accommodate to their version of liberalism, and that various institutions sought to protect. In this chapter I approach the question of why they retained the common law domestic relations in the 1870s and 1880s.

In the late nineteenth century there was a perceived political need for the affectionate family to counterbalance a market that was increasingly beset by relations that were impersonal and antagonistic. The law could meet this need through its provisions for the domestic relations of the common law. In this paper I show that rendering the family more affectionate did not replace the hierarchy of the common law but, indeed, reasserted patterns of subordination and made its feudal social relations available for modern purposes. I show this by tracing the development of the domestic servant in judicial decisions. As one of the few categories of servants that remained domestic in the late nineteenth century, the domestic servant provides insight into how changes in the characterization of occupations altered the family image, rendering it more plausibly intimate in judicial fiction. By studying the position of the domestic servant within this intimate home, I am able to identify the hierarchy that remained in the family and

to suggest that the language of affection, rather than releasing the family from its hierarchy of history, made hierarchy possible under a modern guise.[202]

In this chapter I make some progress toward explaining the legal construction of the household and family by looking not just at the husband-wife relation but by taking a broader look at the household as constituted under the domestic relations. In taking in the household in its analysis, this study focuses on one of the categories of the domestic relations that is seldom discussed, even in treatments of the domestic relations—the domestic servant. While the domestic servant is seldom a subject of our political analysis, it emerges in this study out of a gender inquiry into the study of the common law in American history. In refuting the Hartzian thesis that America had no feudalism and therefore no socialism, some studies in American political development have used the feudal, common-law origins of labor law to show that feudalism did persist in the master-servant relation.[203] While both the master-servant relation and the husband-wife relation persisted into the twentieth century, their histories diverged in significant ways. While the master-servant relation was eventually modernized with the passage of labor legislation of the 1930s, coverture did not have a definite endpoint.

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[202] The ability of feudal social orderings to survive their apparent modernization is identified in Reva Siegel, "The Modernization of Modern Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930," *The Georgetown Law Journal* 82 (1994) 2127-2225; See also Karen Orren, *Belated Feudalism : Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998).

[203]Karen Orren, *Belated Feudalism;* Christopher Tomlins, "Subordination, Authority, Law: Subjects in Labor History," *International Labor and Working-Class History* 47 (Spring 1995): 56-90.

To identify the differences between these two relations, I draw upon one development that did take place in the master-servant relation in the late nineteenth century—it began to leave the domestic relations. Judges and legal commentators became increasingly uneasy about counting the master-servant relation as a relation that was domestic and began to replace the household model of labor with a contractual model of agreements made between individual employers and employees. While this development did not have real impact on the conditions of workers until the 1930s,[204] it did change the location of the relation. While this development was of little consequence for workers, it did have an impact on those relations that were still considered to be domestic. Workers, in ceasing to be seen as domestic, were poised to receive the benefits of twentieth-century labor and social welfare legislation while wives remained strapped under common law obligations, disabilities and status. This meant that they would be included in social security legislation as dependent wives rather than as workers,[205] and that they would receive relief from the disabilities of coverture in piecemeal fashion through statutes designed to address those particular disabilities but not to overturn their common law status as wives. Hence the gendered question: why did workers get to leave the domestic relations while married women had to stay?

This question leads to a gender analysis that helps to identify the rise of domesticity in the late nineteenth century and to recognize that it was put to use to

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[204] See Orren, *Belated Feudalism.*

[205] See Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917-1942* (Ithaca: Cornell University Press, 1995) 123-150.

retain the domestic relations and all of their hierarchies and status. The gender analysis does not only tell us about women; it opens the door to revealing larger dynamics of the state as well. Women had to remain in their subordinate roles as wives because the state had a need to retain personal relations. One sees this when one steps back from the immediate disabilities of married women and takes in the larger view of the household of which they were a part. This allows one to see why the state saw a need to protect the household. It was a project in which legislators as well as judges were engaged.

The notion of the household as distinctly domestic did not originate in the late nineteenth century. Earlier changes in the Industrial Revolution had shifted the economy from household production to industrial, bringing men's work and identity outside of the home and leaving the middle-class home under the control of women. Separate spheres ideology had obtained in the early nineteenth century, and the "cult of domesticity" had already reached its peak by the 1880s.[206] A form of separate spheres ideology gained renewed political currency, though, in the late nineteenth century when the relations of the home began to be

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[206] While early feminist historians saw separate spheres ideology as denigrating to women, it has come to be noted for its potential for politicizing women. Nancy Cott, *The Bonds of Womanhood: 'Woman's Sphere' in New England, 1780-1835,"* (New Haven: Yale University Press, 1977); Paula Baker, "The Domestication of Politics," in *Unequal Sisters* ed. Ellen DuBois and Vicki Ruiz (New York: Routledge, 1990); Ellen DuBois et al., "Politics and Culture in Women's History: A Symposium," *Feminist Studies* 6 (Spring 1980), 26-64. Carl Degler sees affection within the family as encouraging mutual respect and increased autonomy for women within the family in *At Odds: Women and the Family in America from the Revolution to the* Present (Oxford: Oxford University Press, 1980). While this may have been true for those living within the family, this paper shows that within the courts, the legal fiction of the affectionate family turned families away from, rather than toward, egalitarianism. The language of affection actually served to reassert the common law hierarchy of the family.

valued out of nostalgia for the imagined loss of the personal relations in employment.

It would be an understatement to say that relations between workers and their employers were strained in the late nineteenth century. In the face of labor unrest, strikes and increase in labor associations, members of Congress grew alarmed at the disharmony of labor relations. So concerned were they that they held a hearing on the relations between labor and capital in 1883, inviting the testimony of workers, industrialists, labor leaders, foremen, in order to assess the animosity among different classes. In a bemused "why can't we all just get along?" tone, they asked workers such questions as, "How do you workingmen feel towards the people who employ and pay you?" to which they received such responses as "They hate the bosses and the foremen more than the bosses, and the feeling is deep."[207]

One reaction to such findings was to lament the antagonism of market relations and to grow nostalgic for an earlier, more peaceful time of personal relations. As one witness testified, "The workman, foreman and boss used to be one family. Now they don't know one another in the street."[208] This observation has origins in legal history—labor relations had been contained in the master-servant relation of the common law as one of the domestic relations. To invoke these relations as familial relations was to exploit the domestic aspect of the relations. Indeed, there were certain characteristics of the relations that resembled

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[207] John A. Garraty, ed. *Labor and Capital in the Gilded Age : Testimony Taken by the Senate Committee upon the Relations Between Labor and Capital, 1883* (Boston: Little, Brown & Co., 1968) 21.
[208] *Ibid*., 80.

families. The master was responsible for his servant, and he might owe the servant certain obligations, including such necessaries as food clothing, housing, medical assistance, just a husband or father owed to his family. Like a husband or father, the master was responsible for the conduct of his servant, and would have to answer for him in court.

Karen Orren has cautioned against mistaking these obligations for benevolence. These practices were likely rooted in necessity. Before there was public transportation, e.g., it was likely more convenient to house one's servant than to send him home each night.[209] It is important to note, too, that the seeming benevolence of the master's treatment was born not out of good will but out of paternalism. As the treatise writer James Schouler explained, the master-servant relation was one in which the parties stood on unequal footing, thereby making the master's obligations moral obligations: "A moral obligation resting upon every master whose connection with his servant is a very close one, the latter being manifestly on an inferior footing, is to exert a good influence, to regard the servant's mental and spiritual well-being."[210]

The personal relations so lamented in the 1883 hearing were, therefore, relations that had never been based on mutual respect but on inequality. In choosing to see the lost relations as personal and benevolent, they were constructing a history of close, personal relations between masters and servants. The loss of this intimacy could be cited as the cause of the present labor unrest.

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[209] Orren, 100-101.
[210] James Schouler, *A Treatise on the Law of Domestic Relations* Third Edition (Boston: Little, Brown, and Company, 1882) 664.

As the historian Amy Dru Stanley has noted, it was "widely agreed that the extinction of human bonds under the wage system was a main cause of the labor problem."[211] Personal relations could not be restored in labor relations, however, for labor was already divorced from the household and the domestic relations in its characterization. There were still relations that were domestic, such as the relations between husband and wife and parent and child, and these relations could be counted on to retain those personal relations that were in jeopardy in the public sphere. Whether the wistful allusions to the foregone household model were accurate or not, the fact is that its invocation pointed to the household as an important counterbalance to the ills of the market.

There was a problem, though, for the household, too, was apparently in peril of its own. Concern over the state of the household is evidenced in another line of questioning in the 1883 Senate hearings. Senators were also curious about the physical condition of the home. They asked detailed questions of people who had visited the homes of coal-miners and other workers, wanting to know the size of homes, their layouts, the type of furniture, the health conditions of the families of workers, and whether workers could support a family on their wages.[212] While one interpretation of this concern is for the male-based citizenship—the concern that men were not earning a wage sufficient to support a household[213]—in light of the contrast to the market, we can shift the focus to the importance of the household itself. The subordination of wives could be attributed not to the

[211] Stanley, 77.
[212] Garraty, 2, 31, 74-75, 39-40.
[213] Stanley, 48-55.

sacrifices they should make for their husbands but for the protection of the household as institution. The poor conditions of workers were affecting the condition of homes. Rather than sites of intimacy, homes were also afflicted with the disharmony of the market, owing to unsuitable living conditions, overworked husbands and, likely, wives as well.

Homes, then, had to be protected from the corrupting influences of the market.[214] If this could not be done in actuality, it could be accomplished with legal fiction. The reconstruction of the household would take place in the courts, which still had the responsibility for the domestic relations, and the household was also undergoing its own, legal changes, owing to changes in the master-servant relation. Although the feudal social orderings of the master-servant relation would not disappear until the ability of labor legislation to be passed in the 1930s, the master-servant relation began to be seen as a relation that was not domestic. This was a development that did not affect the conditions of workers and their employers so much as the other domestic relations. As employment began to be seen as something that occurred outside of the home, those relations that remained in the home looked more properly domestic.

The progression of the master-servant relation outside of the domestic relations was predicated on the traditional distinctions among servants, for the term "servant" had always encompassed varying categories of occupations,

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[214] Joan Williams also sees a distinction made between the intimate home and market relations, and in her study of divorce law identifies contemporary aversion to treating the marital relation as too commercialized and rational. She sees this distinction as new, however, finding that historically, the marital relation was able to be seen as "*both* an economic arrangement *and* a locus of intimacy." "Is Coverture Dead? Beyond a New Theory of Alimony," *Georgetown Law Journal* 82 (September 1994) 2281.

differing in their activities, location and stature. In the late nineteenth century, those servants who were more professional and whose work occurred outside of the home ceased to be seen as properly belonging to the domestic sphere. This change is evident in the legal treatises that covered the law of domestic relations. As one reads the chapters on the master-servant relation in treatises written throughout the nineteenth century, one can detect a progression in tone from one that is unquestioning of the inclusion of the master-servant relation in the domestic relations to one that complains about including workers as domestic, and finally to one that drops employment from the purview of the domestic relations.

Sir William Blackstone's eighteenth-century exposition on the common law, *Commentaries on the Laws of England*, served as a popular text for the common law for subsequent generations. Far from being disturbed by categorizing the master-servant as a domestic relation, he listed it as first of "the three great relations in private life,"[215] the other two being the husband-wife and parent-child relations, with the guardian-ward relation added as a fourth. Whereas the other domestic relations had origins in nature, the master-servant relation was "founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him."[216] He showed little discomfort with the relation of authority and subordination between master and servant, and indeed, set the servant in contrast to the slave, a status that was "repugnant to reason and

[215] Blackstone, 410
[216] *Ibid*.

to the principles of natural law."[217] The disabilities of the servant were benign in comparison.

Blackstone listed four categories of servants, the first being menial servants, the name deriving from *inter moenia* (within the walls), otherwise known as domestic servants. The common-law rule for the hiring contract was one year, unless the parties agreed otherwise. Apprentices, the second category, were indentured for a set number of years. This relation was often set up so that a minor apprentice could learn a trade. A special provision was made for town overseers to apprentice out the children of poor persons. The third class, laborers, hired themselves out for service by the day or week and did not reside within the household. He was hesitant in adding the final category: "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs."[218] Although Blackstone has few qualms with classifying the master-servant relation as a domestic relation, he finally expresses some discomfort in classifying those more prestigious categories with other servants, and indeed, interchanges "master" with "employer" so as to suggest that even though the servants worked for their masters, they did not occupy the same positions of subordination as other types of servants.

Treatises in the mid-nineteenth century did not seriously question the placement of the master-servant relation as a domestic relation. In his *Commentaries*, James Kent assumed the more customary ordering by listing the

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[217] *Ibid*., 411.
[218] *Ibid*., 415.

master-servant relation last among the domestic relations. Kent classified servants by three, broad categories: slaves, hired servants, and apprentices.[219] Tapping Reeve likewise did not pause to question whether the master-servant appropriately belonged to the domestic relations. In his categorization he reverted to Blackstone's classifications, classifying servants as slaves, apprentices, menial servants, day laborers, and a final category that included the more prestigious positions of agents, factors and attorneys.[220]

It is in the treatises of the 1880s that treatise writers begin to complain about having to include servants, specifically the higher grades of servants, in their works on domestic relations. In 1882 James Schouler began his chapter on master and servant by stating that it was "not strictly a domestic relation" because "[t]he relation of master and servant presupposes two parties who stand on unequal footing in their mutual dealings, yet not naturally so, as in other domestic relations."[221] The difference in origin between the master-servant and husband-wife relation now factors in the assessment of the tolerance of hierarchy, tolerable in the purportedly natural husband-wife relation but not in the master-servant relation, which after all, was only founded in convenience. Schouler remains selectively disturbed by the hierarchy of the domestic relations, reserving his consternation for the master-servant relation: "This relation is, in theory, hostile to the genius of free institutions. It bears the mark of social caste. Hence it may be

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[219] James Kent, *Commentaries on American Law* Ninth Edition, Volume II (Boston: Little, Brown and Company, 1858).
[220] Tapping Reeve, *The Law of Baron and Femme, Parent and Child, Guardian and Ward, Master and Servant, and of the Powers of the Courts of Chancery; with an Essay on the Terms Heirs, Heirs, Heirs of the Body* Third Edition (Albany: William Gould and Son, 1867).
[221] James Schouler, *A Treatise on the Law of Domestic Relations* Third Edition (Boston: Little, Brown and Company, 1882) 646.

pronounced as a relation of a more general importance in ancient than in modern times."[222] Here Schouler is expressing that modern sentiment of looking askance at hierarchy, relegating it to some pre-modern time, even as he tolerates other forms of hierarchy.

Despite his clear disapproval of including the master-servant as a domestic relation he does discuss it at greater length, since it is, for legal purposes, domestic. In doing so, he reveals that it is not the master-servant relation itself that is repugnant to modern mores but rather just that some occupations continued to fall under it. This is evident in his complaint about the categories included under servant, for "not only cooks, butlers, and housemaids are thus brought within the scope of this relation, but farm-hands, plantation laborers, stewards, bailiffs, factors, family chaplains, and legal advisers."[223] Those servants of higher prestige did not belong with the lower grades, who also happened to be menial servants. Schouler presents this not as a class issue, but as a legal issue rooted in the concept of contract, explained by the theory that "the common law, under the head of master and servant, discusses principles which, in this day, belong more justly to the relation of principal and agent; and that we constantly find an offensive term used in court to denote duties and obligations which rest upon the pure contract of hiring. Clerks, salaried officers, brokers, commission merchants, all are designated as servants; and our topic in this broad sense is not, if words mean anything, within the influence of domestic law at all."[224]

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[222] *Ibid*.
[223] *Ibid*., 647.
[224] *Ibid*.

Schouler was referring to the rise in the concept of contract, which served to characterize hiring and to replace the feudal status contained in the master-servant relation. One of the great modern developments was that contracts between individuals was coming to replace old orders of status. As Orren shows, the language of contract did not eradicate the feudal arrangements, and judges continued to rule according to the common law rules in spite of the contact model.[225] In spite of the limited effect of the contract model for the conditions of workers in the late nineteenth century, Schouler's evident dismay indicates the one way in which the language of contract was having its effect—it was rending apart the categories that had always existed for servants. Even if the condition of the workers did not change, the notion of the proper location for employment did.

This distinction among servants was maintained in later treatises. In 1883 Irving Browne considered who should be considered as a servant for the purposes of writing his domestic relations treatise: "Strictly speaking, so far as this subject comes with Domestic Relations, it should be confined to menial service, but usage has brought under this title many other relations, particularly that of employer and employee."[226] Walter Tiffany expressed similar sentiments in 1896: "The relation of master and servant has from a very early period been classed as one of the domestic relations; and it is still so treated in modern textbooks, and in some of the modern codes. This classification is accurate enough when applied to slaves,

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[225] The declaration that society was moving from status to contract was made by Henry Maine in *Ancient Law*: *Its Connection with the Early History of Society, and its Relation to Modern Ideas* 1864 (Tuscon: University of Arizona Press, 1986). Karen Orren has shown the limited effect that the contract doctrine had on nineteenth century workers in *Belated Feudalism*.

[226] Irving Browne, *Elements of the Law of Domestic Relations and of Employer and Employed* (Boston: Charles C. Soule, 1883) 121.

apprentices, and domestic servants, but it is not accurate when applied to other servants, like clerks in stores and offices, laborers, employés of railroad companies, and many other employés who are subject to the law governing master and servant."[227] In 1899 W.C. Rodgers' discussion reflects modern changes; he would not talk about slavery or other involuntary service, "nor will that wide branch of the law of master and servant pertaining to the service of employees in the large business and public as well as *quasi*-public enterprises and undertakings of the present day be discussed at exhaustive length."[228]

Rodgers also makes a curious distinction in his classification of servants. Whereas the distinction was made earlier according to the location of the service or the duration of the contract, Rodgers introduces a new categorization: some classes of service "require very high attainments and accomplishments in the particular duty, and the performance of the service may be attended with the most gigantic and solemn responsibilities" in contrast to others, of which "the service may be of such a nature as to require little intelligence and perhaps only medium physical strength."[229] By 1913, the master-servant relation is "practically omitted" in Edward Spencer's treatise on the domestic relations, for "it is common knowledge that it has ceased to be in any strict sense a domestic one." Distinctions among servants were a thing of the past, he said, and "furthermore,

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[227] Walter C. Tiffany, *Handbook on the Law of Persons and Domestic Relations* (St. Paul: West Publishing Co., 1896) 451-452, quoting *Frank v.* Herold 63 N.J. Eq. 443.
[228] W.C. Rodgers, *A Treatise on the Law of Domestic Relations* (Chicago: T.H. Flood & Co., 1899) 690.
[229] Rodgers, 690-691.

since the abolition of slavery it can hardly be said to involve status or even capacity, except remotely."[230]

These treatises reflect the gradual removal of the master-servant relation from its placement in the domestic relations, but the customary distinctions within the category of servant allowed for only some of the relations to leave, while other servants, whether seen as within the household or of a lower grade, continued to be included in the domestic relations. By the early twentieth century, treatise writers were comfortable in just writing off the master-servant relation as not belonging to the domestic relations anymore, but with the original distinctions remaining, the category of servant had not entirely disappeared. Those in the higher grades of service were on their way to becoming public, as opposed to domestic, and hence were known as employees. The term "employee" was increasingly being used to replace "servant," but only for those classes of servant that were on the brink of leaving the domestic relations.

"Employer" and "employee" were not new terms. Indeed, Blackstone used employer interchangeably with master (albeit in reference only to the highest classes of service). Judges, on the other hand, were treating it as a new, novel concept. In its entry on employee, *Corpus Juris* cites a judge who grappled with the use of this fashionable term:

> The word employé, or employee, … is not a legal term, nor is it an English word, but a word imported with its native pronunciation from the French language, which is frequently used by English speaking people as a convenient common-place term to designate the relation or situation of a

[230] Edward Spencer, *A Treatise on the Law of Domestic Relations and the Status and Capacity of Natural Persons as Generally Administered in the United States* (New York: The Banks Law Publishing Co., 1913).

> class of persons who are not precisely menial servants, but whose whole time and services are employed and paid for by another person or persons, or by a corporation, or by the government. … It is a foreign word, and… to import and preserve its native pronunciation …the use [is made] of such combination of letters as they consider most likely to convey to English ears the nearest approximation to the native sounds of its several syllables.[231]

This judge's reflection on the incorporation of the French term may be more than a practical concern of spelling and pronunciation, for the courts were adopting not only a French term, but a French concept. In choosing to replace servant with employee, they were replacing the Anglo, common law status with a French, civil law term. When a servant engaged in a contract for hire, he contracted into a subordinate status. When an employee contracted, he apparently contracted as an individual and would remain as such in the employer-employee relation. The judge in this statement, then, is self-consciously acknowledging the depth of change that takes place when the Anglo common law adopts a foreign concept. When the servant came to be called an employee, he did not simply get a new name; an employee was defined as one who worked for an employer, or one who worked for wages. The attendant obligations and status were absent from the definition of employee.

While *Corpus Juris* noted that "the word 'servant' was coming to be generally synonymous with 'employee,'" it also noted that not all workers were employees. Such occupations as attorney, bookkeeper, builder and contractor came to fall under the umbrella of employee, but the very highest and lowest

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[231] *Corpus Juris, Being a Complete and Systematic Statement of the Whole Body of the Law as Embodied in and Developed by All Reported Decisions,* Ed. William Mack et al., Volume XXX (New York: The American Law Book Co., 1923) 1241, citing *Macfie v. Hutchinson* 12 Ont. Pr. 167, 179.

grades of employment did not: "[I]t rarely refers to the higher officers of a corporation or government or to domestic servants."[232]

Domestic servants did not make the transition from servant to employee, and thus they did not make the transition out of the household model to the contract model. Furthermore, this was not a simple matter of leaving domestics behind in the household but of redefining their stature. The term "servant" came to be synonymous with domestic servant, and the term "menial," which had always characterized their location of labor (within the walls) now came to be synonymous with work that was degraded. "Word 'servant' is losing the connotation it had in earlier days and older decisions, possible because as a word of usage rather than a word of art it connoted a menial and its use was distasteful."[233] Thus as the legal categorization of servants changed and most classes left the domestic relations, that remaining class, the domestic, was not simply left behind but was modified in its characterization.

To identify how the this recharacterization of domestics occurred in the late nineteenth century, and what effect it had (or was affected by) judicial construction of the household, I did a Lexis-Nexis keyword search for domestic and servant or servants in the appellate courts decisions of six states[234] for the period 1830-1889 in order to find the ways in which judges characterized servants. Searching in this way had an advantage over searching for cases with a

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[232] *Ibid.*, 1244.

[233] *Words and Phrases: Permanent Edition: All Judicial Constructions and Definitions of Words and Phrases by the State and Federal Courts from the Earliest Times* (St. Paul, West Publishing Co., 1971) 464, citing *Cinefot International Corp. v. Hudson Photographic Industries* 237 N.Y.S. 2d 742, 744 (1963).

[234] The six states are Massachusetts, Maine, Indiana, Illinois, Kentucky and Louisiana. They were chosen for their geographic diversity. Louisiana was a civil law rather than a common law state.

direct legal issue regarding domestics because there are few cases that domestics brought to court and because the approach that I chose allowed me to gather references to domestics in cases that had might have had nothing to do directly with domestic service, providing a way to trace the appearance of domestics in judicial narratives over time.

Decisions from the early period tended to mention domestics as members of the household, but not in significant ways. Decisions from the later years presented episodes in which domestics appeared as very much part of the household in that they were intimately linked in the affairs of the family for which they worked.[235] In the later years of this period, there is an increase in references to servants being in the midst of the family. This is evidenced in repeated references to marital squabbles being fought in front of the children and the servants,[236] revealing that servants were ubiquitous in the home. Or, the fighting

[235] My search for domestic servants produced 56 cases in which domestic servants appeared. Out of those 56, domestic servants appeared as intimates to the household in 15 of the cases. I've charted those 15 cases in order to show that they clustered in the later years, with the notable exception of the southern states. This cells in this table record those cases in which domestic servants appear as intimates of the family, and how many such cases appeared in each decade for each state. The n's indicate the total number of cases for each decade or state in which domestic servants appeared in judicial decisions.

	1830s (4)	1840s (5)	1850s (14)	1860s (6)	1870s (11)	1880s (16)
Illinois (19)			1		1	4
Indiana (1)						
Massachusetts (17)					2	1
Maine (3)						2
Kentucky (4)	1					
Louisiana (12)			2			1

[236] *Trowbridge v Carlin*, 12 La. Ann. 882 (1857).

may have been with the servants rather than in front of them. My search found two cases in which maids left their households after bitter, "stormy" fights with their employers. The intensity of these fights sounds less like that that might characterize differences in the workplace and more like those that take place in the privacy of the home.[237] Testimony of a mistress in a case involving her maid indicates that each knew the comings and goings of the other.[238]

There is a notable exception to this pattern: the servant as actor in the midst of the family appears much earlier in the South. For example, while the language of intimacy does not become noticeable in Illinois, Massachusetts and Maine until the 1870s (with a single Illinois case excepted, discussed below), it is present in Louisiana decisions in the 1850s and in Kentucky in 1839. In antebellum Louisiana and Kentucky, of course, the servants that appear in the decisions are, in fact, slaves, and the references to them as part of the family reflects the southern, patriarchal culture of the father as the head of the household, the household understood as encompassing the whole plantation. In terms of the development of the domestic relations, the southern family in this sense represents not an aberration from the modern family but rather its precursor. The southern patriarchal family was able to construct a legal fiction of household as kin before the rest of the country, where the domestic relations still contained those workers outside of the home who were obviously not part of the family. It was only when those workers left the domestic relations to be seen as employees operating under the contract model that the northern household could now be seen as something

[237] *Roby v Murphy*, 31 Ill. App. 599 (1888); *Weaver v Halsey*, 1 Ill. App. 558 (1878).
[238] *Common v People*, 28 Ill. App. 230 (1888).

approaching kin-centered, and could be seen as properly domestic. That the southern states got there first is not contradictory, for the hierarchy of the southern patriarchal culture is only an exaggeration of the hierarchy that would continue to mark the legally constructed household.[239] This actual hierarchy was not incompatible with the language of domesticity.

In this set of cases in which domestic servants appear as intimates to the household, there are three cases that reveal both the mingling of servants within the intimate affairs of the household and a recharacterization of the household itself. These cases involve the use of servants' testimony as witnesses, whereby servants appear as intimates to the families for which they work. The earliest case to arise was in Kentucky in 1839. A son who was left out of his father's will questioned the validity of the will because he claimed that his father was insane. In considering the family's situation, the court saw that "a very sudden, extraordinary and unnatural change took place in his feelings toward his youngest son, who was thirty years of age, attending to his business, and who had always before been his favorite child. He made efforts to procure his son's expulsion

[239] See Willie Lee Rose, "The Domestication of Domestic Slavery," in *Slavery and Freedom*, ed. William Freehling (New York: Oxford University Press, 1982) and Eugene D. Genovese, *The Slaveholders' Dilemma: Freedom and Progress in Southern Conservative Thought, 1820-1860* (Columbia: University of South Carolina Press, 1992) for accounts of slavery that attempt to explain the paradox between slavery and progress that emerges in the rise of domesticity in the ideology of slaveholders. Jeffrey Robert Young moves closer to bridging the paradox in *Domesticating Slavery: The Master Class in Georgia and South Carolina, 1670-1837* (Chapel Hill: The University of North Carolina Press, 1999). The trend in the study of the history of slavery in the south has been from viewing slaveholders as ruthless owners to patriarchs, a change that has encouraged historians to find that proslavery arguments were not necessarily pre-modern, but that southerners were developing their own conception of modernity. Peter Bardaglio, on the other hand, presents the southerners' use of the domestic relations as a patriarchal exception to egalitarian mores regarding the family in the rest of the country in *Reconstructing the Household: Families, Sex and the Law in the Nineteenth-Century South* (Chapel Hill: The University of North Carolina Press, 1995).

from the church, and drove him from the house, ordering him never to return, and refused his mother persmission to visit him, and never made friends with him."[240] The court was disposed to pronounce the father, Mr. Singelton, insane because of these sudden and unnatural feelings towards his son. In accepting the proof of insanity, the court relied upon the testimony of the man's wife, close friends, and acquaintances. These were the people they saw as most likely to gauge his condition. As for those who attested to his soundness of mind, "it may be remarked that the witnesses generally, who deposed for the defendants, had not the same opportunities afforded them, as the complainants' witnesses to arrive at a true knowledge of his condition. They were, for the most part, mere general acquaintances who met with him occasionally."[241]

Upon rehearing of the case, however, the court changed its mind about Singelton's insanity and the reliability of the witnesses as well, because they had gained some new facts about the family. They found that Singleton's reason for disinheriting his son was that William had engaged in "illicit cohabitation" with one of the slaves. Singleton's behavior was now seen as natural, for he was doing his paternal duty in punishing his son after attempts to reform him failed. This new evidence altered their interpretations of the witnesses' abilities as well. Those who testified on behalf of Singelton's sanity were now noted as being distinguished men of the town who had done business with Singleton. One of the most influential witnesses, though, was the overseer, who had actually been brought forward as a witness by the son, but who hurt his case:

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[240] *Singelton's Will* 38 Ky 315 (1839) 322.
[241] *Ibid*., 323.

> Here is their own witness, who lived as an overseer with the testator, during the year ’33; slept in the same house, eat [sic] at the same table, and labored in the fields with him, received orders every day from him, and almost every hour communicated with him, was placed in a situation which above all others enabled him to ascertain the state of his mind, his qualities and properties of character, yet he ‘did not think he was deranged.’[242]

The overseer’s testimony was relied upon in the rehearing not simply because he supported the case for Singleton’s sanity but because his testimony was reliable. Unlike other domestics, his knowledge of Singleton was not limited to personal matters; he could attest to his capacity to carry out his work. Thus the overseer gets recharacterized as a fellow professional rather than as an intimate within the home.

Those who were intimates, whether family or servant, were seen as lacking in credibility in the rehearing. The court saw them as being too interested in the outcome of the case: The court was skeptical about a nephew of the widow who testified to Singleton’s insanity, noting that “the Court will not forget that Ben Taylor is the full nephew of Mrs. Singleton, and palpably betrays all the predilections and aversions of his aunt in the foregoing deposition.”[243] Or the family members might simply be unreliable: Whereas the court deferred to the wife’s testimony in the first hearing, referring to her as “(an aged matron, the simplicity and candour of whose detail, carries with it intrinsic evidence of its truth,)”[244] in the rehearing they found that she “was further in the wane of life, than her husband. She was a year older. She was subject to all the imperfections

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[242] *Ibid*., 358.
[243] *Ibid*., 350.
[244] *Ibid*., 323.

and infirmities of age."[245] In the course of these two hearings, the wife went from being a gentle, doting helpmate to an old, confused woman not capable of offering valid legal testimony.

In the first hearing the court presumptively respected the testimony of household members, and in the second hearing they questioned their motives and capacities to provide valid, legal testimony. The very closeness to Singleton that earned them reliability in the first hearing rendered them unreliable in the second. The business associates and colleagues now proved to be more trustworthy exactly because of their professional distance from Singleton. The person falling in the middle was the overseer. He was a servant, but not merely in the domestic sense, so he could also attest to Singelton's professional, as opposed to merely domestic, behavior.

In the two other cases in which the testimony of domestic servants is used, domestic servants did not occupy any middle ground but were clearly lodged in the home. A similar set of witnesses was brought by both sides in an 1859 Illinois case in which a married woman signed away her trust property to her husband's creditors. At first the court treated the matter as one of simple technicality: the law provided that a married woman could dispose of separate property only as explicated in the marriage settlement. Since she used other means, the conveyance of property was void.

In a separate opinion, however, one of the judges introduced the matter of coercion. He found the conveyance void because he presumed that the husband

[245] *Ibid*., 356.

coerced the wife into turning her property over to him. This presumption of coercion was rooted in the common law and became relevant as married women increasingly owned and used their separate property. Mrs. Castle's property had been held in trust for her and managed by a third party, a common, legal means of shielding property from husbands.[246] When a married woman signed her property over to her husband, courts presumed that she was coerced.[247] This presumption of coercion, however, could be refuted with evidence, so the Illinois court examined the trial records more closely, and when it did it altered its views on the facts and witnesses and changed its decision accordingly. It found that her testimony of fraud, duress and coercion, was "made up of her own declarations, detailed by her relatives and familiars sympathizing with her, and disposed to magnify small circumstances into great matters."[248] Those who she called forward to attest to her husband's coercion were the children's music teacher (who lived with the family), the family doctor, a hardware merchant, a baggage master who was a friend of Mrs. Castle, Mr. Castle's clerk, her friend, and her sister and brother-in-law. In this list of intimates were servants, the music teacher who lived in the household and friends who were not domestics but were in the

[246] Prior to statutes that allowed married women to own their own property, holding property in trust was a practice in equity that allowed a married woman to have separate property. This was a common way for fathers on property to their daughters without turning it over to their sons-in-law. See Rabkin, Basch, *In the Eyes of the Law*.
[247] Marylynn Salmon recounts the equitable procedures whereby courts would consult women apart from their husbands should they have wanted to dispose of their property to benefit their husbands in *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986).
[248] *Swift v. Castle* 23 Ill. 132 (1859) 193.

lower grades of service.[249] As in *Singleton's Will*, the witnesses' very proximity to the parties serves to render them unreliable.

In 1883 a Louisiana case involved a will that was questioned on the basis of the testator's mental capacity. Edward Burke, whose forced heir under Louisiana's civil law was a grown daughter from his first marriage, rewrote his will in the last days of his life, when his brother had come over from Ireland to visit him in his illness. Burke changed his will to make that brother his universal legatee and committed suicide days later. In determining whether Burke was of insane mind in these final days the court initially drew upon its first impressions. There was something "strange and unnatural" about "the father of an only child" abandoning that child, the "fruit of his first love" in that manner in order to sign over his estate to a brother who had rushed over from a foreign country, a brother who had likely exercised undue influence over him.[250] The only explanation for this behavior, the court determined, was that Burke lacked his full mental capacity.

In recognizing this behavior as insanity, the court reviewed the witnesses for both sides, and there were many of them—the testimony of fifty witnesses filled a transcript of over 1,000 pages. Those witnesses who testified that Burke was insane were his intimates, which included long-time friends, his clerks and employees, and his wife and two house servants. Those testifying that he was not insane included a bank president, bank clerks, the druggist, a store clerk, and the

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[249] It should be noted that Mrs. Castle had been Mr. Swift's maid before they married. Hence the inclusion of servants can be seen as the inclusion of her friends to support her position.
[250] *Godden v. Executors of Burke* 35 La.Ann. 160 (1883).

priest. The court was particularly moved by the "loud and violent denunciations made of the wife, of the servants, and of the clerks"[251] and recounted their testimony with all of its details. Those people who lived within Burke's home were witness to his bizarre behaviors, and it was particularly owing to their anecdotes that the court initially found Burke insane:

> [H]e could not distinguish meat from potatoes or from fish, salt from sugar, brandy from water; that he would try to put on pillow cases and pocket handkerchiefs for shirts; would go around the room in the night drilling, militia drilling; speaking about fighting, having a great battle, fighting dogs; that he would buy cotton shirts unnecessarily when he had a quantity of the finest linen shirts at home; that he would chalk all his shoes around and then cut them;…that he would have black alpaca sewed on his socks….[252]

The court saw this behavior in a new light, however, when it reheard the case. In the second decision, the court reassessed the reliability of these witnesses, finding that "the attention is arrested by the fact that all the witnesses of intelligence and good judgment are on one side, and those of ignorance and passion on the other."[253] Now, the fact that one was an intimate meant that one had an interest in the outcome of the case and was not to be trusted. To be removed from this intimacy meant not that one was unfamiliar with Burke but that one possessed a clearer judgment of his mental capacity, not to mention that these witnesses were all distinguished men.

In the rehearing, rather than focusing on Burke's behavior in the home the court examined his public behavior. It found that he had continued to attend to

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[251] *Ibid*., 168.
[252] *Ibid*., 169.
[253] *Ibid*., 179.

business in the last days of his life, "not indeed to the menial work of the shop…but to the management of his affairs on a large scale." These large affairs included depositing money in the bank, drawing checks, and pursuing his debtors. In these dealings he "had been in almost daily intercourse with persons of intelligence and observation,"[254] i.e., those bank presidents, clerks, and other professional associates who had testified for his mental capacity at the trial.

This deference to the more reasonable witnesses did not make the court's opinion any less maudlin, however. In its second decision the court waxed romantically about Burke's manliness. A closer look at the facts revealed that his daughter, the one referred to in the first hearing as the "fruit of his first love" lived in New Jersey and had such little contact with her father that some of his associates were not aware that he had a daughter. His brother, on the other hand, had apparently remained close, even though—or especially because—he lived in Ireland, the place of Burke's birth, significant to the court because "there can be no doubt that laws mould individual and national character. They exert their influence silently and to the individual unconsciously, but the spirit of independence, of self-reliance, of robust manhood" remain indelible.[255] The Louisiana court presumed that Burke would have had difficulty accepting Louisiana's law of the forced heir, and the court assumed that it was natural that with this assault on his manly independence "his thoughts reverted to the old country and the kindred that were there."[256] In replacing its trust in the testimony

[254] *Ibid*., 180.
[255] *Ibid*., 182.
[256] *Ibid*., 181.

of Burke's immediate family with that of Burke's brother, the court was not simply substituting one family for another. Burke's immediate family was the family of the private home. In the court's references, his familial relations with his brother had more to do with nationalism than with intimacy.

As for the servants' testimony to his bizarre behavior, the court found explanations for it, such as his tracing his feet with chalk and having black alpaca put on his socks. One can compare this version of the socks incident with the earlier telling:

> His feet hurt him. He called for lighted candles one evening, and a piece of chalk. Putting the candles on the floor and standing up, he made one of the women of the house chalk his shoes where he wished to cut them, and seating himself, cut the uppers and transformed them into low quarter shoes. Then his white socks became visible, and this offended his taste. He sent his wife out the next day to buy black silk socks. It will be a cause for alarm if a *penchant* for that article of dress shall be judicially pronounced a badge of insanity. His wife could not find any, and then the tidy old gentleman had black alpaca sewed over his socks to conceal the glare of their whiteness. The incident is at once tender and delightful, and warms one's heart to the punctilious old man.[257]

In the rehearing, the court's romanticism has not disappeared but has been displaced. The court's initial impulse was to be taken in by the allure of the home, whose members could disclose the most intimate details. Upon reconsideration it called into question the reliability of such testimony. What was questioned was not the intimacy of the family but its reliability in a legal setting. Conversely, the same professional distance that rendered witnesses unfamiliar in the first hearing came to mark them as reliable.

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[257] *Ibid*., 181.

These three cases share a number of features. Changing categories of servants appear in all of the cases. Those higher classes of servants who in the legal treatises were ceasing to be seen as domestic appear sometimes as colleagues of professional stature, the lower grades appear as intimates to the family, and non-domestic, lower grades of servants appear on either side.

In addition to the shift in servants being evident, the court indicates some confusion over how to view the family. All of the cases involved a revision of the court's initial decision, a move from the courts making presumptions about the familiarity of the home based upon their first impressions to calling that very familiarity into question not because they doubted the family's intimacy but because they questioned its suitability outside the domestic sphere.

As the family became circumscribed within its sphere of intimacy, domestic servants remained present in the family. For legal purposes, domestic servants were part of the household and even part of the family. In an Illinois case in which a widow's dower was called into question, the court had to determine how much she was allowed in a statutory provision allowing for "such bed, bedsteads, bedding and household and kitchen furniture as may be necessary for herself and family, and provisions for a year for herself and family."[258] The court included grown children and servants in the definition of family; since this was the way the family was constituted when the husband was alive, this was the family of the widow after his death.

[258] *Strawn v. Strawn* 53 Ill. 263 (1870) 273.

One might wonder how much servants really were part of the family, however. By inquiring into the servant's position as part of the family we can gauge the intimacy of families in relation to the hierarchy that had traditionally characterized the common law. The domestic relations had always been built on hierarchy, with each relation establishing a relation of authority and subordination. There was hierarchy between the relations as well. The husband of the family had always been considered to be the head of the household, occupying the superior position in each of the relations as husband, father, master, lord, guardian. The status of husband as head of household survived the language of intimacy, as becomes particularly clear in seduction cases. Under the common law, when a woman was "seduced" it was not she who would bring a case to court but rather her husband or father. The reasoning behind this rule was that the husband or father was suing for injury to the wife or daughter, he bringing the case because it was he who lost her services. In an 1881 Massachusetts case in which a woman was assaulted and raped by her husband's boss, the husband brought suit against his superior. The Massachusetts court did not see this as a case of seduction: "The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person of conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant."[259] While this might seem to signal recognition of a woman's right to bring assault cases in her own name, this was not where the court's reasoning led. Rather, it decided that the

[259] *Bigaouette v. Paulet* 134 Mass. 123 (1881) 123.

husband could still bring suit, using the common law doctrine of loss of consortium—his employer's assault upon his wife had robbed him of his wife's company, cooperation and aid. In acknowledging that a wife was not a servant, the court reasserted that a wife was a wife, just as she had always been under the common law.

The Illinois courts were also reconsidering the common law reasoning. In its seduction cases, the Illinois court questioned the process of a father as well as a husband having to show loss of services.[260] This idea of loss of menial services was an "old" idea that was fast giving way to the "more enlightened views" of the times: "In this class of cases, the loss of services may be the alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery."[261] With this statement, it sounded as if the court were moving away from the common law. But this is not so. Despite its self-conscious reliance on "higher grounds" for judging seduction cases, it reproduced the old common law social orderings. It was still the father or husband who brought the case because his domestic circle was damaged. To rely on enlightened reasoning did not mean overturning the common law; it just meant that new justifications sustained the old relations.

The husband would be seen as the head of the household even in the face of evidence that he was the one with less resources. In a case in which a husband

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[260] *Doyle v. Jessup* 29 Ill. 460 (1862) and *Yundt v. Hartrunft* 41 Ill. 9 (1866).
[261] *Yundt v. Hartrunft,* 12.

did the agricultural work on land that belonged to his wife and in which it remained to be determined who owned the products raised on the farm, the court was in a bind. By statute, a husband could not interfere with or control the separate property of his wife, and the court knew it had to "proceed cautiously."[262] It finally determined that the materials produced from his labor on her land were his property, notwithstanding the married women's property act of 1861, because he occupied the land for the benefit of the family.

Matters were even less clear when articulating the difference between a wife and a servant, or between a child and a servant, but there were distinctions nevertheless. Such distinctions were raised in a number of intriguing cases in which women came forward to claim that even though they were nominally daughters, they did the work of servants and felt that they were treated as servants, and hence demanded compensation for their housework.[263] The courts consistently found that these complainants were all members of the family, but in a peculiar way. The way that the court identified them as family members was not that they found that the women's claims to performing service were unfounded; all family members performed services within the home, and courts recognized that. To perform service within the household did not destroy the purported intimacy of the family.

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[262] *Elijah v. Taylor* 37 Ill. 246 (1865) 249.

[263] The idea that family services to one another did not require compensation was one that nineteenth century suffragists challenged, to no avail. Even though married women won the right to retain their own earnings for labor outside of the home, they could not earn money for services rendered to their families, courts reconceiving their services as performed out of love and affection for their families. Reva Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880," *Yale Law Journal* 103 (March 1994) 1073-1217; Siegel, "The Modernization of Marital Status; and Stanley, *From Bondage to Contract*, 175-217.

The presence of service within the domestic relations has prompted the political scientist Sara Zeigler to identify the labor contract as the essence of the contract underlying the domestic relations, that when entering marriage a wife agreed to be her husband's servant, doing household chores, making herself sexually accessible to her husband, bearing and babysitting her own children. All of these were part of her contract for services.[264] As these cases suggest, however, while services are present in all of the domestic relations, we cannot reduce the relation to this service aspect, and judges did not either. The thing that distinguished a child from a servant was not that the servant performed household service, for the legal question in the cases was not whether the women had actually performed the services. The question was whether they were treated as members of the family. To be a child was not to be a servant. While a child and servant might do the same things, their status was not the same.

In confronting the questions raised in these cases courts were able to refine what it meant to be a member of a family. One way in which this situation would arise was if a child remained with the family after coming of age. If no express contract was made, then the services of that adult child were performed as a member of the family, and she could not expect compensation. This rule was questioned by an adult woman whose position as the child in the family seems to have been peculiar in that she was her father's child from his first marriage. She remained living with the family until she was thirty-six years old and wanted to be compensated for serving as the family's domestic servant. The court found,

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[264] Sara Zeigler, "Wifely Duties: Marriage, Labor, and the Common Law in Nineteenth-Century America," *Social Science History* 20 (Spring 1996) 63-95.

though, that she was a member of the family and thus could not be compensated. There was a rule that such service "naturally arises out of the relation of parent and child," but the court did not simply look to this rule; it also weighed evidence of how she was treated and whether she was treated differently from the other girls in the family. Finding that her father furnished her clothing and that she ate with the family indicated that she was, indeed, treated as a member of the family.[265] Rather than merely applying common law rules of parent and child, courts were constructing new grounds for how family members were expected to treat each other.

A similar case in which a child had been taken in to her grandmother's family and remained until she was twenty-seven years old relied on evidence that her grandmother clothed and nurtured her and sent her to school to determine that she was treated as a member of the family and not as a servant.[266] Another woman tried to recover $965 from her father-in-law's estate for nursing him in his final illness. She actually won the jury trial, but the appellate court ordered a retrial which would allow evidence of the things that the father-in-law had provided: he furnished a home for her and her husband on his farm, he had bought all groceries, furnished household servants, furnished provisions, furnished furniture, and he had bestowed gifts, including a $60 silk dress. The reason for allowing this evidence into the retrial was not to show that she had already been paid but to show that they had lived as one family.[267]

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[265] *Miller v. Miller* 16 Ill. 295 (1855).
[266] *Cooper v. Cooper* 12 Ill. App. 478 (1882).
[267] *Johnson v. Johnson* 100 Ind. 389 (1885).

A child who was taken in to her aunt's family and "made visits at her pleasure, using the horse and buggy of the family, was well dressed, had pin money, and went into general society of the neighborhood" was a member of the family, not a servant. She was also essentially paid, being left $200 when her aunt died and living rent-free on the farm owned by her uncle, who subsequently conveyed the land, worth $1,000, to her and her husband for $1.[268]

As these cases indicate, there is much that these *quasi*-children and servants had in common. They performed services and they received some form of compensation. The crucial distinction lay in how courts viewed that compensation. Servants were paid a wage, children were supported, their education and social lives advanced. To reimburse a child was done in a different spirit than paying a servant's ages, and it is that spirit that the court saw as setting the family apart from mere contractual relations.

Servants, then, were present in the household, but there were limits to the extent to which they were part of the family. Social historians have shown how this ambiguity of the servant was manifested in the architectural trends of the middle-class nineteenth century household. With the growth of large family fortunes and the rise of the middle class, beginning in the 1840s, those with new money sought to acquire servants as a sign of prestige and to distinguish themselves from those servant. A number of practices were available to mark differences in status—mistresses might dole out small or inferior portions of food, which would be eaten on plates reserved just for servants. Whereas earlier in the

[268] *Patterson v. Collar* 31 Ill. App. 340 (1888).

century, household help might have eaten with the family, by the late century, servants were not welcome at the family table. Architecture of the day tended to separate the house by class distinction, insulating servants and workplaces from the family living areas: "Back entrances, back stairways, bedrooms tucked away in rear portions of houses and attics, and service areas partitioned from living quarters by halls, pantries, and doors allowed servants to travel inconspicuously from cellar to attic and to enter and leave a house unseen."[269] So even though it remained common for domestic servants to live in the homes of their employers, they occupied a marginal position in the household and did not consider themselves to be part of the family, as evidenced by the statements of servants themselves: "'Home is the place where the loved ones live,' one servant said, 'a place of freedom, with the companionship of equals on equal terms. Home is not the kitchen and back bedroom of a house belonging to another.'"[270]

Looking at the household through the lens of the domestic servant allows us to identify the status and hierarchy that remained in the home. Despite rendering domestic services, a child was not a servant; nor was a wife. The child and wife enjoyed a privileged status over the servant.[271] The way to preserve that status was to maintain the domestic relations. In insisting that the wife and child were not servants, the courts had to maintain their status as wives and children, the tools for which were contained in the common law domestic relations.

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[269] Daniel Sutherland, *Americans and Their Servants: Domestic Service in the United States from 1800 to 1920* (Baton Rouge: Louisiana State University Press, 1981) 30.

[270] David Katzman, *Seven Days a Week : Women and Domestic Service in Industrializing America* (New York : Oxford University Press, 1978) 161.

[271] Part of this status was that they did not get paid for their services in the home, a factor that was ignored when the earnings statutes were passed. See Reva Siegel, "Home as Work" and Joan Williams, "Is Coverture Dead?"

Hierarchy thus served to retain intimacy; in setting family members apart from servants, courts could ensure that the family and its relations remained distinct from contractual market relations.

Intimacy was the trope that drove this reassertion of the domestic relations. It served to circumscribe the home from the larger, impersonal society. Within the home, intimacy separated the family as kin from the legal construct of the household. This intimacy was expressed through hierarchy—a father showed his love for his child by providing for that child, a provision that was ensured through the common law obligations that a father owed his children. Whatever the role that the Victorian language of intimacy may have had socially, when applied in the law it offered new explanations for retaining feudal social arrangements. This finding comports with other literature that has found that status regimes can survive progressive reform in modern guise. It also serves to show why coverture was maintained during a time when it could have been radically reformed. If the state-level actors in the previous chapter expressed the need for social relations, the focus on servants in this chapter has clarified what those needs were. The state saw a need to maintain personal relations in the midst of broad and depersonalizing change. The remaining domestic relations proved to be the site of protection of intimate relations.

We can recognize the reliance on the domestic relations to ensure intimacy as the limits of liberalism. Certain citizens would have to remain in the domestic relations in order to achieve this social purpose. For states in the 1870s and 1880s, there was more to liberalism than its abstract ideals, and they were willing

to sustain the domestic relations in both their status and hierarchy. In the domestic relations was a denial of liberal principles but it was also seen as a site of intimacy that the liberal principles could not provide.

Chapter Four: Liberal Abstractions

In previous chapters I have shown that the common law and liberalism were compatible both in Lockean liberal theory and in a form of liberalism evident in states in nineteenth-century America. Locke incorporated the common law into his liberal theory and reformers of marriage law were able to see reform as rectifying the hierarchy of the marital relation while retaining its status. This is not a version of liberalism that is often recognized as liberal, however, because liberalism has developed since then and has come to be defined solely in terms of its abstract ideals. This might seem to be an unproblematic development, because with the loss of the common law went the loss of legitimacy of it as a system of social ordering. While this would seem to be a basic product of progress, in this chapter and the next I inquire into what a liberal society loses when it develops in this way.

The development of liberalism from a doctrine that accommodated the common law to one that set itself apart from the common law is itself the product of a tension that has always been present in liberalism. If Lockean liberalism sustained both liberal ideals and the common law, and nineteenth-century American states perpetuated it, then sooner or later someone was going to rely on those ideals to apply to the hierarchy of the common law. Given the prevalence of coverture and the disabilities it placed on married women's civil rights, which in turn justified the denial of political rights for all women, it should come as no surprise that woman rights activists of the nineteenth century sought to abolish

coverture in addition to their struggle to obtain suffrage for women. To do so, they appropriated ideals of liberalism and made them apply to women. They generated a liberal argument that is familiar to us today. In this chapter I present their form of liberal argument as well as a critique of that form by the twentieth-century feminist Mary Ritter Beard. Beard's critique, itself derived from the skepticism of general ideas displayed by Alexis de Tocqueville in *Democracy in America,* provides a framework for seeing what is wrong when liberalism develops so as to be understood only in terms of its abstract ideals.

THE SUFFRAGIST LIBERAL ARGUMENT

Woman rights activists in the nineteenth century knew firsthand the experience of the common law domestic relations, as the law of husband and wife as expounded by Blackstone was, for the most part, in operation in America.[272] Some of them were also well-read and educated in activism through their

[272] I say "for the most part" because, although the rules regarding the husband-wife relation looked to be reproduced in American law, there were exceptions available through equity. Equity, the legal principle dating back to Aristotle and St. Thomas Aquinas, allowed for exceptions to the law when rigid adherence to the law would result in injustice. Equity was administered through the law through courts of chancery—special courts dealing specifically with equity—or through equitable decisions made by the highest courts of states without courts of chancery. Equitable procedures included antenuptial contracts and the use of trustees who held property in their name for use by married women. For discussions that argue that the actual, lived condition of married women was ameliorated by resort to equity, see Mary Ritter Beard, *Woman as Force in History: A Study in Traditions and Realities* (New York: Collier Books, 1946; reprint, New York: Octagon Books,1976) and Norma Basch, "Equity vs. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson," *Journal of the Early Republic* 3 (Fall 1983) 297-318 and Basch, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," *Domestic Relations and Law* ed. Nancy Cott (Munich, New York: K.G. Saur, 1992). Carol Elizabeth Jenson, on the other hand, points out that the use of equity was limited to the upper classes and thus only of use to a small number of married women in "The Equity Jurisdiction and Married Women's Property in Ante-Bellum America: A Revisionist View," *International Journal of Women's Studies* 2, No. 2 (1979): 144-154.

participation in the abolition movement.[273] Elizabeth Cady Stanton and Lucretia Mott were among the small group of women to organize the first woman's rights conventions in 1848 at Seneca Falls, where they drafted the Declaration of Sentiments. This document was modeled on the Declaration of Independence, and like its predecessor, it identified the aggrieved—in this case, women—and the oppressor—in this case, mankind. Relying on the Declaration of Independence's natural rights arguments they proclaimed the injustice of this oppression and, of course, attached a list of grievances which included:

> He has made her, if married, in the eye of the law, civilly dead.
>
> He has taken from her all right in property, even to the wages she earns.
>
> He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.[274]

These particular grievances refer to the condition of married women under coverture. The unity of husband and wife under coverture rendered the wife civilly dead in that her identity was covered by her husband. The denial of property rights and earnings were legacies of coverture (and, incidentally, the

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[273] Eleanor Flexner explains that the woman's right movement may have grown out of the exclusionary aspects of the abolitionist movement. At the World Anti-Slavery convention in London in 1840, it was decided that women could not be seated at the meetings. Excluded from the meeting, Lucretia Mott and Elizabeth Cady Stanton commiserated on the position of women. *Century of Struggle: The Woman's Rights Movement in the United States* (Cambridge: The Belknap Press, 1975) 71.

[274] The Declaration of Sentiments in *History of Woman Suffrage* Volume I, ed. Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage (New York: Fowler & Wells, 1881) 70-73.

major areas of reform in the nineteenth century).[275] A woman who committed a crime in the presence of her husband was presumed to have acted under his coercion, and so the law did not recognize her as an individual culpable for her own actions. As head of household, the husband could expect his wife's obedience and he could beat her with a switch no larger than his thumb.

Having aired these grievances in the Declaration of Sentiments, a group of suffragists went on to work for the abolition of coverture at the same time as they fought for women's right to vote. To do so they relied on the principles of the Declaration of Independence—the ideas of equality and right to revolution of the Declaration—and explicitly relied upon liberalism. Liberalism provided grounds for hope and reform in its promise of social equality and progress. Liberalism could be used to eliminate the hierarchies of the past.

When the suffragists used the term *liberal* it is not clear which liberal tradition they were drawing upon. They invoked Lockean ideas in the Declaration of Sentiments, but their later discourse would seem to be influenced more directly by Mill. Indeed, they referred to Mill explicitly and often, referring to both his work (and that of his wife, Harriet Taylor) and his advocacy of

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[275] The common-law rules of coverture were reformed by states throughout the nineteenth century, beginning in the 1830s. The initial statutes allowing married women to won their own property were passed by southern states as a way of relieving families of being deprived of all property owing to a husband's debts. Statutes passed in the North were precipitated by fathers who wanted to protect their family property from use by their sons-in-law. See Elizabeth Warbasse, *The Changing Legal Rights of Married Women, 1800-1861* (New York: Garland Publishing, 1987); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Peggy Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation* (Westport: Greenwood Press, 1980). Woman rights activists became involved in the passage of some of the later property statutes and in the passage of statutes that allowed married women to retain the money they earned. See Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930," 82 *The Georgetown Law Journal* 2127-2225.

women's rights in the British parliament. They also adopted his form of liberal argument. In *The Subjection of Women,* Mill declares that "the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality."[276] He saw this change as inevitable, as inequality was at odds with the tendencies of a modern society, especially since it was based on nothing more than women's inferior strength, itself a justification at odds with a civilized society.[277]

Mill thus attributes women's inferior legal status to the physical explanation of strength, lending credence to his explanation that inequality was brutish and archaic and that it should therefore capitulate to the progressive doctrine of equality.[278] The suffragists adopted this form, both in casting the common law as archaic and liberalism as progressive. If this is so, then one could conclude that the suffragist discourse is simply a reliance on Mill's liberalism in America, except that their argument had repercussions for Lockean liberalism in America. By shaping Locke's right to revolution in this form of argument, we begin to see Locke's liberalism modeled on this form of argument, with the ideals being seen as progressive and the common law as barbaric and outside of liberalism.

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[276] John Stuart Mill, "The Subjection of Women," in *Mill: The Spirit of the Age, On Liberty, The Subjection of Women* ed. Alan Ryan (New York: W.W. Norton, 1997) 133.
[277] Mill, 136-137.
[278] In this explanation, Mill is employing a method of analysis that is still present in liberal thinking. One casts the illiberal doctrine as archaic and comprise for it an explanation that it is out of sync with progressive liberal norms. The presence of this illiberal doctrine thus looks out of place and in contradiction to liberalism, and the logical recourse is to allow it to fall to progress.

The suffragists relied on this liberal argument throughout the late nineteenth century, as their activism continued. Leaders of the National Woman Suffrage Association, Elizabeth Cady Stanton, Susan B. Anthony and Parker Pillsbury, who had split from the Republican Party after the failure of women to be included in the Reconstruction Amendments, began a newspaper called *The Revolution* in 1868 with the slogan, "Principle, not policy—Justice, Not Favors—Men, Their Rights and Nothing More: Women, Their Rights and Nothing Less."[279] It stated its editorial commitments to promoting universal suffrage, equal pay for women, an eight-hour work day, broader ideas in religion, greenbacks for money, and organized labor. It also devoted many pages to publicizing the injustices of coverture. The first issue contained a report of a lecture delivered by Lucy Stone to the Brooklyn Academy. She began by talking about the denial of women's political rights to vote and to serve on juries and then went on to talk about the plight of married women. Husbands controlled family property and children. A woman had no legal existence, she was given to her husband as chattel. All of this was owing to the common law:

> The old barbarous law of England in respect to the rights and status of women was the law of nearly every part of the Union to this day; a law which gives her to her husband as a chattel, annihilated her personality, and only preserves her the right of being maintained.[280]

Another article educated readers on marriage by suggesting that, frankly, one was better off being a mistress than a wife. A reader had written a letter to the editor, arguing that it was less dishonorable to be a mistress than a wife, as a

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[279] *The Revolution* I, No. 2 (January 15, 1868) 8.
[280] Lecture by Lucy Stone: On Suffrage for Woman, at the Brooklyn Academy, Dec. 26" *The Revolution*, I, No. 1, (January 8, 1868) 2.

mistress received some compensation from the man, while a husband could demand drudgery from his wife. In response to reader outrage to such a suggestion, *The Revolution* educated its readers on the position of women by offering a lesson in the laws of marriage and divorce, whereby it would make clear that while a mistress may carry an inferior social position, a wife carried an inferior legal position. Citing Coke, Kent and Blackstone, the leading British and American commentators on the common law, the article educated readers on the wife's status as *feme covert* and lists the disabilities of the wife, declaring, "We have not yet outlived the old feudal idea, the right of property in woman."[281]

The Revolution also targeted religion as the source of women's inferior position. When faced with the *New York Times'* admonition, explicitly directed to the women involved with *The Revolution*, to heed St. Paul's advice, "Wives submit yourselves to your own husbands as unto the Lord," *The Revolution* responded that when the time came that women had husbands as virtuous and wise as Christ, then they would respectfully submit. Until then they would work to strike the word "obey" out of the marriage vows.[282]

In the first volume of *History of Woman Suffrage*, a multi-volume, comprehensive account of the feminist movement first undertaken by Stanton, Anthony and Matilda Joslyn Gage and later completed by other women in the movement, Gage wrote a chapter on "Woman, Church, and State." Here she traces the history of the Church to argue that the Church's long disdain for women

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[281] "Marriages and Mistresses," *The Revolution* Volume II No. 15 (October 15, 1868) 233. Mary Ritter Beard points out that the accessibility of the common law is what allowed it to be so well-known and misinterpreted by lay readers. See *Woman as Force in History*,

[282] "St. Paul on Duties of Wives," *The Revolution* II, No. 5 (August 6, 1868) 73.

permeated the common law. She conducts a revisionist history of the Church to demonstrate the ways in which it oppressed women, considering them to be evil, wicked, and unworthy of independent existence. She presumed that this history might shock modern readers: "To persons not conversant with the history of feudalism, and of the Church for the first fifteen years of its existence, it will seem impossible that such foulness could ever have been part of Christian civilization."[283]

These examples present women's subjugation by both Church and law as part of a barbarous past that was at odds with modern sensibilities. The solution lay in liberalism, which *The Revolution* defended in one article by using a series of dizzying mixed metaphors: While the conservative might advise that things be left alone, the liberal knows that society has been "accumulating with dust and mould" and must be "swept" occasionally. Liberalism is likened to a cleansing storm, to a hewn forest. The liberal has the "eagle power of discernment" to perceive what reforms need to be made. The article continues in this manner, using imagery of nature to demonstrate its adherence to natural law and references to sight to demonstrate its enlightened perspective.[284]

This keen, enlightened, liberal perspective was employed in attempts to reform religion. Hence *The Revolution* regularly advertised for the weekly newspaper, *The Liberal Christian,* whose bold ads proclaimed it to be not only full of the best essays and criticisms, but "rich, spicy, able and liberal."[285] Just as

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[283] *History of Woman Suffrage* 762.
[284] "Liberalism," *The Revolution* I, No. 18 (May 7, 1868) 278.
[285] Advertisement in *The Revolution* II, No. 1 (July 9, 1868) 16 and elsewhere.

religion could be reformed by liberalism, so, too, could the law. The passage of the Married Woman's Property Act of 1848 was hailed as "the death-blow to the old Blackstone code for married women in this country, and ever since legislation has been slowly, but steadily, advancing toward complete equality."[286]

There is much that is sensible in the strategies the woman activists chose in their efforts to abolish coverture. They recognized the systems that subjugated women and relied on a discourse that was central to American political thought—the Declaration of Independence. After Seneca Falls, they continued to rely on the Lockean liberal ideals that undergirded the Declaration of Independence and sustained arguments that remain persuasive to readers today.

In relying upon liberal ideals, they juxtaposed liberal ideals to an archaic common law and cast the common law—the source of laws governing husband and wife—as barbaric. While this might seem like common sense to readers today, these activists were, in fact, presenting a version of liberalism that they had constructed. As I showed in previous chapters, liberalism was not always thought of in terms of this juxtaposition. Locke had incorporated the common law domestic relations into his liberal theory, and members of state government institutions had retained these relations even as they reformed them. The suffragist argument is distinctly different from these versions of liberalism because it juxtaposes the common law domestic relations to liberalism and renders them illiberal rather than compatible with liberalism. In adopting the Lockean ideas via the Declaration of Independence, the suffragists chose to adopt

[286] Stanton et al., 64.

the Lockean ideals of individualism in the public sphere and make them applicable to women. Locke did not see individualism as unqualified, especially in regards to the family, the site of women's subjugation. By rendering the version of liberalism that they did, the woman rights activists defined liberalism solely in terms of its ideals, specifically individualism and equality, and cast the common law as barbaric and decidedly illiberal.

This development in liberal thinking in America allowed for liberalism to be expansive and to apply to previously-excluded groups. Liberal terms such as *equality* can have variant meaning over time and even at the same time. J. David Greenstone used a Wittgenstein approach to language to show that differences over the same liberal terms displaced Hartz's consensus thesis, but we could use the same theory to see liberalism as inviting its own expansion through this contest over meaning[287] This is a version of liberalism that has come to be associated with the story of American citizenship. And yet, recognizing that it is a construction of liberalism, one can pause to ask about the consequences of such a development. In expanding liberalism and recasting it according to its "best" traits, did liberal thinking in America lose anything? One can identify the loss in a number of ways. Mary Ritter Beard did so in the mid-twentieth century with her Tocquevillian analysis. Given Beard's critique, one can turn to late-twentieth century constitutional discourse to assess the legacy of this version of liberal thinking.

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[287] J. David Greenstone, "Political Culture and American Political Development: Liberty, Union, and the Liberal Bipolarity," *Studies in American Political Development* 1 (1986): 18.

MARY RITTER BEARD

Mary Ritter Beard was a feminist of the twentieth century who co-wrote books on American history with her husband, Charles Beard, and wrote books of her own on women's history. Beard's work is known among contemporary feminists, particularly owing to her attention to equity in American history.[288] Beard was critical of the suffragists' vilification of the common law, finding it to be extremist and inaccurate, as married women always had courts of equity at their disposal to ameliorate the harshness of the common law. Beard furthermore found that the story of women in history as told by the suffragists portrayed women as victims to forces in history. Part of Beard's career-long effort was to recover the story of woman as agent in history. This is why equity was so important for Beard; it demonstrated that women would not just let themselves be put down by the common law. They had the wherewithal to seek a remedy, which they found in courts of equity.

Beard criticized the woman suffragists specifically for their reliance on the idea of equality. This, in part, can be seen as a product of her time. Beard had been involved with both the equality- and labor-feminists of her generation. She had been active in the later years of the suffrage movement, having worked with the Woman Suffrage Party until she broke from it in 1913.[289] She worked with

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[288] See Basch, "Equity v. Equality;" Jenson; Nancy Cott, ed. *A Woman Making History: Mary Ritter Beard Through her Letters* (New Haven: Yale University Press, 1991).

[289] Nancy Cott has shown that Beard had differences with members of the party over the treatment of Emmeline Pankhurst, (Cott, 14) which she addressed in her essay**,** "Have Americans Lost Their Democracy?" *Mary Ritter Beard: A Sourcebook* ed. Ann J. Lane (New York: Schocken Books, 1977) 85-88. In this essay, she laments the hostility shown to Pankhurst, a radical suffragist from England, during her 1913 visit to the United States. Beard was disappointed that Carrie Chapman Catt, leader of the Woman Suffrage Party, did not support Pankhurst.

the more radical Congressional Union, but inexplicably dropped out of that organization in 1916. She had also been a longtime member of the National Women's Trade Union League as well as a member of the Woman Suffrage Party. After suffrage was achieved, the feminist movement split between those feminists who wanted to work for an equal rights amendment and those who wanted to work for labor legislation.[290] It would seem likely that Beard would not side with the equality feminists, as she was committed to labor reform. While she was explicitly critical of equality feminists, she did not completely side with labor feminists, either, because labor feminists, in an attempt to get labor legislation passed in the period before the 1930s, singled out women as requiring protection. This position was the one for which Beard criticized the nineteenth-century suffragists, because it placed women in the position of passive victim, and Beard was committed to recovering women's agency, illustrated in the title of her work, *Woman as Force in History.*

Nancy Cott sees Beard's opposition to equality discourse as a critique of individualism, a critique that was reinforced by the perils of laissez-faire philosophy, as seen in the Great Depression.[291] This would make Beard's critique comport with her husband, Charles Beard, who is best known in political science for his "Economic Interpretation of the Constitution."[292] Mary Beard's

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[290] Joan Zimmerman has explained that each group chose their plans strategically, with the equality feminists basing the ERA on the Thirteenth Amendment and labor feminists choosing protective labor legislation. "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital,* 1905-1923," *The Journal of American History* 78 (June 1991) 192-193.

[291] Cott, 38

[292] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: The Macmillan Company, 1935).

arguments certainly do include arguments against individualism. In "Feminism as a Social Phenomenon," Beard traced the history of the woman's movement as originating in Enlightenment philosophy, rooted specifically in the ideal of progress and in Rousseau's doctrine of equality, but that these humanistic impulses eventually degenerated into excessive individualism.[293] It would reduce Beard's critique to mere economic explanation, however, to see her critique of equality as a simple critique of rugged individualism. Beard elides simple compartmentalizing, for her critiques transcended the political divisions of her day. To identify Beard's argument, one can look to the text of her works, which reveals a critique of equality that is rooted not so much in the conflicts of feminism in her time so much as in a critique of the way that equality is employed in political discourse. One can discern this feature of Beard's position by garnering in her work the thoughts of Alexis de Tocqueville, who captures the problematics of equality when it is used as a general idea.

Beard found that the suffragists exaggerated the victimization of women in American history and in doing so turned to the general idea of equality to rectify their treatment. Thus her critique of feminists' equality discourse begins with the rendition of history told by the suffragists. In trying to bring attention to the condition of women, suffragists overstated the disabilities of married women, pointing to Blackstone as the source of their troubles. This was an argument that originated with Mary Wollstonecraft and was perpetuated by the American

[293] in Lane, ed., 168-171. Originally published in *Woman's Press Magazine* (November 1940).

suffragists. Beard sees this as a clever tactic, because Blackstone was so accessible by a popular audience:

> [F]or a law work, it was written in free, flowing, and popular style, so that any literate person of a little more than ordinary intelligence could by a few months' close study make himself master of its leading principles. With relief, law students could neglect the qualifying provisions of Equity and put aside the more difficult texts of Littleton tenures, Coke's commentaries on Littleton, and Coke's institutes—all of which called for hard work if they were to be mastered. In short students could get their legal 'education' from 'the elegant Blackstone,' with relative ease."[294]

Beard saw Blackstone's *Commentaries on the Laws of England* as the text of choice for the lazier sort of lawyers as well because it was so accessible:

> It is also a matter of historical record that for nearly a century or more Blackstone's *Commentaries* was a standard textbook for the training of lawyers, particularly in the United States. The work was written with such rhetorical persuasiveness and such display or semblance of learning, that it captivated innumerable students of law.[295]

Despite the popularity of Blackstone, Beard claimed that the common law was simply never as bad or pervasive as the suffragists had claimed. People who were better trained in law, Beard explained, understood Blackstone's *Commentaries* to be incomplete, because British law also included laws of Parliament, laws of custom left undisturbed by the common law, and equity, in addition to those private practices of men and women who lived their lives outside of the common law rules. Nevertheless, the suffragists relied on Blackstone as the definitive text on the law of husband and wife in America:

> Mrs. Elizabeth Cady Stanton, an outstanding pleader for women's rights before law-making bodies, spoke and wrote as if Blackstone's account of

[294] Beard, *Woman as Force,* 120.
[295] *Ibid.,*, 89.

> English law was in fact the law of the land.…she repeatedly resorted to wholesale generalizations which treated Blackstone's sweeping generalizations as still binding in law, even to her day in the United States.[296]

Apart from the selective reporting of systems of law by Blackstone, there was another reason why the common law of Blackstone could not gain hold in America. Beard's discomfort is not limited to Blackstone's inattention to equity; Blackstone could not be adopted wholesale in America because of an American spirit, as Beard explains in chapter six of *Woman as Force in History:*

> The mounting democratic spirit, associated with the comparatively wide distribution of freehold land ownership and the love of liberty underlying the migration of many Europeans to the new world, did not comport with the aristocratic servitudes of old feudal land tenures.[297]

It is here that Beard's analysis becomes marked by similarities to the work of Alexis de Tocqueville. This passage contains a number of references to Tocqueville's *Democracy in America*. The allusion to "the mounting democratic spirit" reminds one of Tocqueville's initial discussion in the introduction to Democracy in America. He asserts that "[a] great democratic revolution is taking place among us," a revolution whose forces are "irresistible."[298] The equality that characterizes this revolution is "the generative fact from which each particular fact seemed to issue;"[299] Facts about American society could be traced back to their source, the equality of conditions. Beard's mounting democratic spirit is similar, a force that is growing and that colors other social aspects.

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[296] *Ibid.,* 126-127.
[297] *Ibid.*, 288.
[298] Alexis de Tocqueville, *Democracy in America* tr. and ed. Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000) 3.
[299] *Ibid.*, 3.

Beard's reference to freehold land ownership in the quotation above is a curious choice to characterize the American democratic spirit, but not so curious when one is reminded that Tocqueville saw reform in estate laws, particularly primogeniture, as an underrated influence upon human affairs.[300] If Beard was paying homage to Tocqueville, then this was one way. Finally, there is her peculiar characterization of the old feudal land tenures as aristocratic. In the feminist complaints against the common law, the old legal system tends to be referred to as feudal or barbaric, but seldom as aristocratic. Beard's characterization of it as aristocratic evokes *Democracy in America's* contrast between American democracy and French aristocracy.

Beard's implied references to Tocqueville in this passage indicate that there may be deeper similarities to Tocqueville in her thought.[301] Tocqueville, too, was wary of Americans' use of equality as ideology. Beard and Tocqueville meet in their critiques of equality when used as a general idea. For Tocqueville, general ideas grew out of the need of the human mind to make sense of the many ideas in its world: "General ideas are admirable in that they permit the human mind to bring rapid judgments to a great number of objects at one time, but on the other hand, they never provide it with anything but incomplete notions, and they always make it lose exactness what they give it in extent."[302] When general ideas

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[300] *Ibid.*, 47-48.

[301] Note that Beard does not explicitly reference Tocqueville here; the similarities I draw are my own. She did, however, research Tocqueville in *The American Spirit: A Study of the Idea of Civilization in the United States* Charles Beard and Mary Beard (New York: The Macmillan Company, 1942) 170-177.

[302] Tocqueville, 411. James Ceaser has shown that Tocqueville's distrust of general ideas grew out of his distaste for intellectual developments of his own day, with abstract thinking replacing original formulations of the rationalist, empirical methods. "Alexis de Tocqueville on Political

are accepted by a population, people begin to lose the capacity to think for themselves: "These abstract words that fill democratic languages, and of which use is made at every turn without linking them to any particular fact, enlarge and veil a thought; they render the expression more rapid and the idea less clear."[303] People think that they have mastered ideas because they have the abstract language for it, but when it comes right down to it, abstract language is vague and obfuscating.

For Tocqueville, one of the most dangerous of the abstract ideas plaguing a democratic society was equality. When equality came up against liberty in the affections of the people, equality would easily win, for equality was the easier sell. While freedom required responsibility, "the advantages of equality make themselves felt from now on, and each day one sees them flow from their source."[304]

Beard, too, finds equality to be an easy sell by the suffragists. When she recounts the choices made in strategies at Seneca Falls, she remarks:

> Here they set forth for themselves and for generations of women to come the ideal that freedom from tyranny required complete and unconditional equality with man—with the male creature who had, throughout history, pursued as a 'direct object the establishment of an absolute tyranny over' woman….in their prolonged contest for equal rights with men, leaders of the woman movement steadily fixed their attention on legal and political equality rather than on woman's force, potentialities, and obligations.[305]

Science, Political Culture, and the Role of the Intellectual," *American Political Science Review* 79 (September 1985) 656-672.

[303] Tocqueville, 457.

[304] *Ibid.*, 481.

[305] Beard, *Woman as Force,* 158-159.

Even as she is critical of their tactics in choosing equality as slogan, she admires it for its salience:

> Unquestionably there was dynamism in the slogan: Equality! Here was a formula of perfection, hoary with age and ringing with revolutionary associations. The women of '48 did not invent the word or the idea behind it. They adopted a conception older than Christianity, an ideal pagan in origin. The utter simplification of historic processes, the propagandistic convenience, and the flavor of utopian grandeur represented by equality furnished fuel for a fiery crusade.[306]

The problem with equality, for both Tocqueville and Beard, was that it was difficult to render this appealing and abstract idea concrete. The abstract idea was held up as a belief, but it could never be actually instituted. It holds as a lure the perfectibility of man, an ideal which is impossible to achieve, "the image of an ideal an always fugitive perfection is presented to the human mind."[307] Apart from ideals of perfection, basic assumptions about complete equality are not achieved; the notion that all are equal is simply not reflected in reality. The psychological cost is high; Americans tend to envy others because each knows that he has not achieved the position of others, but the ideal tells him that he is entitled.

> Democratic institutions awaken and flatter the passion for equality without ever being able to satisfy it entirely. Every day this complete equality eludes the hands of the people at the moment when they believe they have seized it, and it flees, as Pascal said, in an eternal flight; the people become heated in the search for this good, all the more precious as it is near enough to be known, far enough not to be tasted.[308]

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[306] *Ibid.*, 159.
[307] Tocqueville, 427.
[308] *Ibid.*, 189.

Beard found some practical problems arose when equality was attempted to be implemented as a social policy. "Efforts to give constructive concreteness to the idea of equality as the years of the nineteenth century passed led far and wide into sociology and economics, and thus into a maze of perplexities."[309] The problem was compounded when equality was considered between men and women. When equality as concept is applied to the condition of men and women, new questions arise. Does equality mean that all men are to be treated exactly alike? That men and women are to be treated alike? Such questions invite sociological and psychological inquiry into the assumptions behind people's physical natures and mental interests. Beard found such exercises to be futile, and she was particularly disturbed when such questions intruded into the relations of the home. The problem with applying the concept of equality to the home was that it left too much unaccounted for, as she indicates in one section of *Woman as Force in History* entitled "When is equality attained?" The section consists of a series of rhetorical questions that arise once married women were given property rights, matters that the property rights advocates did not foresee or take into account, such as: "Is the wife's separate property liable for the payment of domestic servants engaged in doing the household work of the family?" "May the husband require the wife to earn all she can to help support the family?" "Is the failure of a husband to support his wife, save in case of sickness or of extremely extenuating circumstances, to be regarded as a punishable crime after the enactment of the married woman's property law?"[310]

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[309] Beard, *Woman as Force,* 163.
[310] *Ibid.*, 178-179.

Beard was pointing out that the marital relations had traditionally sustained married women's disabilities, but they had also justified husbands' obligations to their wives and families. Once married women gained property rights, did the obligations remain? The obligations that had always been part of the marital relation were important to Beard, for both Tocqueville and Beard were concerned with social ordering along gendered lines. Beard found it important to maintain gender in the face of equality rhetoric. In *On Understanding Women* she argued that women have made a unique contribution to historical progress, but that their story has been ignored.[311] In private letters, she claimed that she saw woman's unique contribution not as mothers and childrearers but that they had public contributions.[312] In *Woman as Force in History*, however, she does indicate that there is something important about their private contributions insofar as women and men have a status within the family, a status that was threatened by the liberalizing reforms of the nineteenth century:

> Through the long legal struggle between the common law on the one side and statutory and equity law on the other ran the eternal struggle of life—not of individuals, but of men *and* women united by their inexorable relationships—to survive and provide safeguards for each other and for their children, under the law or in spite of it. Here the strength and permanence of the family was an objective.[313]

The individual rights that men and women gave up in the marriage was an important sacrifice, and this sacrifice was threatened by ideals of liberalism, as she reveals in her critique of nineteenth-century laissez faire individualism, which used rhetoric that "was atomistic in its social effects," elevating the individual as

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[311] Mary Ritter Beard, *On Understanding Women* (New York: Grosset & Dunlap, 1931).
[312] Cott, *A Woman Making History,* 226.
[313] Beard, *Woman as Force,* 98.

the unit of society and playing down the family and community.[314] This tension between the individual and family arose when the common law was reformed. While it might sound fairly straightforward to allow married women to own their own property, as states did in the nineteenth century, treating married women as single women raised a host of perplexing situations:

> Is the wife to be free to use her property as she pleases while the husband is in straits to support her and their children? In what, if any circumstances is the wife to be under obligations to support the family in part or whole? Is the owner of the home, whether husband or wife, to be allowed to sell it at will, without the consent of the other party to the marriage contract, and turn the family out of it? These and a hundred other questions taxed the adroitness of law-makers and were answered by women and by men in many different ways. No mere declaration of equality could dispose of them in a few words.[315]

Beard is here referring to the conflict between a married woman gaining individual rights to property with the obligation that the common law placed on both husband and wife for the sake of sustaining the family. Under the common law, the husband did own all the family property, but he was also required by the common law to provide necessaries for the family, i.e., to financially support them. We should note though, that the husband gained some superiority along with his obligations, privilege that Beard chooses to overlook: the husband did have to provide the family with a home, but with this obligation came the discretion to choose where the family would live; the wife's domicile followed that of her husband, regardless of the wife's wishes about where she chose to live. Nevertheless, Beard is trying to get at the fact that men and women assumed

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[314] *Ibid.*, 166.
[315] *Ibid.*, 170-1.

statuses within marriage so that they could fulfill obligations within it. Equality as an idea is no help here, for it abstracts from the actual situation and living conditions of family operation. It could even hinder the carrying out of these obligations when it was used to eliminate hierarchy within the family, destroying at the same time the basis for obligations.

Tocqueville, too, saw gender roles as contributing to the larger social order and, in his estimation, the success of American democracy. When he initially discusses the effects of democracy on the family he explains that paternal authority diminishes in a democracy as compared to an aristocracy, and the father becomes a fellow citizen to his sons rather than their governor. The result is that children become closer to their father. The language here refers to fathers, because the distinction between the aristocratic and democratic family lies in the position of the father as head of the family, but it is not only sons who enjoy the relaxed rules and increased camaraderie within the family; girls benefit, too. In the next chapter Tocqueville describes American girls as independent, free-spirited, and spunky. All of this freedom is put to use, however, so that the girl is free and has full use of her faculties of reason when she makes the contract to marry. She is free to choose her own subjection, for with marriage her life is drastically changed. She must set aside her girlish amusements, not simply because she has to take on adult responsibilities but because she will become subservient to her husband as head of the household. While paternal authority of the father over the son was diminished in a democracy, the patriarchal authority of husband over wife remained. Why, though, did the old common law husband-

wife relation persist in an age when equality was apparently so pervasive? Why did Tocqueville note the passing of other domestic relations—the parent-child and master-servant relations—in *Democracy in America* but not the husband-wife? He explains it through the eyes of Americans, by gauging the limits to the democratic change that they could accept. He sees men and women as being on different paths (which, he says but does not explain, should be seen as different but equally regarded[316]). He ascertains that Americans would never imagine introducing their democratic principles into the family to displace authority, which every association needs.[317] This argument does not hold up, however, for it does not explain why it was acceptable for the family to lose its father as authority while the husband as authority must remain.

He offers further explanation in his connection between family and society. When men and women assume their respective statuses as husbands and wives, they each have roles to play, connecting this role to a larger, American project. In the Appendix, Tocqueville includes a passage from his journal to illustrate the trials of women who accompany their husbands to live on the frontier. During his journey across the United States his traveling party sought to spend the night in a small, remote ramshackle cabin, overrun with unruly children and half-wild dogs. The wife of the family is clearly exhausted, although her face reveals "both melancholy and joy," reflecting the trials and rewards of her job. The husband, though, reveals his own trials as well. Although he officially enjoys the privilege of being the head of the family, the characterization of this particular

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[316] Tocqueville, 576.
[317] *Ibid.*, 574.

husband as representation of the frontier man is not exactly favorable. Tocqueville portrays him as socially inept. When the husband initially saw the approaching travelers he did not come forward to meet them. Once they came inside his house he extended his hand as formal greeting, asked them the requisite questions and answered their questions politely but perfunctorily. He took care of setting up the cabin to house them for the night, but was not gracious, to the point that Tocqueville and his companions were ill at ease: "Seeing him thus engaged in these benevolent attentions, why, despite ourselves, do we feel our gratitude chill? Is it that he himself, in exercising hospitality, seems to submit to a painful necessity of his lot: he sees in it a duty that his position imposes on him, not a pleasure."[318]

In this glimpse into the pioneer family, via Tocqueville's impressions, we see that things are hard on the American wife, but they're not much better for the husband. Each has duties to fulfill for a greater good—to eke out an existence in the frontier, raise a family and be the pioneers in claiming this land for the United States. In this journal entry Tocqueville indicates that this couple hails from New England. Early in the work he indicated that it was the Anglo New Englanders in whom the success of America rested.[319] In the journal entry it is clear that things are not easy for them in the wilderness, that the future rests with them because they are the group with the fortitude to withstand the difficulties of the frontier. As individuals they might choose to opt out of the difficulties; as husbands and wives they persevere. The result? They raise children who are suited for the

[318] *Ibid.*, 701.
[319] *Ibid.*, Book I, Chapter 2.

frontier, children who are "full of health, turbulence, and energy; they are true sons of the wilderness."[320]

When we see the American family in this situation, the roles of the husband and wife become notable not for their hierarchy, or for their setting of the husband above the wife in authority, but for the roles dictated by their status; each must fulfill obligations which may not be pleasant for either of them. They work to sustain the family, which in turn contributes to the success of the nation. Thus Tocqeuville sees marital roles as part of a larger social project.

By reading Beard through Tocqueville one can appreciate that Beard was critical of the suffragists' equality discourse because she was concerned about its effects of the social relations, which played a larger role in service to society. It would be a mistake to simply say that Beard does not see equality as a worthwhile goal, although one might conclude that from her criticism of the suffragists. Beard anticipated that she would be misunderstood and that *Woman as Force in History* would draw the disdain of both feminists and woman-haters.[321] Beard's analysis suggests that equality be used differently. Beard is not simply opposed to equality. Realizing the Tocquevillian character of her analysis helps us to see that it is the *abstract* character of equality that is the problem for her, that it is summoned to the aid of victimized woman in history, that it is a persuasive

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[320] *Ibid.*, 701. Note that if Locke saw the limits of individualism to lie in the unity of family for the sake of property, then Tocqueville saw the limits of liberalism to also lie in the family, but a family put to use for the purpose of expansion (or, imperialism, if you will). In Tocqueville's account, the family is patriarchal, but while the husband enjoys privilege as head of household, both the husband and wife sacrifice their individualism to that their children, and country, can benefit.

[321] Mary Ritter Beard, Letter to Florence Kitchelt, March 17, 1950, in Cott, *A Woman Making History,* 315.

rhetorical device without its content worked out, and that its abstractness threatens to obfuscate social ordering. The Tocqueville and Beard critiques questioned having one's politics being driven by abstractions. General ideas were persuasive rhetorical strategies but did not get one very far when actually implementing change. Both suggest more attention to social needs that have to be met, social considerations that should be judged apart from the standards of equality as abstract idea. We see this in action when Tocqueville touts the democratic character of the family in one chapter and goes on to show that hierarchy still remains in another. Tocqueville was not being inconsistent; he was showing that the democratic standards did not extend into the area in which social needs were met.

Both Beard and Tocqueville are critical of equality in the abstract because it can threaten the status relations, which each of them finds important to maintain. Given the toll that maintenance of these relations has had on women, it might not be apparent why we should pay heed to their analysis today. They each underestimated the toll that these status relations took on women. The obligations of the marital relation that they so admired were secured by hierarchy and male privilege. Tocqueville's brief explanation that women are equally but differently regarded does not serve to secure equality for women, whose life opportunities were limited by the demands upon them in the household.

It was this totalizing effect of the domestic relations on women's identity as citizens that impelled woman rights activists to rely on the ideals of liberalism. Activists demonstrated that women were denied educational opportunities based

on the presumption that they would not need the knowledge or skills of boys in their future vocation as wife and mother. Their livelihoods were thus limited by this expectation for their future, and their political rights were limited as well. As women (whether married or not) lived in a household, and each household had its head, women were said to be represented by their husbands, fathers, brothers or sons. Lucy Stone complained about this virtual representation:

> Would *men* consent to be represented by their wives and sisters? If it were possible for any class to legislate for another, it might be supposed that those who sustain to each other these tender relations, could do so. But we find, that in every State, the laws affecting woman as wife, mother and widow, are different from and worse than those which men make for themselves as husband, father and widower.[322]

Elizabeth Cady Stanton also pointed out the inconsistencies:

> [I]t is only the incidental relations of life, such as mother, wife, sister, daughter, that may involve some special duties and training. In the usual discussion in regard to woman's sphere, such as men as Herbert Spencer, Frederic Harrison, and Grant Allen uniformly subordinate her rights and duties as an individual, as a citizen, as a woman, to the necessities of these incidental relations, some of which a large class of women never assume. In discussing the sphere of man we do not decide his rights as an individual, as a citizen, as a man by his duties as a father, a husband, a brother, or a son, relations which he may never fill.[323]

The suffragists pointed out that the status relations of the home generated identities that women assumed not only in their capacity as wife and mother but identities for which they were prepared through childhood and that continued to mark their adult lives, whether they actually married or not. It was because of the

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[322] Lucy Stone, "Woman Suffrage in New Jersey. An Address Delivered by Lucy Stone Before the New Jersey Legislature," (Boston: C.H. Simonds Co., 1867) 8.
[323] Elizabeth Cady Stanton, "Solitude of Self: Address Delivered by Mrs. Stanton Before the Committee of the Judiciary of the United States Congress, Monday, January 18, 1892," Reprinted from the Congressional Record, 1.

toll that domestic responsibilities took on women's civic identity that the suffragists applied their equality discourse to coverture.

The suffragists did not intend to dismantle the home. They repeatedly stated in their speeches and writings that the home would not be endangered by their ideas. They disputed the suggestion that gaining rights would change their character or their obligations. Lucy Stone pointed out that women had voted during the revolutionary period and years of the early republic in New Jersey, and "Women did not cease to be womanly."[324] They also made the case for improvements in the home:

> Nor will woman fulfill less her domestic relations, as the faithful companion of her chosen husband, and the fitting mother of her children, because she has a right estimate of her position and responsibilities. Her self-respect will be increased; preserving the dignity of her being, she will not suffer herself to be degraded as a dependent.[325]

The suffragists were playing upon a tension within liberalism. While Locke had retained both the individual and the family, the suffragists dissipated that tension by demanding individual rights for women. As Stanton explained, "In discussing the rights of women, we are to consider, first, what belongs to her as an individual, in a world of her own, the arbiter of her own destiny, an imaginary Robinson Crusoe with her woman Friday on a solitary island. Her rights under such circumstances are to use all her faculties for her own safety and happiness."[326] In Stanton's consideration of woman's rights, domestic responsibilities do not arise until the fourth consideration. A woman was an

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[324] Stone, 13.
[325] Lucretia Mott, "Discourse on Woman," (Philadelphia: T.B. Peterson, 1850) 10.
[326] Stanton, "Solitude,"1.

individual first, with the home constituting part of her obligations, but not definitive of her identity.

Regardless of their intentions to maintain the home, the form of their argument was such that liberalism would become unmoored from its common law social ordering. Obliterating the domestic relations was not their professed project. The Beard critique, however, helps one to see that despite these intentions to retain the obligations of the marital relations, the reliance on the use of equality could serve to wipe them out as it was used to dismantle hierarchy. One could say, however, that the suffragists had to form their argument this way owing to the internal tension of liberalism. If liberalism relied on the domestic relations to retain domestic obligations but also advanced abstract ideals, then sooner or later women in the home would avail themselves of the abstract doctrine and apply it to themselves. They were only playing upon a tension.

There is, however, an alternative means of dealing with this tension. Beard has helped us to identify the suffragist argument as not just expansive but as abstract. With this in mind, one can identify liberal arguments that were expansive but did not rely on ideals in their abstraction. There is another way to talk about equality, and that can be found in a debate in Indiana in 1850. In this debate the social reformer Robert Dale Owen tried to include a constitutional provision for recognition of married women's right to own property. He shares sentiments with the suffragists but he frames his arguments in a form that is different in significant ways.

ROBERT DALE OWEN IN INDIANA, 1850

Indiana held a convention in 1850 to revise its constitution. The convention debated married women's property rights at length, and the way that it did so offers the opportunity to examine another use of liberalism by contemporaries of the woman suffragists. During the ongoing debate over an eventually-defeated provision to extend married women's property rights, one is treated to a variety of justifications for retaining coverture and of attempts at waxing eloquent on the natures of men and women. In opposing the status quo of gender relations and stereotyping, the reformers do not rely much on abstract liberalism. Locke is seldom to be seen in these debates. Rather, they debate within the area of the social aspects of liberalism, the debate being a contest over who can best provide for these social imperatives. The framing of the debate in this manner allows the reader to get past the inequality and the rest and to isolate the social elements of liberalism, to identify what social imperatives that generation perceived. This debate provides one of the few opportunities to see protracted debates over the common law.

When the Indiana constitutional convention convened to revise the state constitution the delegate Robert Dale Owen was already a familiar figure. The son of Robert Owen, founder of the socialist utopian community, New Harmony, Owen had spent his earlier career founding a community for former slaves, editing a freethought newspaper n New York, and serving in both the Indiana and U.S. House of Representatives. In his newspaper he had publicly advocated for women's rights and had published tracts on birth control and divorce reform.

Owen introduced his proposal with references to inalienable rights. References to him in *History of Woman Suffrage* make it clear that he ran in the suffragist circles.[327] His time spent in New York would have exposed him to the liberal arguments and activists of the day. Mary Ritter Beard includes him in her litany of activists who were expounding abstract liberalism.[328] Owen would therefore appear to be a liberal akin to the suffragists, but his liberal argument was carried out differently. While Owen and other reformers were clearly motivated by egalitarian concerns, they did not suggest that Indiana attempt to achieve complete equality at the expense of social structures. Rather, they suggested that laws could be equalized without destroying the home. Certainly Mill and the suffragists expressed the same sentiments, but Owen went further to present empirical arguments to show that husbands and wives would still get along, that women would still tend to their domestic duties, and that these limited reforms in property rights would not usher in larger reforms in political rights.

While a member of the Indiana House in 1837 Owen had introduced a married woman's reform bill. It failed, but at the time he suggested that Indiana adopt Louisiana's civil law system of marital relation and property. This suggestion was not forgotten by the delegates to the constitutional convention, and they were prepared to defend the common law against the reforms of Owen in 1850. In 1847 the Indiana legislature did pass a law allowing married women to

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[327] See *History of Woman Suffrage* 2, 292-3 for Owen's collegial letter to Susan B. Anthony; 293-306 for a "glimpse into his domestic life" written by his daughter; 313 for reference to Owen's wife, Mary Robinson Owen, herself a vice-president of the Indiana State Woman Suffrage Association; 746 for reference with his debate with Horace Greeley in the *New York Tribune* regarding a pending liberal divorce bill in New York in 1861.
[328] Beard, *Woman as Force,* 174.

own their own real property and to control real estate. It was wealthy women who most benefited from this reform, so Owen sought to allow women to control their personal property as well.[329] During the convention Owen headed the Committee on the Rights and Privileges of Inhabitants of the State and he used that position to advocate for the extension of the rights of married women.

On October 29, 1850, Owen introduced a provision that would allow married women to acquire and possess property for their sole use and disposal. It was defeated two weeks later. Owen and other reformers then endorsed a more conservative provision which was passed on November 27. On December 11, however, another delegate moved to reconsider that vote and the reform was voted down. On January 16 Owen came forward with a third proposal, which was voted down on January 29. A week before final adjournment he presented a fourth proposal (met with exasperated cries of "no, no, no"). It initially passed, but that afternoon, the vote was reconsidered and it was voted down.[330] Owen's biographer suggests that the political maneuverings were *ad hominen*, that delegates knew of Owen's activism, and they reacted strongly not so much to the issue but to him personally.[331] Regardless, the ongoing drama created by these repeated proposals, their successes and failures and their reconsiderations resulted in many days of debate over married women, and provides a glimpse into the ways in which coverture and the common law were perceived by both reformers

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[329] Richard William Leopold, *Robert Dale Owen: A Biography* (Cambridge: Harvard University Press, 1940) 273; Indiana, *General Laws of the State of Indiana* (Indianapolis: Morrison and Bolton, 1835-1851) 1846-47, 45-46.
[330] Leopold, 273-77.
[331] *Ibid.*, 276.

and maintainers of the status quo. The reformers did not argue in an abstract, liberal fashion; they rarely couched this as an issue of equal rights. And the opponents to reform were not acting simply out of inegalitarian sentiments but were rather relying on the hierarchical social relations to meet needs that they determined to be important for their society.

When Owen introduced his first proposal he chose to render it persuasive by pointing out the plight of widows. Under Indiana's use of the common law, widows were not entitled to inherit their husbands' real estate, and they were only entitled to one-third of the rents and profits of his estate during her lifetime. This policy resulted in many widows living in poverty. To select this issue as one in need of reform was a clever tactic on the part of Owen, for helping widows was a safe endeavor, and it provided a means of addressing the property rules of the marital relation that gave rise to the problems that widows faced. There were a few elements of his argument, however, that worried the convention. First, he introduced this as an issue of woman's rights, noting that the protection of property is a right that is natural, inalienable, and inherent, yet was denied to women. Owen thus began his argument with what appears to be a classic use of abstract liberalism. By the time he finished his proposal, however, he identified the source of women's deprivation of rights as rooted in the common law and once again suggested altering the common law. Owen knew his audience, and he anticipated reactions to his proposal. He knew the "domestic harmony" arguments that would be directed against him, whereby the peacefulness and stability of the home was attributed to the gender roles of husbands and wives,

and he did not dispute them, so he questioned whether domestic felicity requires that the woman be financially dependant upon her husband. He also pointed out that the common law relations rested on the benevolence of the husband; a rascal of a husband could leave the wife with no protection. He could have continued along this vein and presented these reforms as equitable practices that already accompanied the common law, but he then went on to suggest that Indiana incorporate the most favorable features of the civil law by introducing civil law principles to those areas in which the common law lacked progressive resources.

It is perhaps this final suggestion that raised alarms and brought on the eventual defeat of every proposal Owen endorsed. The debate over women's rights at the convention became a debate over the common law. Opponents to Owen's proposals were not protesting the extension of rights to women so much as they were protecting what they perceived as their way of life. It becomes clear in the subsequent debates that delegates were vested in protecting the common law in order to maintain the stability of society.

One ongoing exchange, therefore, involved the defense and critique of the common law. Owen never suggested dismantling the common law; he only wanted to introduce some civil law principles in those areas where the common law was sufficient to protect the rights of women. Owen pointed out that the common law was the best system for protecting civil and political rights; "the Civil Law cannot be compared with the free spirit of the English and American Common Law system."[332] When it came to private rights and personal contracts,

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[332] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* H. Fowler, Official Reporter (Indianapolis: A.H. Brown, 1850) 523.

on the other hand, the civil law system offered greater protection of rights. Owen pointed out that when one looked around at other states, civil law states were not adopting common law systems, but common law states were adopting civil law principles.

What was timely reform for Owen, however, was a perceived assault on a way of life for other delegates. They came forth to defend the organic common law and to point out the vagaries of civil law societies. One delegate pointed to history to remind Owen of "the many evils which the Roman civil law entailed upon the Romans themselves" such as debauchery and producing women who were insulting and haughty towards their husbands once they had as much money as them. This is confirmed by "the immortal Jefferson, writing in reference to the then state of society in France, and the debauched condition thereof, attributes the whole to the effects of the civil law in force in France, permitting the wife to hold, acquire, and own property separate and distinct from the husband."[333] Another urged his fellow delegates to compare the common law countries of England and America with the civil law countries of France, Spain, Italy, Portugal, Holland, South American states and Mexico: "Why is there less enjoyment, less happiness, and less prosperity in these countries than in those where the common law prevails? By their fruits ye shall know principles; it is an intrinsic defect in the system."[334]

This last statement reveals an important dimension to this debate. We are accustomed to thinking of liberal rights as "trumping" any state policy that

[333] *Ibid.,* 484.
[334] *Ibid.,* 506.

deprives an individual of individual rights. In this debate, however, rights were not produced by reformers as a trump. Rather, the debate took place over the efficacy of the state policy. The evaluation of the policy was not whether it did or did not infringe on rights but rather whether it was effective in maintaining a stable and robust society. The debate was thus an empirical one rather than an abstract one. The facts that were referred to were, obviously, not always accurate, as the quote above demonstrates. Nevertheless it is important for our purposes to note that this is the level at which both opponents and proponents of reform engaged. One might expect that the reformers, if they were liberal, would merely rest their case on the deprivation of women's basic rights. But they instead argued that their alternative system would not damage the social structure.

The comparison of the civil and common law becomes specific when the delegates argue over conditions in Louisiana. Owen claims that all is well there and that he has enjoyed fair trade with dealers in Louisiana,[335] while an opponent to reform claims that the community partnership of property between husband and wife under Louisiana's civil law opens the door for fraud. Another opponent adds that "in Louisiana…[it is] a sickening fact that a large portion of the litigation in that State is by wives against their husbands."[336]

The delegates are revealing why they were so vested in maintaining a system that clearly deprived women of rights. It is not a simple matter of these men enjoying a system in which they dominated their wives. Rather, they

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[335] *Ibid.,* 527.

[336] *Ibid.,* 1172. The negative references to life in Louisiana suggests another form of social ordering based on race and nationality. The colonization of civil-law states by France and Mexico is likely not far in the back of the minds of the Indiana delegates in these expressions.

revealed an organic understanding of a good society. A stable economy and social life were tied to stable, peaceful homes in which husband and wife were not at odds, not litigious, and not in economic competition with one another. The liberal appreciation for individual rights could end at the home, for to risk the stability of the home would affect larger structures of society. They saw the common law relations as maintaining this stability and the civil law system as undermining it. Thus when an opponent declares that "there are no homes in Paris"[337] this statement is fraught with meaning.

Why are homes so important? The nineteenth century already had its separate sphere ideology, whereby woman's place in the home served to inculcate virtue in children and ensure a virtuous society. What I find in these debates is not that delegates were constructing this separate sphere but rather relying upon already existing gender constructions in order to respond to other fears. Delegates perceived losses and invoked a gendered social ordering to guard against them. One perceived threat was the damage that the unsettling of the common law would do to achieving full personhood. Opponents continually referred to the idea that the feminine nature completes the masculine, that woman's presence in man's life softens his masculine harshness. This is seen as good for both of them: "The more we can unite male and female, the better it will be for both, "[338] and "Woman was given to man to make up for his deficiencies, to teach him to love everything around him. She modifies his natural ferocity, alleviates suffering."[339]

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[337] *Ibid.,* 1176.
[338] *Ibid.,* 500.
[339] *Ibid.,* 476.

It is not only her nature but her maintenance of the home that helps a man: "Home and its sacred influences soften the asperities of man's character."[340] That this relation of the masculine and feminine is symbiotic is summed up in imagery that made the rounds of mid-nineteenth century America: "While the vine clings to and is supported by the oak it is loaded with fruit, but independent of the oak, it trails upon the ground, losing its beauty."[341]

For a contemporary reader these are difficult arguments to swallow. When we get past our initial aversion, however, some interesting topics emerge. Behind all the talk of clinging vines and dutiful wives providing a safe haven for their toiling husbands is the fear of man's denuded character as public citizen. One who enjoys all the benefits of society and engages in public pursuits is not leading a complete life. There is something about the home that completes him, that makes him fully human. This fear is expressed in gendered terms, but what is even more striking is that delegates were discussing these fears at all. Such concern for character development is not supposed to be part of the modern project. Modern governments should be concerned with providing for the good citizen, not the good, or complete, man. Yet here we see delegates urging that the constitutional order retain those principles and institutions that provide for the development of one's personhood.

Owen's perceived threats to the common law system have thus made apparent certain presumptions which were usually left unaddressed when the common law was unquestioned. The common law retained certain premodern

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[340] *Ibid.,* 502.
[341] *Ibid.,* 1172.

conceptions of citizenship. The premodern aspects of the common law are usually considered to be feudal, as they arose during the feudal social arrangements in England.[342] As we see from the delegates' arguments, however, citizens of Indiana vested in the common law system the philosophical premodern components of citizenship. In mustering their own justifications for retaining the common law, the Indiana delegates revealed their own social anxieties. Their statements suggest that people expected their political ordering to provide for—or, at least, not to interfere with—the maintenance of support to develop one's person. This is not a topic that is usually made public, but when the common law ordering was threatened we are provided with the rare opportunity to see these concerns aired.

Inquiry into the opponents' arguments shows that their stereotypical portrayals of women did not exist simply to keep women in their place for the sake of dominating over them. Rather, the delegates reveal that they understood the importance of providing for the complete person and a stable society, and the best resource at hand was the social ordering of the common law. Women's subjugation was instrumental, not an end in itself.

When we reassess this social imperative as a social aspect of liberalism, we can reconceptualize their defense of the common law. One could say that the defenders of the common law were illiberal, but liberal ideals were not applicable to the social relations, because this issue was not part of a rights discourse. They saw themselves as providing for society, an issue distinct and not relevant to the

[342] See Orren, *Belated Feudalism.*

prevailing rights discourse at the time. This might be what one might expect from the opponents to reform. One could say that these were merely conservative men who enjoyed the status quo and not expect them to be receptive to the cause of women's rights. So it comes as much more of a surprise to view the tactics taken by the reformers. One might expect that the most immediate route for the reformers was to render this discourse a rights discourse by subjecting the social relations to the standard of liberal ideals. The reformers, however, used these principles in a nuanced way.

Few of the reformers' arguments were abstract. Only one of them drew upon political philosophy, and he speaks only once. While Read did not advocate for women's political rights he did frame the issue as one of justice based on the natural law tradition of property. Citing Locke, he said that women are entitled to the fruits of their labor. Critiquing the law of baron and feme—"the LORD and his WOMAN!"—he compared the wife to a slave. He cited Blackstone and alluded to Montesquieu. Like suffragist arguments of the day, he used abstract concepts to point out the injustices of the common law.

But this was not the tactic chosen by the other reformers. For them, it was not a simple matter of justice versus injustice. Things were complicated by considerations of matters other than women's property rights. That reformers other than Read aimed their arguments at alternative ways of meeting these obligations indicates that they recognized the social as a legitimate concern. Rather than having rights trump these concerns, they suggested more egalitarian ways of meeting these concerns.

Gibson was a reformer who was clearly not debating women's rights for the first time, because he knew what arguments to expect from opponents; his frustration is evident in his complaint, "I knew, sir, that we should have to meet the old and stereotyped arguments." He turned the table on all of the talk of maintaining the common law to protect women and for women to complete man by declaring, "Shame, shame, on the manhood of the nation that tolerates so foul an outrage."[343]

Reformers offered empirical arguments to show that their reforms are a better way to protect women. Such arguments indicate that liberalization of the status of the wife was not the guiding animus of reform, and are further strengthened by their admission that they were not trying to give women political rights, or, as Sherrod put it, to "enlist and equip an army of female Amazons." They were only trying to protect women's welfare in an area in which the common law failed to provide adequate protection. Blythe pointed out that the people that women need to be protected from are their own husbands. Pepper noted that it is "the wrongful acts of an improvident or dissolute husband" that threaten the tranquility of the home, not reforms in the common law. He offers empirical evidence that reforms in property rights will not disturb those households that are already at peace.

Owen does not stray far from the debate over the best way to secure social conditions. To appease the fears of the opponents, He makes it clear that property reforms will not harm the marriage relation. He points to Indiana's law of 1847

[343] *Report of the Debates,* 481.

allowing married women to own real estate, noting that this change has not resulted in husbands and wives living less harmoniously. He agrees that domestic harmony is important, but he doubts that it requires that a wife be financially dependent upon her husband, asking, "Is, then, the secret of domestic felicity to be found in pecuniary dependence?"[344] He does not dispute that there will be some inequality between husband and wife in financial matters, but he does dispute that a wife must be totally divested of all property rights:

> Dependent, to some extent the relation of a wife to her husband, is and must always be. Men have monopolized all the most profitable occupations of life; custom sanctions this; and even if it did not, women would be, in a measure, shut out from these, by the engrossing character of their maternal cares and duties. There is great danger that this dependence, natural and necessary as it is, should give birth, on in the one hand, in coarse and overbearing natures, to tyranny, and on the other, in timid and yielding natures, to fear.[345]

Like the opponents to reform, Owen thinks that homes are important, and that men and women have duties to uphold in the home. There will always be differences between men and women in the home, but that does not require that women be utterly divested of property rights. He points to a dozen states that had passed married woman's property statutes without destroying marriages. England, too, provided exceptions to common law rules by resorting to equity to allow for married women to own property through trusteeships, and he does not find domestic harmony to have been sacrificed in England, either.

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[344] *Ibid.,* 465.
[345] *Ibid.,* 465-466.

He also takes on the opponents' focus on the development of the person and complains about all the talk of the female completing the male. What about the woman, he asks. Does she exist only to complete a man? Again, he is not suggesting that women abandon their household duties, but that these duties not come to completely define her:

> Household cares properly claims the wife's—the mother's attention; no true woman neglects these. So is it the husband's and father's first and bounden duty to provide support for the family. But it no more follows that a man of commanding talents shall tie down every energy of his soul to the one task of accumulating dollars and cents, than that the influence of a woman, fitted to aid in the civilization of her race, should be restricted to the parlor or kitchen.[346]

Of these reformers, it is Owen who might sound to be the most liberal, in his description of the common law as a "Barbarous relic" or in his assertion that the wife was no better off than a slave.[347] Such arguments were to be heard in suffragist circles. Perhaps we should label Owen as a liberal of the suffragist variety, then. But rather than working to identify what kind of liberal Owen actually was, it is instructive to identify the kind of liberalism he used in different circumstances. That he did not wholly resort to the suffragist version of liberalism in his efforts to secure a constitutional provision giving married women property rights indicates that it was not the version of liberalism suitable for his audience. That he couched his arguments a certain way may tell us less about

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[346] *Ibid.,* 1187.

[347] Owen referred to coverture as a barbarous relic in his marriage vows, in which he renounced his male privilege: "Of the unjust rights which in virtue of this ceremony n iniquitous law tacitly gives me over the person and property of another, I cannot legally, but I can morally, divest myself. And I hereby distinctly and emphatically declare that I consider myself, and earnestly desire to be considered by others, as utterly divested, now and during the rest of my life, of any such rights, the barbarous relics of a feudal, despotic, system." *History of Woman Suffrage* 295.

Owen than it tells us about the way that rights and status were understood in Indiana in 1850.

This debate should confound our understanding of the liberal tradition in America, for the opponents to reform were conservative, but their main concern was not to subjugate women for the sake of controlling them, and the reformers themselves were not entirely liberal, at least liberal in the sense that we know it today. The well-known suffragist discourse of the time would have us believe that the issue was a simple one of equality overcoming inequality. The Indiana debate indicates that it was much more complicated, that equality, while holding a certain elevated status, was not the only measure of progress. Equality was just one concern of lawmakers at the time. They also had a parallel interest in meeting social needs, and for that they turned to the common law, whose inegalitarian outcomes were not seen as a contradiction to equality under other areas of the law. The debates cast doubt on Rogers Smith's explanation in *Civic Ideals* that gender hierarchy fulfilled men's desire to dominate women, or that it was tool by which elites could rally men. The tactics of reformers indicate that they, too, had the same concerns as opponents but searched for alternative ways of meeting them. Equality was present as a concern, but only one concern among others. It was the abstract component of liberalism while social needs were another.

The reformers indicated that they saw a difference between hierarchy and status when they urged that women continue to tend to the home but that their condition be equalized. So it is clear that reformers found a way to challenge hierarchy even as they retained status. Whereas suffragists wanted to do away

with the common law, and hence sweep away its hierarchy and status, the Indiana reformers led by Owen wanted to use equality as a tool to remedy the problems brought about by women's subordination in the marital relation, but not to sweepingly abolish status.

Owen and the other reformers practiced an alternative liberalism in which they used equality in a different way. The juxtaposition between liberal principles and the common law invited the suffragists to cast inequality as inimical to liberal values. Rather than dismissing the inequality of the husband-wife relation as feudal and barbaric, it would be more useful to take inequality seriously. One can then apply egalitarian principles to this situation rather than wielding it generally. The reformers in Indiana provide a model for thinking about equality in a different way. In a way, the suffragists and Owen were not dissimilar. They all saw the husband-wife relation as unduly hierarchical. They all appreciated the status relations to some extent in that they saw the home as worth preserving, and even the suffragists saw it as only proper that women would continue to maintain their domestic obligations even after reform. They differ, however, in the ways in which they sought to attack the hierarchy. The suffragists relied on equality as an abstract doctrine while Owen applied egalitarian principles to existing social relations. The difference lay in the logical trajectory of such tactics. The suffragists relied on a notion of equality that would trump all inequality. Owen was more willing to balance equality with social relations, to rely on degrees of equality rather than using it as a tool to indiscriminately wipe out all existing inequalities. Although the suffragists expressed the desire to preserve the status

relations, their tactics would likely dispense with status, while Owen's would preserve it in a more egalitarian form.

This approach invites one to appreciate domestic relations as Beard and Tocqueville did, and that may be unsettling to contemporaries, as the status relations of the family are at odds with the individualism that we have come to expect from a liberal discourse. This chapter, however, should cast doubt on whether liberalism really is properly understood to be about unrestrained individualism. The presumption that it is betrays an optimism in the expansiveness of liberalism, an expansiveness that has limits. Wrestling with the less attractive aspects of a liberal society can yield a more just and effective use of equality.

The domestic relations are usually vilified for their hierarchy. This chapter suggests that the domestic relations were retained in America not simply because of their hierarchy nor for the desire of men to dominate women but, rather, for their provisions for forming status relations. We often focus on the wife in the husband-wife relation because the wife's subjugation was so stark, but when we look at this relation in terms of its status rather than its hierarchy, a system of law emerges that served to fix identity and obligations for both men and women. Given that this is an aspect of liberalism that can be traced to Locke, one can conclude that liberalism has always had its limits. Although it advanced ideals of individualism, they were to be limited in the home. When those very ideals are used to challenge women's subjugation in the home, then the functions

of the home become lost from liberal inquiry as they assume a position of outdated, archaic hierarchy.

The purpose of introducing Beard's Tocquevilian analysis her was not to suggest that the nineteenth-century domestic relations be restored but rather that they be appreciated as limits to liberal individualism. There is something important there, and to dismiss them because of their hierarchy might be to ignore the role that status relations play in a liberal order. Beard's critique serves as a cautionary note against eager application of liberal principles. This critique might pale against the gains that the suffragists made, but the next chapter serves to point out the problems with carrying out the form of the suffragist argument in the twentieth century.

Chapter Five: Liberalism Outside of the States

In prior chapters I demonstrated that an alternative version of liberalism operated in the nineteenth century. It was a liberalism that recognized the importance of social order for a liberal society and thus reconciled the social relations of marriage to the more-commonly recognized abstract ideals of liberalism. This version of liberalism was present in state courts, legislatures and constitutional conventions, as seen in the passage and interpretation of the married women's property acts. It was primarily in states that the common law was sustained, and so I have focused upon states to discuss coverture and the reform of coverture through the married women's property acts. Women's rights were dealt with in a peculiar way as married women's status was determined according to the rules of the common law. Over time, however, women's rights became a constitutional issue, and women's rights are now thought of quite differently; women's rights tend to be dealt with at the federal level as constitutional law while family matters remain seen as a "local" affair. Although coverture has fallen into disfavor as a legal rule, family law remains a matter of local jurisdiction.[348]

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[348] The Supreme Court has recently pointed to family law as the paradigmatic case of a local issue that should be free from federal intrusion. In striking down a congressional law prohibiting the possession of firearms in a school zone as an impermissible exercise of Congress' power to regulate interstate commerce, the Court found that the Act was not related to an economic activity, and hence Congress was interfering in issues for state and local governments. Expressing concerns about Congress' threat to federalism, the Court said that if Congress could pass this Act, then "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." (*United States v. Lopez* 514 U.S. 549 [1995] 564) Of course, one could make the case that marriage, divorce, and child custody issues do have bearing on individuals' economic situation. By denying this connection, the Court is able to dismiss sociological realities of the marital

If development has occurred in American liberalism in that the principles of liberalism have been cleaved from its social considerations, an examination of the constitutional treatment of the legacies of coverture indicates that this division has taken place institutionally, as well. Liberal principles have been extended to women through constitutional law, but this expansion was not accompanied by a shift in family relations becoming a matter of constitutional discourse. Instead, the domestic relations became reconceived as family law and remained in the purview of the states, although family matters still have bearing on women's rights and difficulties surrounding women's rights. Because of this institutional split, women's rights discourse has developed in such a way that the source of women's rights has been susceptible to being misdiagnosed and liberal principles applied in the wrong place.

In this chapter I look to discussions of marriage at the federal level, in the United States Congress and the Supreme Court. It is not possible to directly compare the way that states and federal institutions dealt with married women's property rights, because the husband-wife relation under coverture and its statutory reform were matters for state jurisdiction. The federal government seldom directly engaged in these matters unless they did so in dealing with territories.[349] The federal government did deal with marriage, however, in that

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relation and to render marriage immune from such considerations by retaining it as a local, rather than constitutional, issue.

[349] Richard Chused studies Congress' conferral of property rights upon married women in Oregon in "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures," in *Domestic Relations and Law* ed. Nancy Cott (Munich: K.G. Saur, 1992) 312-343. Under the Oregon Donation Act of 1850 a wife was entitled to one-half of the homestead of her husband. Chused also notes that the original House committee version of the bill would have granted married women far greater property rights, approximating the acquisition and use of property of the *feme sole*.

women's civic identity and rights continued to be ordered by their status in the household. Because the federal government continued to rely on the domestic relations while not having jurisdiction over them, actors at the federal level tended to treat these matters in matters of determining citizenship status and rights with a high level of generalization.[350] The result was that once women's exclusion was treated constitutionally, their historic subordination was attributed to generalized views of women rather than to the social institutions that had perpetuated their status. Hence the Supreme Court has applied principles which have alleviated inequalities but have not struck at the legal source.

POLITICAL PARTIES IN CONGRESS

In 1856 the Republican party platform declared that the party would commit itself to ridding the nation of the "twin relics of barbarism," which it identified as polygamy and slavery. Both were issues that related to Congress' regulation of the territories, and the regulation of both would involve marriage. By tracing how these were dealt with in Congress in the periods prior to and after the Civil War, therefore, we can see how Congress dealt with marriage. In the matters of both polygamy and slavery Congress demonstrated a resorting to generalizations in matters of gender and thus conceptions of gender relations and

[350] Rebecca Edwards has shown the ways in which political parties relied on the rhetoric of family, masculinity and femininity to define themselves and attack their opponents from the Civil War through the Progressive Era. She shows that family and politics have always been intertwined in American political history. This had consequences for women who were trying to make inroads into formal politics at the time, and it had consequences for growth of the state: Edwards shows that the language of manhood was used to expand state power in the Progressive Era and that appeals to family and womanhood are employed by today's conservatives in order to constrict the state. (*Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era* (New York: Oxford University Press, 1997) In this chapter I will show that such rhetoric is made possible by the level of generalization at which the federal government tends to treat matters of gender.

efforts to reform them took on a particular cast quite different from that in the states. The prohibiting of polygamy that Congress would agree upon illustrates Congress' resort to generalizations in maintaining the marital relations. Congress' treatment of newly-freed slaves after the war involved transferring the obligations and privileges of the traditional white husband to men who were recently emancipated from slavery. In extending the rights and status of white men to black men, members of Congress, during a time in which liberty was being reevaluated, failed to readjust the rights and status of women. They reproduced the marital relations and relied on them at the federal level, but they insisted on leaving the domestic relations as a matter for the states.

The Republican party formed in 1854 in response to the agitation over slavery and to the repeal of the Missouri Compromise, which had served to balance the tension about the status of slavery in newly-acquired states and territories. This stability was disrupted in the 1850s, however, with the Kansas-Nebraska Act, John Brown's raid, and other events that polarized the issue of slavery and made the issue of control of the territories even more critical. The importance of territory was thus reflected in the platform of the Republican party when it met in its first national convention in 1856. The party declared its opposition to the repeal of the Missouri Compromise, to the policies of the administration of Pierce, to the extension of slavery in free territories. It invoked the Declaration of Independence to declare its return to the first American principles of republican institutions and rights. In its disdain for the path that regulation of the territories was taking and its commitment to the principles of the

Declaration of Independence it thus asserted that "it is both the right and imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy and Slavery."[351] Both were issues that could be left to control by Congress in territories, and both involved the domestic relations. As the suffragists had done, the Republican party classified these practices as barbaric and implied that they would render them obsolete through the ideals of the Declaration. Dealing with both of these issues would involve Congress in the issue of marriage, but Congress' treatment of marriage would be quite unlike the suffragists, for their appeals to the ideals of the Declaration would not include rights for women on par with men.

I. Polygamy

Woman activists and the Republican party may have found polygamy barbaric, but not for the same reasons. The feminist position on polygamy that comes immediately to mind is that it is bad for women. Carol Weisbrod and Pamela Sheingorn show the ways in which different suffrage groups viewed polygamy in the late nineteenth century.[352] Members of the American Woman Suffrage Association, associated with Lucy Stone and Henry Blackwell, abhorred polygamy because it boded badly for women's equality. They argued that women could achieve equality within the parameters of an egalitarian and monogamous relationship. Weisbrod and Sheingorn thus assess this feminist view as looking

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[351] *Proceedings of the First Three Republican National Conventions of 1856, 1860 and 1864, including Proceedings of the Antecedent National Convention held at Pittsburgh, in February, 1856, as Reported by Horace Greeley* (Minneapolis: Charles Johnson, 1893) 43.
[352] "Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women," *Domestic Relations and Law* Ed. Nancy Cott, (New York: K. G. Saur, 1992) 357.

askance at polygamy but finding there to be a recoverable form of the marital relation. Members of the National Woman Suffrage Association, associated with Elizabeth Cady Stanton and Susan B. Anthony, on the other hand, saw polygamy as bad for women, but because they placed it on a continuum of relationships of exploitation inherent in the common-law marital relation. In a speech before the National Woman's Rights Movement, Stanton addressed the ills of polygamy in the context of divorce reform, another contentious issue of the day and one which she worked for. Since divorce was not available in the majority of states, the situation encouraged behavior in which men would abandon their wives and move to another state and marry there. Or, a man who could not obtain a divorce might take on a mistress. Thus the plural marriage of the Mormons was just one form of polygamy, of which she identified three:

> *First.* There is the Mohammedan or Mormon form of polygamy, many wives known to each, living in daily contact.
>
> *Second.* There is the from known to our laws as bigamy, where one man has two or more wives living in different places, each supposing herself the legal wife.
>
> *Third.* There is the form well known to society, which our legislators now propose to license, where a man lives with one wife, whose children are his legal heirs, but who has many mistresses. This is everywhere practiced in the United States.[353]

Stanton thus used polygamy to show that it was bad for women, but so were the laws of divorce that held women captive in unhealthy marriages, leading to "seduction, rape, infanticide, lily hands strangling the moral monstrosities of an

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[353] Elizabeth Cady Stanton, "Address at the Decade Meeting, on Marriage and Divorce," *A History of the National Woman's Rights Movement* compiled by Paulina W. Davis (New York: Journeymen Printers' Co-Operative Association, 1871) 70.

unwilling maternity, wives running to Indiana and Connecticut like slaves to their Canada, from marriages worse than plantation slavery."[354] While these groups of suffragists did have their differences over why, specifically, polygamy was bad, they were in agreement in their evaluation that polygamy was bad for women.

Congress and the Supreme Court took positions against polygamy, but their impetus was not entirely to elevate women from degradation. In the 1860 debates over a bill to ban polygamy in the territories, members of Congress expressed their views of polygamy as barbaric, as delivering a race of women into prostitution, and as destructive of monogamous marriage in the same way that free love was.[355] Congress passed the Morrill Act in 1862, banning polygamy in the territories. Polygamy's deleterious effects upon women was not the only reason for finding it barbaric, however. Another way to oppose polygamy was to see it as corrupting the standard, monogamous marriage in the face of rising divorce reform.[356] The importance of monogamous marriage becomes clear when the Morrill Act was reviewed by the Supreme Court in *Reynolds v. United States*.[357]

George Reynolds, a Mormon and resident of Utah, was charged with bigamy in violation of the Morrill Act. A case that was primarily concerned with possible procedural errors during the trial and the First Amendment issue of the

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354 *Ibid.* Indiana and Connecticut were states that allowed divorce.
355 Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000) 72-75.
356 *Ibid.*, 110-111.
357 98 U.S. 145 (1878).

Act's possible violation of the freedom to exercise one's religion, the case is also notable for Justice Waite's remarks on the practice of polygamy:

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has always been treated as an offence against society.[358]

Waite references the common-law tradition, and thus it would seem that he was invoking the importance of the common law in the construction of the marital relation. In his subsequent discussion, however, it becomes clear that the common law was referred to more in order to racialize it and render a division between Asiatic and Africans and Anglos,[359] rather than invoking the importance of the structures set by the common law, for he defends monogamous marriage in a sweeping manner: "Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."[360] Even though it may appear that he is connecting the common law with social needs here, he goes on to say, "Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle

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[358] 98 U.S. 145 (1878) 164.

[359] Cott points out that it was common practice in the 1870s and 1880s for Americans to link Mormonism to the "'Incas of Peru,' 'Turkey,' Mohammaden countries,' or the 'Barbary states'—savage and slavish places of colored peoples." *Public Vows* 117-118. The use of the common law was not free of its own nationalistic presuppositions. Blackstone, after all, touted the common law for its suitability for English gentlemen. Supporters of the common law in Indiana in 1850 implicitly contrasted an Anglo common law to a civil law associated with France, Spain and Mexico. Race and gender can thus intersect in social ordering. In *Reynolds*, Waite is emphasizing racial social ordering.

[360] *Reynolds,* 165

cannot long exist in connection with monogamy."[361] William Eskridge has shown that Francis Lieber's 1838 work on obligations of the citizen was reprinted throughout the century. Lieber argued that the citizen did not just exercise rights but owed obligations to the state as an exercise of civic virtue. Marriage was particularly suited for instilling such virtue because it involved self-sacrifice and sociality of its members.[362]

According to Chief Justice Waite, there is a connection between the common law and social needs, but he makes this connection broadly by linking it to patriarchy. In his reliance upon the work of Lieber, he uses a theory of republican governance, whereby the society requires virtue on the part of its citizens. This is not dissimilar to the state-level treatment of the common law. Both approaches make a connection between society and regulations upon the citizen's choices, but they differ in important ways. Waite does not explore what a society needs or how this principle is generated through living in a society that allows polygamy.[363] The connection is general and based more on stereotypes of non-Anglo cultures than a detailed working-out of the connection that we found in the states.

Both Congress and the Supreme Court acknowledged an importance in protecting the marital relations from the practice of polygamy, but they protected

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[361] *Reynolds,* 166.

[362] William Eskridge, "The Constitution of Equal Citizenship for a Good Society: The Relationship Between Obligations and Rights of Citizens," *Fordham Law Review* 69 (April 2001) 1748.

[363] One can find this explicated elsewhere, such as in Montesquieu's *The Spirit of the Laws* ed. Anne Cohler et al. (Cambridge" Cambridge University Press, 1989), but Waite does not explore the connection between the principle of a government and its operation with the specificity that Montesquieu does, or that the states did.

the marital relations in a way that differed from the states. They dealt with relations that originated in the common law but defended them with generalizations. They saw polygamy as perpetuating a patriarchal principle but did not articulate how, precisely, the common law ordering of marriage encouraged freedom. This tendency to deal with matters of marriage in generalizations is displayed even more starkly in Congress' treatment of marriage and slavery.

II. Slavery

After the Civil War, Congress wrestled with policies on Reconstruction, aid to newly freed slaves, a civil rights bill to protect newly freed slaves from state laws, and constitutional amendments. In these debates freedom became redefined, and the right to contract became the mark of liberty. Before the Civil War, when the issue of slavery became polarized and intense, freedom was defined as self-ownership. Slavery was understood in a concrete sense, but other forms of dependency utilized the slavery analogy, namely the economic dependence in wage labor and a woman's subservience to her husband. After the Civil War, as contract became definitive of freedom, to work for wages was seen not as a sign of dependency but the mark of a free individual.[364]

The contractual element of freedom after the Civil War is often seen in terms of Republican free-labor ideology.[365] Certainly labor is an important theme

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[364] Eric Foner, "The Meaning of Freedom in the Age of Emancipation," *The Journal of American History* 81 (September 1994): 445-47.
[365] Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York: Oxford University Press, 1970).

in American politics and is present in significant developments.[366] When we focus on labor, however, we may miss other dynamics. In the case of contract as freedom, there is a notable gap in the development—while labor became, at least rhetorically, definitive of freedom, the other antebellum challenge to freedom—women's equating of coverture with slavery—did not undergo change. That only wage labor was taken up as the mark of liberty is puzzling.[367] We could attribute the lack of reconsideration of marriage to misogynistic neglect of women's issues, but to dismiss it out of hand would be to miss the opportunity to take seriously the possibility that the puzzle is not a contradiction in values but is rather an opportunity to shed light on conceptions of liberty.[368] When we pursue the failure of marriage to be reconsidered after the Civil War, then we can come to see that marriage did not undergo reform because the relations of marriage, specifically the husband's status as head of household, were put in service to define freedom (in a masculine way).[369]

By introducing the role of marriage in formulations of contract freedom in addition to the more commonly-told story of free-labor ideology, one can identify the role that marriage plays in political discourse and recognize that the social relations, obligations, and statuses generated by the marital relation were relied upon in defining freedom. When we focus only on free-labor ideology then we lose sight of reliance on marriage by political actors. Just as contemporary

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[366] Karen Orren, "The Primacy of Labor in American Constitutional Development," *American Political Science Review* 89 (June 1995): 377-388.
[367] Foner leaves this as a puzzle in "The Meaning of Freedom," 455-456.
[368] See notes 19-21.
[369] Amy Dru Stanley identifies the intersection between labor ideology and marriage in *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998).

scholars can lose sight of the role of marriage in American politics, so, too, is it often ignored in political practice. Congress' treatment of marriage in the Reconstruction period shows how the reliance upon marriage can be forgotten. In both political analysis and political practice, there are costs to be paid for this lack of recognition.

After the Civil War, the Thirty-Ninth Congress established a Freedman's Bureau, an agency to aid newly-freed slaves in employment and education. During the debates over the Freedman's Bureau bill, opponents expressed their concern that the federal government was intruding into matters of state jurisdiction. Some members of Congress maintained that slavery was a domestic relation, and the Thirteenth Amendment simply took away the master's power over the slave. Others saw the Thirteenth Amendment as empowering Congress to abolish the badges of servitude that supported the system of slavery. Proponents justified their actions under section two of the Thirteenth Amendment, but it was not clear what the Thirteenth Amendment empowered Congress to do.

Congress eventually used this power to regulate the domestic relation of master and slave by abolishing the relation and reaching the system of laws and regulations that maintained the unequal relation between the master and slave. If the federal government was finally regulating a domestic relation and viewing it in terms of the systemic support of the hierarchy of the relation, then one could ask why other relations, namely the husband and wife relation, were not reconsidered as well.

Amy Dru Stanley points out that the husband and wife relation was not reevaluated at this time and was, in fact, being reproduced in defining the liberty of freedmen.[370] The marital relation was entered into freely through contract but retained a relation of a wife subjected to her husband. Rather than using new notions of freedom to emancipate women from that subjection, principles of contract were relied upon to accentuate the voluntary aspect of entering marriage. Furthermore, the subjection of wife to husband was not ignored but was drawn upon to define the freedom of the free man; marriage served to define the freedman as a capable individual who could contract, labor, and support a household.

In arguing against a narrow construction of the Thirteenth Amendment, Senator Cowan argued that to merely emancipate a slave without securing other rights and privileges would be to abandon him. Otherwise, the freed slave would be left "without family, without property, without implements of husbandry,"[371] and would therefore not be a free man. A man could be counted as free if he had a wife, family, and home, and a wage to support them. The inequality of the marital relation, then, was justified by the consent that wives exercised when they entered the contract and further buttressed by the status it afforded newly-freed male slaves as heads of households. Stanley's account draws our attention to the ways in which married women's status was justified in its traditional form in these debates.

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[370] *Ibid.*

[371] *The Congressional Globe,* 39th Cong., 1st sess., (Washington, D.C.: Congressional Globe Office, 1866) 39, pt. 1: 504.

Having a family became the mark of the freeman, and entering into marriage, therefore, became an important sign of the capacity of the free man, especially to the freedman who had traditionally been denied this privilege. The marriage contract had been denied to slaves, owing to the understanding that they were not capable of entering contracts.[372] Entering the marriage contract was therefore critical to newly-freed slaves, and providing it was an important historical step.

In defining freedom, in part, by the freedom to enter the marriage contract, the marriage contract was being presented in a selective way. The marriage contract was a contract, but it had unique features that distinguished it from contracts between individuals, as the state played a significant role in the contract for marriage between a man and woman. Certainly there were contractual aspects to the way that marriage was initiated, but the parties making the contract were not free to define it; the state had an interest in this contract and an active hand in regulating it. These regulations began with whom was fit to marry. To have a prior marital contract or to be related by blood or marriage were canonical disabilities that would prevent a couple from marrying one another.[373] Civil disabilities were added, such as one of the parties being under age, nonconsent of

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[372] Slaves were incapable of making any contract, including the marital contract, and so they were not able to be legally married while slaves. Even the customary marriages of persons under slavery were not viewed by courts as *de facto* marriages. See *Stewart v. Munchandler* 65 Ky. 278 (1867). In his dissent in *Dred Scott v. Sandford* (60 U.S. 393 [1865]), Justice Curtis finds that Scott's marriage in the state of Illinois to be material to the outcome of the case. Because he married with his master's consent, the master recognized Scott's capacity to contract and take on all the attendant rights and obligations of marriage. In this recognition, the master relinquished his legal rights as master (471-472).

[373] Blackstone, *Commentaries on the Laws of England* ed. William Carey Jones (San Francisco: Bancroft-Whitney Co., 1916) 608-609.

parents (in the case of couples who failed to post banns of marriage), and mental incapacity.[374] While some of these civil disabilities could qualify as the state regulating the individual's capacity to enter a contract, to these civil disabilities, American states added other regulations, such as prohibitions of marriage between blacks and whites. Hence the localized character of regulations on the marriage contract revealed the role of the state in shaping the marriage contract and families, and using this power to order society.

The marriage contract differed from other contracts in another notable way in that once a man and woman made this contract, they took on the status of husband and wife and the state imposed obligations on them. In his 1896 treatise Walter Tiffany explained,

> It is said by most of the text writers, and it has often been said by judges that marriage is a civil contract, but this is not true. Strictly speaking marriage is not a contract. In a contract the parties fix its terms, but marriage imposes its own terms. A contract may be terminated by mutual consent, but the marriage relation cannot be so terminated. By marrying, a relation is created between the parties that they cannot change.[375]

In referencing marriage as an aspect of personal freedom, Congress overlooked the role of the state in shaping the marital contract and the terms of the marital relation. In stressing the natural justice in allowing citizens to marry and obscuring the role of the state in whom could marry whom and under what terms, in addition to the state-sanctioned status of the marital relation, marriage emerged as naturalized and its constructed relations of hierarchy became obscured from view in Congress.

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[374] Blackstone, 611

[375] Walter Tiffany, *Handbook on the Law of Persons and Domestic Relations* (St. Paul: West Publishing Co., 1896)

The Thirty-Ninth Congress passed another important piece of legislation in the Civil Rights Act of 1866. Senator Trumbull introduced the Civil Rights Bill to protect rights in a way that the Freedman's Bureau bill could not. He pointed out that southern states had passed a series of Black Codes inhibiting the liberty and mobility of newly-freed slaves: Mississippi legislated that persons of African descent traveling from one county to another had to have a pass or certificate of freedom, and prohibited them from owning guns, or from acting as a minister. In South Carolina it was illegal to teach former slaves. Trumbull and other Republicans relied on section two of the Thirteenth Amendment to use the federal government to put an end to such laws, reasoning: "And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?"[376]

The civil rights to be secured against state invasion were those fundamental rights of the citizen, natural rights, so to speak.[377] In the debates over the civil rights bill, civil rights were distinguished from political rights, such as the right to vote, to sit on a jury, or to hold office. A list of civil rights was thus enumerated in the bill itself: "the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and

[376] *Globe,* 39th Cong., 1st sess., 1866, pt. 1: 474.
[377] *Globe,* 39th Cong., 1st sess., 1866, 39, pt. 2: 1757.

proceedings for the security of person and property."[378] This list of civil rights would seem to address many of the disabilities of women under coverture. Historically, married women were denied the right to contract; the absence of civic identity precluded the right sue, be sued, and to give evidence in court; and married women could not own property. By 1866, married women had gained some of these civil rights through state statute, but, as was evident in Chapter Two, these were not conferred explicitly as civil rights. Civil rights could continue to be denied to married women, and the civil rights protected by congressional statute were not understood in a universal sense.

Just as the rights of the freedman were defined in terms of the man entitled to be the head of his family, so, too, were civil rights defined in terms of men. That these civil rights were intended for men was revealed in the language of the debates. In defending the doctrine of equality from those members of Congress who trivialized it, Senator Wilson asked:

> Does he not know that we mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land? Does he not know that we mean that the poor man, whose wife may be dressed in cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land?[379]

The Thirty-Ninth Congress did not reconsider marriage so as to reconsider the civil rights of the freed*woman*. One can explain that through members of Congress' direct references to the Thirteenth Amendment. People did argue that the Thirteenth Amendment was limited to abolishing slavery and not to regulating

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[378] *Globe,* , 39th Cong., 1st sess., 1866, 39, pt. 1: 476.
[379] *Globe,* , 39th Cong., 1st sess., 1866, 39, pt. 1: 343.

the other domestic relations. Senator Cowan saw the Thirteenth Amendment as limited to the abolition of slavery and nothing more. Hence other matters under state jurisdiction remained immune from federal control:

> That amendment, everybody knows and nobody dare deny, was simply made to liberate the Negro slave from his master. That is all there is of it. Will the chairman of the Committee on the Judiciary or anybody else undertake to say that that was to prevent the involuntary servitude of my child to me, of my apprentice to me, or the *quasi* servitude which the wife to some extent owes the husband? Certainly not.[380]

The rationale for the male-centered view of civil rights, coupled with the limited reach of the Thirteenth Amendment into matters of state police power, can be found in Congress' treatment of anti-miscegenation laws. Opponents to the civil rights bill, recognizing that the right to contract into marriage would be counted as a civil right, brought up their concern that this might infringe upon states' ability to pass laws prohibiting the intermarrying of blacks and whites.[381] When the status of anti-miscegenation laws arose during the discussion of the Freedman's Bureau, Trumbull assured those concerned that federal protection of civil rights would not have an effect on anti-miscegenation laws, because under those laws both races were treated the same:

> One of its objects is to secure the same civil rights and subject to the same punishment persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man and *vice versa*? I presume there is no

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[380] *Globe,* , 39th Cong., 1st sess., 1866, 39, pt. 1: 499.

[381] As former confederate states were not present in these debates, it was representatives of northern states, primarily from Indiana and Delaware, who were concerned about the status of laws in their states and voiced their disapproval for the potential reach of bills such as the Freedman's Bureau bill and the Civil Rights bill.

> discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races.[382]

Anti-miscegenation laws, therefore, could survive even a civil rights bill because of the anti-discrimination principle, which did not see distinguishing between blacks and whites as discrimination. So long as whites were subject to the same laws as blacks, equality was maintained. We could carry this anti-discrimination principle over to the civil rights of freedwomen. Women who had been slaves would be entitled not to the civil rights of white men but of white women. So long as black women were treated like white women, there was no discrimination, and no badge of servitude. Thus freedom for women was not reformed during the Reconstruction debates, and marriage was made available to newly-freed slaves in the form that it had always been available to whites. Like the racial regulations governing marriage and segregation, the traditional rules of marriage were retained by shielding them from constitutional reform by classifying them as state issues.[383]

Despite the reproduction of male freedom in the Freedman's Bureau and the Civil Rights Act of 1866, woman activists did not become actively involved until the debates over the Fourteenth Amendment. They had not organized to question the male-based definitions of freedom in the Freedman's Bureau bill or

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[382] *Globe, ,* 39th Cong., 1st sess., 1866, 39, pt. 1: 322. Note that this is the reasoning that would be relied upon in an equal protection challenge to anti-miscegenation laws, in which the Court found that an Alabama law that inflicted criminal penalties on blacks and whites who married one another to be constitutional because it "applies the same punishment to both offenders, the white and the black." (*Pace v. Alabama* 106 U.S. 583 [1882] 584) This reasoning is also found in *Plessy v. Ferguson* 163 U.S. 537 (1896), in which the Court found that distinctions between persons on the basis of race do not necessarily imply inferiority.

[383] In *Plessy v. Ferguson,* it is the police power that proves to be the foil against the equal protection claim.

Civil Rights Act. While woman activists would devote enormous energy later in the year to attempt to strike the word "male" from the Fourteenth Amendment, they did not speak up about the course that the civil rights debates were taking, which is surprising, because the emphasis was on the rights of freed*men.* They may have withheld dissension, as the suffragists were still in coalition with male abolitionists, which they would maintain until they withdrew their support of the Republican Party after the passage of the Fourteenth and Fifteenth Amendments. Or their silence could be owing to the fact that woman activists, many of whom had worked for the abolition of slavery, sincerely supported the protection of civil rights for newly-freed slaves. *The History of Woman Suffrage* provides an account of the work of Josephine Griffing, who organized relief for slaves entering Washington, D.C. during the civil war.[384] Her work in providing shelter and opening industrial schools and teaching women to sew and sell their products led her to suggest that the government start the freedman's bureau after the Civil War. Mrs. Griffing is remembered for her charity. Woman activists may therefore have seen the initial efforts to help newly-freed slaves as charity befitting downtrodden people and thus did not perceive such charity as a threat to their own rights. At the anniversary of the Loyal Women's National League in 1864, the League set forth a list of resolutions including, "we demand for black men not only the right to be sailors, soldiers, and laborers under equal pay and protection with white men, but the right of suffrage, that only safeguard of civil

[384] Elizabeth Cady Stanton, et al., eds., *History of Woman Suffrage* II (New York: Fowler & Wells, 1881) 26-39.

liberty, without which emancipation is a mockery."[385] Thus woman activists were not opposed to civil rights for freedmen and indeed they had actively campaigned for an end to slavery and the securing of rights for newly-freed slaves. It was not until the extension of political rights began to be considered in Congress, however, that they realized that the post-War commitment to equality would exclude women, and their opposition would take on a racialized form.

They did become actively involved in the debates over the Fourteenth Amendment, and by this point their tactics would largely take the form of casting themselves as worthy of the vote in contrast to the ignorant black man. Robert Dale Owen was responsible for alerting the Loyal Women's National League to the various versions of the proposed Fourteenth Amendment, and it was through these that woman activists became aware that the Fourteenth Amendment would insert the word "male" into the Constitution.[386] The suffragists proclaimed that they relied on their only political right under the Constitution, the petition,[387] to urge Congress to avoid inserting "male" into the Fourteenth Amendment and thus disenfranchising women explicitly. These debates over the Fourteenth Amendment induced the split between woman activists and the former abolitionists, now radical Republicans and working for the civil and political rights of African-Americans. The suffragists appealed to the Democrats and it is

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[385] *History of Woman Suffrage* II 85.
[386] *History* II 91. Although the Fifteenth Amendment would come to directly address suffrage and this express declaration would preclude reading suffrage into the Fourteenth Amendment (see *Minor v. Happersett* 82 U.S. 162 (1874)), at the time of the debates over the Fourteenth Amendment, a right to suffrage was understood in the section two, in which the term "male citizens" appears. Hence suffrage was restricted to males even before the Fifteenth Amendment prohibited denial of the right to vote on the basis of race (but not on the basis of sex).
[387] *History,* II 87.

at this point that their rhetoric became racially biased, deploring the extension of suffrage to black men while the purportedly worthier white women were still denied it.

Before the debates over the Fourteenth Amendment, however, Congress had addressed suffrage when it debated whether to extend suffrage to blacks in the District of Columbia. Senator Wade introduced a bill relying on Congress' power to make laws for the District of Columbia by regulating suffrage. This bill provided that

> each and every male person, excepting paupers and persons under guardianship, of the age of twenty-one years and upward, who has not been convicted of any infamous crime or offense, and who is a citizen of the United States, and who shall have resided in the said District for six months previous to any election therein, shall be entitled to the elective franchise, and shall be deemed an elector and entitled to vote in any election in said District, without any distinction on account of race or color.[388]

The bill was initially challenged for extending suffrage and securing the right to vote for blacks, but then Senator Cowan introduced an amendment to strike the word "male" from the bill, thus extending suffrage to women.

The debates over this amendment are reprinted in *History of Woman Suffrage,* presumably as a way of drawing attention to those members of Congress who were loyal to the woman's movement and to express their disappointment in members of Congress who had been loyal to the woman's movement but chose to

[388] *Globe,* 39th Cong., 2nd sess., 1866, 39, pt. 1: 38.

support civil and political rights for newly-freed slaves at the expense of women's rights.[389]

These debates were not simply about extending political rights to women. In arguing against the extension of suffrage to women, members of Congress relied on the status relations of marriage to justify the denial of political rights to women. A woman's status as wife could serve to mark her identity as citizen and her political rights. The domestic relations were thus invoked in these debates, but their common-law origins were left unacknowledged. Instead of referring to the common law, the marital status was justified by women's natural inclinations.

Some proponents of the amendment to strike "male" from the D.C. suffrage bill supported woman suffrage by claiming that modern society warranted it. They pointed out that suffrage was being extended to blacks because they had served in the Union army, but that the citizen-soldier concept of citizenship was feudal and out of keeping with modern society. Determining who should vote should now be based on logic. Since women paid taxes on their property, for example, they deserved the tools of representation. Or the trajectory of modern progress was such that women were gaining rights, and the right to vote should logically follow from the extension of rights women were already enjoying.

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[389] Not all of the advocates for woman's suffrage in the debates over D.C. suffrage may have been supportive of women's rights. Some senators accused Cowan of introducing the amendment as a means of defeating the bill. Nevertheless, some known advocates of women's rights did speak up in the debates. The suffragists singled out their supporters and also those who had apparently abandoned the cause of women's rights, such as Charles Sumner, who claimed it was "the negro's hour" and that activism should focus on gaining rights or freed slaves, and Horace Greeley of the *Herald Tribune,* who did want to compromise the chance to obtain suffrage for freed slaves. *History* II, 93-94 and 103.

Proponents' arguments, however, were more likely to emerge from reaction to the arguments of the opposition. The opponents to Cowan's amendment were not united in their opposition. Some were sympathetic to the woman's cause, but they did not want to sacrifice gains for blacks by adding provisions for women's rights and thus compromising the chances for these bills to pass. They thus argued that blacks needed the vote more, because they had been enslaved, while women had not. Of course, black women had been enslaved, but this was not a problem for their representation, because it was assumed that they would be represented by the heads of their households. Thus women's status in the home served to determine their status politically. A woman was represented by her husband or father or brother, while a black man was not represented by whites. Both a woman and a man were understood politically in terms of their status in the household, and in this formulation the family was understood as a unit of society, with the voting man representing not just himself but his family.[390]

Proponents of woman's suffrage contended that irresponsible husbands might not represent their wives well. The response to this by opponents was not to buttress women's rights but rather to ensure that this form of representation worked by encouraging men and women to live up to their manhood and womanhood, respectively. "So the women of America vote by faithful and true

[390] Some members of Congress explicitly made the argument that the family is the natural unit of society. *Globe,* 83. This flies in the face of Sir Henry Maine's contemporary contention that modern society was progressing, with status relations being replaced by contract and with the family as unit o society being replaced by the individual. *Ancient Law: Its Connections with the Early History of Society And Its Relation to Modern Ideas* Third American Edition (New York: Henry Holt and Company, 1885)

representatives, their husbands, their fathers, their sons; and no true man will go to the polls and deposit his ballot without remembering the true and loving constituency he has at home,"[391] they argued. The man with proper manliness and character would uphold his responsibility and vote for the benefit of his family, while women would remain true to their womanhood by remaining in the home. Drawing upon separate spheres ideology, opponents portrayed the political world as a place inimical to the purity and nature of women.[392] The separate spheres were justified by appeals to the true nature of men and women, and these natural roles were themselves rooted in the relations of the common law. Thus the common law marital status was brought to bear upon political rights by naturalizing those marital statuses. Rather than the common law rules of the marital relation being traced to the legal fiction of marital unity, they were now attributed to the natural order of things:

> The instincts, the teachings of the distinct and differing, but harmonious organism of each, led man and woman in every race and people and nation and tribe, savage and civilized, in all countries and ages of the world, to choose their natural, appropriate, and peculiar field of labor and effort. Man assumed the directions of government and war, women of the domestic and family affairs and the care and training of the child and each have always acquiesced in this partition and choice.[393]

In these discussions, the family and women's and men's role in it, is naturalized. The common-law origins and reasons were lost from consideration as Congress relied on the common law marital relations in redefining freedom and protecting rights. The level at which these debates took place allowed opponents

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[391] *Globe,* 39th Cong., 2nd sess., 1866, 39, pt. 1: 66.
[392] *Globe,* 39th Cong., 2nd sess., 1866, 39, pt. 1: 65.
[393] Quoted in *History* II 145.

to women's rights to refer to women's status as something to which they were naturally inclined and something which they chose themselves. The duties of woman as wife and mother were certainly supported by the common law domestic relations, but the system of domestic relations is not referenced or grappled with in these debates. Instead, the status that those relations generated is referenced and then justified not in reference to domestic relations but to natural proclivities of men and women. The family is seen as the unit of society according to reason, nature, and religion rather than owing to the common law.

At the state level, on the other hand, where married women's status was challenged and defended, the common law itself was defended and explained. In the state-level debates we get a better sense of why people found those relations to be necessary. Those who wanted to reform the common law had to become mired in discussions of whether reformed relations could serve the same purposes. While stereotypes are not absent from the state-level discussions, they do not dominate it. There is an explicit treatment of the common law by its supporters and a more empirical approach by reformers. In the debates over suffrage, on the other hand, opponents to woman's suffrage relied on gross stereotypes of men and women, to which reformers could respond with reference to equal rights and recognition of women's capacities. Lost in these debates is any real interrogation into why women were really denied the vote and thus no consideration of why social relations—and political privileges—were ordered as they were. Despite their lack of engagement in the details of the common law, Congress relied on its social ordering. Hence we can identify this as a reliance upon social ordering

without recognition of its institutions. An examination of the way the Supreme Court handled this situation indicates the limits of liberal principles under these conditions.

MARRIAGE IN THE SUPREME COURT

The development that treatment of women's social position and political rights took in Congress was reflected in the way that these issues were treated in the Supreme Court. In the notable nineteenth-century Supreme Court cases involving women, women's position was attributed to stereotypes rather than based upon a measured understanding of the role of the common law in society. The tenor of these cases was reflected in twentieth-century reform cases, in which the task to achieve women's equality became an exercise in dismantling those stereotypes. This made it look as if that solved the problem of sex discrimination, when what had been lost in this framework was an appreciation for why these stereotypes developed as they did and why they were relied upon.

In the 1872 Supreme Court case of *Bradwell v. State*,[394] Myra Bradwell, a married woman, wanted to obtain a license from the state of Illinois to practice law. The majority opinion, authored by Miller, relied on a limited reading of the privileges and immunities clause of the Fourteenth Amendment to argue that practicing law was not one of the privileges and immunities granted by the Amendment. The more well-known and notorious opinion is the concurring opinion by Justice Bradley, in which he explains that practicing law is not a privilege or immunity because the civil law had always recognized separate

[394] 83 U.S. 130 (1872).

spheres for men and women, and this suited them, particularly women's "natural timidity and delicacy."[395] Bradley noted that the common law was still in operation, and that a married woman was incapable of making a contract without the consent of her husband. He thus references the common law, but he justifies it by drawing upon the apparent natural differences between men and women with the often-quoted lines: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[396]

Stereotypes are further relied upon in the 1888 case of *Maynard v. Hill*,[397] in which the Supreme Court faced the issue of Oregon granting a divorce to Mr. Maynard, whose wife resided in Ohio. Here the Court faced the issue of marriage in asking whether Oregon breached the Constitution's prohibition against state impairment of contracts in granting the divorce to break the marriage contract of the Maynards. The Court acknowledged that this decision involved important matters, for when the validity of a decree dissolving a marriage was questioned, it affected many other matters—"the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained."[398] Thus Justice Field recognized the role that marriage plays in larger issues of property and legitimacy of children.

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[395] *Ibid.,* 141. Bradley's is a concurring and as such it has no weight in terms of legal doctrine. It is important nevertheless because it is continually reproduced in contemporary law textbooks as exemplary of nineteenth-century views on women, and it proves influential in Justice Brennan's 1973 opinion in *Frontiero v. Richardson.*

[396] *Ibid*.

[397] 125 U.S. 190 (1888).

[398] *Maynard,* 204.

Field foregoes invoking romanticized notions of marriage by refusing to consider whether divorce itself is corrosive of marriage, but he does rely on other kinds of stereotypes in discussing marriage itself. He treats the question of whether a state can impair a contract, and thus considers the marriage contract's categorization as contract. He determines that the Constitution's prohibition applies only to contracts involving property, while marriage remains a contract of a different sort. While it is contractual because its parties must consent to entering the marital relation, "it is something more than a mere contract."[399] Once parties make the contract, they enter a relation that they cannot change, and the law holds the parties to obligations and liabilities. His explanation for this is that "It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of family and society."[400] Thus the marriage contract is not a contract within the meaning of the provision.

In elucidating the *sui generis* character of the marriage contract, Field did acknowledge the peculiarity of the marriage contract and drew attention to the status relations of the marital relations. He approaches justification in considering why the law maintains these statuses. The marriage contract emerges as unique and as important, because we are told that it is the foundation of society. If it is so important, then its obligations and liabilities remain beyond reproach and the assignment of those obligations along gendered lines become beyond question. He does not discuss what those particular obligations are, and thus marriage

[399] *Ibid.,* 210-211.
[400] *Ibid.,* 211.

emerges as an institution that is unassailable rather than leaving its obligations open to reconsideration.

From these nineteenth-century cases, then, marital relations emerged as important, but the reason for their particular configuration was lost. Few of these discussions inquired into the common-law origins of the marital relations, and so the marital relations emerged as part of the natural order of things. Thus in the 1948 case of *Goesart v. Cleary*,[401] the Court sustained a Michigan law that forbade a women to work as a bartender unless she was the wife or daughter of the owner. The Court admitted that despite changes in the social and legal status of women, states could still distinguish between the sexes. The Court did not refer to any reasons why states might distinguish among the sexes, such as any common-law rules. Instead, it explained that bartending by women could give rise to moral and social problems, this was a permissible discrimination. In this decision, the Court relies on stereotypical notions of women's character and situation. Lost from this decision is the common-law origin of such a law. In the common law, inns had been considered as quasi-private businesses, and the domestic relations continued to operate within them. In *Goesart*, however, the common-law roots were left to the states, with the Court adopting only their ramifications for gendered differences.

The decisions regarding women having taken this course of subsuming treatment of the common law by relegating its reasoning to the states, by the 1970s, it might appear that women's subjugation was attributable only to

[401] 335 U.S. 464 (1948).

stereotypes and therefore outdated views of women. Thus when Justice Brennan introduced the heightened scrutiny standard for sex discrimination in 1973, he lamented the country's long history with sex discrimination: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination….Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[402] To identify this history, he cites *Bradwell's* reliance on the respective natures of men and women. According to Brennan, paternalism became the basis for an institutionalization of stereotypes: "Our statute books became laden with gross, stereotyped distinctions between the sexes."[403]

Brennan located the source of sex discrimination in stereotypes, for by the time that women's unequal status was considered seriously by the Court, it took place in a tradition that had lost sight of the common-law origins of women's status because the common law and the constitutional doctrine of equal protection has been severed institutionally. When stereotypes are identified as the source of the problem, then the solution would seem to involve the relatively simple task of dispensing with the stereotypes. The attainment of equality, then, would seem to involve simply shedding the outdated visions of women of the past.

The development of the Court's position on gender equality has been assailed by feminist scholars on a number of fronts. Catherine MacKinnon criticizes its focus on the state, thus being unable to treat the social discrimination

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[402] *Frontiero v. Richardson* 411 U.S. 677 (1973) 684.
[403] *Ibid.,* 685.

that maintains women's subjugation.[404] Reva Siegel criticizes it for its ahistorical understanding of women's subjugation. Examining Brennan's opinion in *Frontiero* she shows that women's subordination was attributed to outmoded stereotypes and was brought into constitutional doctrine by equating sex discrimination with race discrimination, thus extending the equal protection of the Fourteenth Amendment to women. This approach fails to recognize the locally-controlled subordination of women through state-level regulation of the family through the domestic relations, and Siegel notes that the family continues to remain beyond the scope of the federal government. Women's condition will thus not be improved until the Court recognizes the source of women's subordination and the need for it and the federal government to interfere in matters that have been traditionally left up to the states.[405]

Siegel's response to these developments is to rely on a synthetic reading of the Fourteenth and Nineteenth Amendments in order to identify the constitutional history of women and thus be able to locate the real source of women's subordination. My response is to recover the role of the common law in American political history and to appreciate the various ways that it has been accommodated to liberalism.

We often see the story of rights in America as a constitutional story. We thus look to Supreme Court cases and congressional debates such as the Reconstruction debates to find developments or setbacks in egalitarianism. Such

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[404] "Unthinking ERA Thinking" *University of Chicago Law Review* 54 (1987) 759.
[405] Reva Siegel, "She, the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," 115 *Harvard Law Review* (February 2002): 947.

pursuits provide us with a limited picture, however. In terms of women's rights, not all of the activity was taking place at the constitutional level. It was at state-level institutions that the relation between the social relations of the common law and reform of those relations was treated the most seriously and where the most reflective arguments took place. While actors at the federal level tended to recur to the common law in generalizations without reflecting on why those relations were retained, it was in the states that defenders of the common law provided thought-out arguments. In response, reformers had to respond to their empirical claims that the marital relation served a social purpose. In debating on an empirical level, they had to come up with a substitute for meeting those same purposes. Debates on such a level managed to introduce equality into the discussion without dispensing with social considerations. In these examples at the federal level, on the other hand, coverture is reproduced without acknowledgement of its social purposes. Reform becomes a matter of tackling the stereotypes and the naturalized portraits of marriage, family and gender that would emerge from them. Lost in such reform, however, would be serious consideration of what these stereotypes served to support in the first place.

We could identify the treatment of women's issue at the state and federal level as the operation of different versions of liberalism. At the state level, some actors recognized liberal ideals and social relations simultaneously and did not see them as lying in contradiction. This was a position that was difficult to continually sustain, because the social relations were likely to come into conflict with liberal ideals. In their effort to sustain them, especially in the midst of

reform, state-level were able to discuss empirically how these social relations could be modified or replaced while serving the purposes they had always served. They were also able to separate marital status from political status. Thus they were able to articulate why marital status and obligations should be maintained while remaining in a better position to determine whether the conferral of political rights would harm the purposes of those statutes.

The discussions at the federal level, on the other hand, invited a use of liberalism based only on its ideals. In discussions in Congress and the Supreme Court, the social relations of the domestic relations were recognized but their purposes were not. Instead, actors constructed stereotypical justifications for them, attributing them to the natural disposition of women or to a vague understanding that these relations were important to society. As these explanations were passed down in constitutional doctrine, they proved to be easily assailed by liberal ideals in the twentieth century. In *Frontiero,* women's subordination is attributed to outdated views of women and becomes a thing of the past, with more progressive notions of women seeming to serve as the simple solution.

In the liberalism of the 1970s we see a liberalism similar to that used by the suffragists, with notable differences. The suffragists introduced a form of liberal argument that relied on the ideals of liberalism in juxtaposition to the common law. By the 1970s, owing to the institutional cleavage of liberal, constitutional principles and the common law, liberal ideals became invoked not in opposition to the common law but in the absence of any reference to the

common law. Use of liberal ideals in this way can lead to a number of conceptual problems, as Mary Ritter Beard pointed out. She pointed out that equality discourse could lead to ridiculous questions, and, indeed, Reva Siegel has pointed out that contemporary equality discourse has a tendency to degenerate into exercises of frustration, as in defining equality, or into exercises of the ridiculous: "In debates over the ERA, a litmus test for commitment to the equality principle was willingness to treat sex like race, which in turn translated into the question, reiterated in debate after debate: But would you eliminate sex-segregated bathrooms?"[406]

The treatment of marriage and liberalism at the federal level, then, has led to problems that state-level treatment could have avoided. The states were more tolerant of the common law, and so women's rights were impeded at the state level, because there were even liberals at the state level who were willing to sustain the common-law marital relation and its statuses. The merits of an approach that recognizes a relation between the common law and liberal principles, though, become more apparent when we contrast it with the federal treatment. At the state level, equality, when discussed, was understood in terms of social ordering. At the federal level, the common-law orderings were obscured and then justified through naturalization. By the time that equality discourse came to be applied to women in constitutional discourse, equality seemed to be applied to mere outdated stereotypes. Equality discourse thus takes place in abstraction, and the source of inequality and the appreciation for social ordering is

[406] Siegel, "She the People," 11.

lost. With the common-law origins of inegalitarian social orderings lost, the inegalitarian past does not make sense (except as a contradiction to liberal principles or as stereotypes). In response, equality as a tool proves to be less than effective in dismantling those orderings, much to the puzzlement of those who understand equality to be an ideal capable of being achieved.

Conclusion

Lockean liberalism has a social order. In addition to the principles present in his liberal theory, Locke relied on the domestic relations of the common law to achieve specific purposes. Some Americans of the nineteenth-century also relied on the domestic relations to serve additional purposes that they saw as needing to be filled, and they did so as liberals. Reliance on both liberal principles and a common-law social ordering generates a tension because the social ordering has proven to be restrictive of the liberty of women. Because of this, we might ask why we should care that the reliance on the domestic relations was consistent with Lockean liberalism. We might praise the development of a version of liberalism that freed women from the strictures of the rules of coverture.

We should care about this version of Lockean liberalism, and its loss from contemporary liberal theory and practice, because the prevailing version of liberalism, a liberalism defined solely in terms of its ideals, impedes explanations in the study of American politics and invites inadequate solutions when liberalism in political practice. In liberal theory, it leads to too many puzzles; we can explain American politics better if we seriously take into account social ordering. In political practice, a lack of recognition of social ordering leads to a misapplication of liberal principles.

Once we care about social ordering, the problem remains in how to account for it. Liberal theory proves to be of limited use, because it does not interrogate the principles of liberalism. In much American political development

literature, which often relies on liberalism as a means of analyzing American political history, and as seen in the historical studies of married women's property rights reform, social ordering, because it is so often hierarchical and ascriptive, is too easily dismissed from studies as unfortunate practices that are continually present. Scholars tend to look to history to identify the demise of these institutions of social ordering, to see when and how American politics developed and abandoned traditions such as the common law domestic relations. This stance impedes scholars from interrogating the domestic relations and from taking them seriously enough to determine why they were relied upon. By casting liberalism in opposition to the common-law tradition, the literature leaves the principles of liberalism unexamined.

In contemporary liberal theory, even in theories that seek to recover social practices, institutions and virtues of liberalism, there is a similar lack of examination of liberal principles and a too-hasty reliance on them. In the case of William Galston and Stephen Macedo, the family is seen as important to a liberal society, and it is also seen as egalitarian. While my goal is also to recognize institutions while applying egalitarian principles, these liberal theories have been premature in applying liberal principles; they have presumed the appeal of egalitarian families while neglecting the historical and ongoing costs that citizens—in the case of families, women—have borne in maintaining these institutions. As much as we might wish for families that are both egalitarian and stable, experience has shown that this wish is not so easily fulfilled.

The problem common to these contemporary uses of liberalism is that they do not recognize the limits of liberal principles. My reading of Locke demonstrated that liberal principles were limited when it came to the institutions of social ordering, and some nineteenth-century Americans practiced these limits as well. Contemporary liberal theorists display an optimism in liberal principles when maybe they should be questioning of the expansiveness of principles. To develop a skepticism about liberal principles, then, one is inclined to go outside of liberalism.

Uday Mehta has provided guidance by employing an analysis that is both Burkean and postmodern in explaining the relation between nineteenth-century British liberal thought and the British empire. There are contemporary Burkeans and postmodernists who have given thought to liberalism's principles that contemporary liberals have not. Relying on the work of Burke, Harvey Mansfield entertains a skepticism for liberal principles, because they are abstract and because they can be invoked and exercised at the expense of social institutions and practices upon which a liberal society relies.[407] He relies on Burke not to suggest an alternative to liberalism but because he sees Burke as capturing ideas that are central to a liberal order.[408] To refer to Mansfield is ironic, as it is feminism that he identifies as the main culprit to erosion of the important social practice of manliness.[409] His Burkean complaint, like Mary Ritter Beard's make

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[407] Harvey Mansfield, "Gentlemen's Gentlemen: Edmund Burke's Critique of Theory," *Times Literary Supplement* (July 11, 1997): 15.

[408] Mansfield sees Burke's preoccupation with manliness as providing for the character formation and public-spiritedness upon which a liberal society relies. Mansfield, *The Spirit of Liberalism* (Cambridge: Harvard University Press, 1978).

[409] Mansfield is not reticent about his disdain for the feminist movement, saying, "Feminism is now the greatest blight on our national prospect" in "The Effects of Liberalism and Feminism on

us sensitive to the possibility that principles that lie in tension with social ordering, can dispose of that ordering.

One can gain a feminist perspective from Wendy Brown, who provides both a postmodern and feminist wariness of liberal principles. If Mansfield is skeptical of the abstract character of principles because they defeat social ordering, Brown is skeptical because the putative abstract character of the principles obscures the social construction underlying their accepted meaning. There is a social background that gives content to liberal principles, and this social background is based on a system f gendered ordering. When the principles are relied upon by marginalized groups, therefore, they reproduce gender subordination rather than escaping it.[410]

The skepticism of principles displayed by both Mansfield and Brown might make us despair of the principles. Mansfield would be happy to see an end to feminist thought. Brown cautions activists against employing liberal principles. They provide perspectives through which to question liberal principles, but in terms of their prescriptions, they do not provide enough guidance in thinking about how to negotiate both liberalism's principles and its social ordering. If one wants to find a way to retain both, then history can serve as a guide. Mary Ritter Beard's Tocquevillian analysis displayed a skepticism for liberal principles because she feared that they would upset social relations. She

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Society," *Commentary* 100 (November 1995): 85-86. He also complains of feminism in Mansfield, "The Partial Eclipse of Manliness: What Room is There for Courage in a Post-Feminist World?" *Times Literary Supplement* (February 26, 1999): 11-12; Mansfield, *The Spirit of Liberalism*; and Mansfield, "Some Doubts About Feminism," *Government and Opposition* 32 (Spring 1997): 291-300.

[410] Wendy Brown, *States of Injury* (Princeton: Princeton University Press, 1995).

did not want to retain the hierarchy of the traditional family, but she did find something redeemable about the status relations of the family, because the obligations they sustained served larger social roles. From Beard we can learn that status relations serve some larger social purpose (or, conversely, that society relies on these relations and, as we've seen historically, employs the power of the state in upholding them).

Beard helps us develop an appreciation for social ordering, but it does not mean that we have to accept her reticence in upsetting the social roles of the family, or even the family itself. Beard is useful because her analysis serves as a heuristic for thinking about how to recognize social order as worthy of retaining, even in the face of liberal principles. The reformist approach of Robert Dale Owen proves instructive in combining an appreciation for social order with liberal principles. Owen wanted to extend liberal principles to women, but he did not want them to trump social relations. He relied on liberal principles to find ways to equalize the marital relations while retaining them. We can therefore see Owen as trying to alleviate the hierarchy from the marital relations while retaining the status.

Left unaccounted in the projects of both Beard and Owen is an explanation of why the status relations need to be maintained. Even Owen, the liberal reformer, concedes to family. He still does not provide a reason for why we should. Was it the family itself that he saw as worthy of protection? Or was the family serving some other purpose? What social roles do marital obligations fulfill? One can respond by acknowledging that the answer changes over time.

Different generations have found different needs. One need that I have identified is the perceived need for intimacy and personal relations of the household in the face of increasingly impersonal market relations. The task remains of why this is an expressed need worthy of consideration and worthy of asking citizens to sacrifice their liberty for.

An example of recognizing social ordering as the limits of liberalism and yet applying liberal principles to that social ordering is provided by Joan Williams, who looks at the legacy of coverture upon family economic arrangements in cases of divorce.[411] Drawing upon Reva Siegel's argument that coverture has not been abolished but displaced in modern form, Williams points out the perpetuation of coverture in the allocation of the family wage to the wage-earner, who tends to be the husband. In divorce, women and the children, if given custody to the mother, tend to lose financially if wives have sacrificed their earning potential to raise children. In response to the sociological trends of divorce, Williams submits a joint property proposal, whereby the wage earned by the wage-earner of the family is shared by husband and wife. She recognizes that this proposal could awaken "commodification anxiety," drawn from "fears of a world in which all human relations assume a market model of commercialized self-seeking."[412]

Williams' reference to commodification anxiety parallels the fears that I identified in late-nineteenth century Americans—as market relations became less

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[411] Joan Williams, "Is Coverture Dead? Beyond a New Theory of Alimony," *Georgetown Law Journal* 82 (September 1994): 2227-2290.
[412] *Ibid.,* 2277.

personal, the relations of the home were seen to be in need of protection. Williams responds not by dismissing the fears of commodification of the family but by taking them seriously. She acknowledges that intimacy and altruism are attributes of the family worth saving, but she does not think that the traditional arrangements of husband as wage earner and wife as altruistic service-provider is the only way to protect the intimacy of the family.

Williams' proposal allows for a continuum of market and nonmarket elements across a broad range of human transactions; there are nonmarket attributes to market transactions and the market can be present in intimate relations. The family thus can be seen as another human relation with both market and intimate aspects, rather than being seen as an institution separate and immune from public, economic considerations. Her proposal allows for a recognition that commodification anxiety has served to render the family intimate, and to do so by reinforcing traditional gender roles. She relies on liberal ideals to challenge the roles in which wives are placed and the material consequences that follow from these arrangements while not attacking the institution that gave rise to these arrangements, which can be altered if the conceptions of the family are reconceived.

Williams' joint property proposal is an exercise in taking seriously the sentiments that give rise to women's subjection. Commodification anxiety may be a means by which traditional, hierarchical arrangements that benefit husbands at the expense of wives are perpetuated, but she responds not by dismissing this anxiety as solely existing to subjugate women but as arising out of a legitimate

anxiety about a perceived need for intimate relations. Her proposal seeks to respect that anxiety while adjusting the means by which it can be alleviated.

Williams' analysis leaves a major question unexamined, however: Why should we as a modern society care about intimacy? After all, intimacy can be made transparent as a trope by which women have been kept in their place in American history. The appeal to personal relations was the means by which the husband-wife relation was kept from further reform in the late-nineteenth century. Intimacy, along with the natural veneer given to the family by Locke as well as the relegation of family law to the states by the Supreme Court today, all serve to render the family less susceptible to change by liberal principles, to suggest that it is a private, nonpolitical sphere even as the public sphere relies on it. So why take the claim of intimacy seriously? To not take the intimacy argument seriously would be to commit the error that I have identified in liberal theory and practice. Just as the Supreme Court has attributed women's inequality to stereotype, is we see intimacy only as outmoded tropes to subjugate women, then we fail to recognize why it is such a sustaining feature of our political discourse and why the state will go to lengths to protect it, even when it means that some citizens will have to bear the burden in sustaining it.

When we take the argument of intimacy seriously, we can acknowledge that intimacy serves a purpose that liberal principles cannot fill. Liberal theory tends to acknowledge those social practices and institutions that contribute to the inculcation of liberal principles.[413] What happens, however, when a society

[413] Amy Gutmann, e.g., makes a liberal argument for education, because public education serves to inculcate shared public values, such as tolerance, which prepare the child to be a citizen in a diverse society. *Democratic Education* (Princeton: Princeton University Press, 1987).

expresses a need for practices that are not derivable from liberal principles and, indeed, may lie in tension with the principles? Lockean liberal theory would accept this as the limits to liberalism and accept the tension.

History has shown that the tension is difficult to sustain, besides being normatively unappealing to us today. One can recognize limits to liberal principles, however, without dispensing with them. One can recognize social ordering, even defend it, without accepting that it must be adopted from past experience unconditionally. An alternative liberalism that recovers Lockean liberalism could seek to identify why certain institutions and practices are valued by a given liberal society. This perspective interrogates institutions such as the domestic relations and identifies what expression these relations manifest. Once one identifies the perceived need for the relations, one can them reform them while respecting the needs and anxieties which the liberal society faces. The institutions can be restructured, with their purposes maintained.

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