Governing Through Contract: Common Law Marriage in the Nineteenth Century

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When Mrs. William Reed's husband died in 1806, she requested an annual payment of twenty-five dollars from the Provident Society, of which her husband had been a member. Although the society guaranteed such support to the widows of all its members, it refused to recognize Mrs. Reed as Mr. Reed's widow, claiming that the Reeds were never lawfully married.[1]

In the trial that ensued, the following story emerged: In 1785, John Guest, Mrs. Reed's first husband, left his wife for unspecified "foreign parts."[2] In 1792, when it was "reported and generally believed" that Guest had died, his wife married Reed.[3] Following the marriage, Guest resurfaced in New York, where he lived until his death in 1800, never objecting to the marriage between Mr. and Mrs. Reed. Mrs. Reed lived with her second husband and "sustained a good reputation in society" until his death.[4]

In a per curiam opinion written by Chancellor Kent,[5] the New York Supreme Court of Judicature held, in *Fenton v. Reed*, that the Reeds' marriage was valid.[6] Although their marriage was null and void while Guest was alive, Kent held, no proof of solemnization after his death was needed for their marriage to be valid. The court wrote:

> A marriage may be proved . . . from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. . . . No formal solemnization of marriage was requisite. A contract of marriage made

1. *See* Fenton v. Reed, 4 Johns. 52, 52 (N.Y. Sup. Ct. 1809) (per curiam).
2. *Id.*
3. *Id.*
4. *Id.* The language about Mrs. Reed's reputation is of evidentiary significance. As a New York court wrote in deciding whether to recognize a common law marriage almost 100 years after *Fenton*, "a great deal more evidence and of a great deal stronger nature will be required in the case of a loose and licentious woman than in the case of a chaste, delicate and refined woman." Bell v. Clarke, 45 Misc. 272, 274 (N.Y. Sup. Ct. 1904); *see also* Leon A. Plumb, *Marriage: Common-Law Marriage in New York*, 1 CORNELL L.Q. 48, 50 (1915) (citing *Bell* in a discussion of the evidentiary requirements for establishing a common law marriage).
5. Although the opinion is unsigned, it is attributed to Chancellor Kent. *See, e.g.*, OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 80 n.1 (1922).
6. *See Fenton*, 4 Johns. at 54.

> *per verba de presenti* amounts to an actual marriage, and is valid as if made *in facie ecclesiæ*.[7]

In the Reeds' case, the court reasoned, because "[t]he parties cohabited together as husband [and] wife, and under the reputation and understanding that they were such . . . ; and the wife, during this time, sustained a good character in society," an actual marriage between them could be inferred.[8]

With this opinion, Chancellor Kent staked out one defining pole of a controversy that was to rage in the state courts for the next century.[9] State courts throughout the nineteenth century debated, with varied levels of vitriol, the legitimacy of the doctrine of common law marriage, the doctrine by which courts could recognize unsolemnized, long-term, sexual unions as marriages. To proponents of the doctrine, a group that included a majority of state courts by the last quarter of the nineteenth century, a common law marriage was a valid contract between a man and a woman that demanded judicial enforcement. To opponents of the doctrine, by contrast, common law marriages represented the desanctification of the sacred marital relationship and the abdication of critically needed state control over the most foundational of social relationships.

In this Note, I examine the nineteenth-century doctrine of common law marriage and question why recognition of the doctrine became the majority position by the last quarter of that century. During the nineteenth century, courts were generally disinclined to favor any sexual unions that failed to conform to the traditional matrimonial model. Yet, by recognizing common law marriages, the majority of state courts seemingly granted their imprimatur to a range of nontraditional unions. I argue that the doctrine of common law marriage provided jurists a tool with which to define the proper relationship between women, their potential male providers, and the state. In other words, courts used marriage as a vector of public policy.[10]

I explore the foundations of such judicial policymaking by focusing on the language of contract that saturates courts' opinions recognizing common law marriages. I argue that nineteenth-century proponents of the doctrine invoked

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7. *Id.* Commentators have debated the veracity of Chancellor Kent's interpretation of the English common law. Each side of the 19th-century American common law marriage debate claimed to have the support of English history and legal authority. *See* KOEGEL, *supra* note 5, at 37-53. An exploration of the English legal history of common law marriage is not necessary for this Note, as my goal is to explain the modes of legal argumentation used by American proponents of common law marriage.

8. *Fenton*, 4 Johns. at 54.

9. The opposite pole was defined one year later by Chief Justice Parsons of the Massachusetts Supreme Judicial Court in the case of *Milford v. Worcester*, 7 Mass. (5 Tyng) 48 (1810). *See infra* notes 82-90 and accompanying text.

10. *Cf.* Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century*, *in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 107, 107 (Linda K. Kerber et al. eds., 1995) (arguing that historians must examine marriage as "a public institution and a building block of public policy" in order to illuminate the ways in which the state exerts its power to shape men's and women's respective roles and statuses).

the language of contract, the quintessential symbol of the private and consensual, while simultaneously crafting a potentially coercive state agenda: the privatization of women's dependency in the era before the rise of the modern welfare state. As in the case brought by Mrs. Reed, most cases concerning the recognition of common law marriages were claims for the material support of women left, by death or desertion, without male partners to provide for them. Common law marriage, I contend, represents one private, common law antecedent of later public law policies to handle the problem of female poverty.[11]

In Part I of the Note, I examine the rise of the doctrine of common law marriage in nineteenth-century America, the basic arguments marshaled in its favor, and its triumph in the courts over the course of the century.[12] In addition, I briefly survey the social context of the judicial debate over common law marriage, laying out various forms of nonmarital heterosexual coupling that occurred in different communities. In Part II, I analyze the arguments of the doctrine's opponents, who denounced the institution on both moral and social grounds. I explore their perception that society was evolving at a rate that challenged social stability and that marriage was a potential check on the ensuing disarray.

In Part III, I analyze the deeper preoccupations and the possible social agenda of the judicial proponents of common law marriage by interrogating their use of contract language as a basis for recognizing the doctrine. I begin by analyzing the critique of a perhaps unlikely opponent of common law marriage (unlikely given the number of female plaintiffs who seemingly benefited in the cases[13]): Elizabeth Cady Stanton. Stanton's speeches, I argue,

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11. *Cf.* Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995) ("Dependency, 'naturally' assigned to the family, is privatized.") I am indebted to Professor Reva Siegel for helping me to formulate this analysis.

12. A word on sources and time period: The sources I rely upon in this Note are primarily civil court cases that span the 19th century temporally and jurisdictionally. I use court documents out of necessity. Informal by definition, common law marriages were not chronicled except when challenged. In addition, other than treatise writers who documented the state of the law, few commentators wrote about common law marriages until the late 19th century and the early 20th century. In examining a broad time period without focusing on a particular region, my goal is to document a trend in laws and attitudes over the course of a century and the continuity of the language used therein. While the institution of marriage certainly changed in many ways over the course of the century, "[e]ven in areas where change [was] relatively substantial, changed rules and rights overlaid but did not obliterate and replace older visions of marital rights." Hendrik Hartog, *Mrs. Packard on Dependency*, 1 YALE J.L. & HUMAN. 79, 89 (1988). The same can be said for the contractual element of marriage. *See* Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING-CLASS HIST. 56, 70 (1995) (arguing that despite efforts at reform, the basic structure of predetermined relations that governed marriage and labor contracts "exhibited substantial staying power, such that, in their essentials, the main legal structures that governed production and reproduction in the early decades of the nineteenth century remained in place at the end").

13. Recently, in fact, one feminist legal commentator has extolled the doctrine of common law marriage as a protector of women, arguing that the doctrine's demise marked a blow to women's financial security in long-term relationships. *See* Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711-12 (1996).

reveal the conservative underpinnings of the seemingly liberal doctrine of common law marriage.

In her speeches, Stanton pointed to the instability of the marriage-as-contract formulation that lay at the heart of judicial recognition of common law marriages.[14] In recognizing the fallacies of this formulation, Stanton was not alone. Two leading jurists of the late nineteenth century, Joel Bishop and Oliver Wendell Holmes, also criticized the legal foundations of the equation of marriage and contract. Using the work of Stanton, Bishop, and Holmes, I expose the doctrinal weaknesses with the marriage-as-contract language and suggest that by using such language, courts successfully contained single women's dependencies within the private sphere of the family, as opposed to the public arena of the state.

In Part IV, I conclude by positing that the judicial proponents of common law marriage were engaged in what I call the act of "governing through contract," that is, the public recognition of private relationships between individuals as contractual in the furtherance of social policy. In so arguing, I do not claim to reveal with absolute certainty the motives of the judicial proponents of common law marriage. As I discuss below,[15] cases unfortunately offer quite limited insight into the subjective motivations of their cast of characters. Judges are no exception to this rule. As the concept of "governing through contract" that I develop implies, in this Note I take seriously judicial opinions as a form of social governance. I thus use judges' opinions, their stated concerns, and their perceptions of appropriate remedies to suggest an awareness on their part of the consequences of their opinions in the realm of social policy. In making this behavior visible as a form of governance, I hope not only to explain the ideological underpinnings of nineteenth-century common law marriage, but also to provide a broader critical lens through which to view contemporary approaches to female dependency.

I. THE CASE FOR COMMON LAW MARRIAGE

A. *The Rise of Common Law Marriage*

With Chancellor Kent's 1809 opinion in *Fenton v. Reed*,[16] New York became a common law marriage state, recognizing informal marriages—relationships that were never solemnized or celebrated before any officiant, but

14. Stanton's critique was not aimed at the notion of marriage as a contract per se, but rather at the judicial project of calling marriage a contract while simultaneously prohibiting exit from marriage as would be permitted in any other contract. *See infra* Section III.B. In fact, as Elizabeth Clark notes, Stanton's "rallying cry" in her battle to reform marriage and divorce laws could have been "from covenant to contract." Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25, 26 (1990).

15. *See infra* note 61 and accompanying text.

16. 4 Johns. 52 (N.Y. Sup. Ct. 1809) (per curiam).

conformed to a pattern of marital behavior—as falling within the legal rubric of marriage.[17] The precise requirements for a common law marriage varied among the states that recognized the doctrine. All recognizing states, however, agreed with Chancellor Kent that a marriage contracted *per verba de presenti*, with words of present consent, was valid and binding.[18]

In 1843, the United States Supreme Court first considered the validity of common law marriages in the case of *Jewell v. Jewell*.[19] With only eight Justices sitting, however, the Court was evenly divided on the question of whether the relationship in question constituted a valid marriage.[20] Not until 1877 did the nation's highest court decisively enter the common law marriage debate. In *Meister v. Moore*,[21] interpreting Michigan law, the Court recognized a growing consensus among courts and commentators in favor of the doctrine of common law marriage and added its approval to the doctrine.[22]

Like *Jewell*, *Meister* was the culmination of an ejectment action that turned on the validity of a long-term unsolemnized relationship, in this case, the

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17. As the New York court explained in 1841,

> [T]he mere fact of a man and woman's living together and carrying on an illicit intercourse, is wholly insufficient to raise a legal presumption of marriage; as it too often happens that such cohabitation takes place when intercourse between the parties is clearly meretricious. The presumption of marriage only arises from matrimonial cohabitation; where the parties not only live together as husband and wife, but hold themselves out to the world as sustaining that honorable relation to each other.

Rose v. Clark, 8 Paige Ch. 574, 582 (N.Y. Ch. 1841).

18. Some states also recognized as valid marriages contracted *per verba de futuro cum copula*, with words of future promise and consummation. Beyond that, states' requirements varied, often including some combination of the couple's cohabiting, holding themselves out to the public as husband and wife, and acquiring a reputation in their community as married. In addition, even states that recognized common law marriages differed on whether they would recognize a relationship as marital when it had commenced while an impediment existed to a valid marriage. In so-called "impediment cases" (such as *Fenton v. Reed*), one party to the alleged common law marriage was legally married to another person when the alleged common law marriage relationship commenced. At some later date, the original spouse died or the original marriage ended in an official divorce. Faced with such situations, many courts recognized the later relationship as a common law marriage, despite the initial impediment. Other courts refused to recognize such relationships, holding that the requisite consent was absent since it had been granted at a time when it was legally impossible for the already-married party to consent to another marriage. *See* KOEGEL, *supra* note 5, at 153-60. For early 20th-century, state-by-state requirements for a valid common law marriage, see BUREAU OF WAR RISK INS., TREASURY DEP'T, DIGEST OF THE LAW RELATING TO COMMON LAW MARRIAGE IN THE STATES, TERRITORIES, AND DEPENDENCIES OF THE UNITED STATES 9-54 (1919); FRED S. HALL & ELISABETH W. BROOKE, AMERICAN MARRIAGE LAWS IN THEIR SOCIAL ASPECTS: A DIGEST 31 (1919); and MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE 370-71 (1929).

19. 42 U.S. (1 How.) 219 (1843). In *Jewell*, Benjamin Jewell's widow, Sarah Isaacs, and their children brought an ejectment action against Jewell's children from his previous relationship with a woman named Sophie Prevost. Benjamin and Sophie, an immigrant to South Carolina from the West Indies, lived together for many years in South Carolina, she by the name Mrs. Jewell. After 15 years together, they separated by mutual consent, signing a contract that divided between them their children, costs, and servants, and that absolved Benjamin of responsibility for Sophie's future support, save the expenses of schooling one of the children for whom she was responsible. The plaintiffs in the case claimed that Sophie's children had no right to be on Jewell's land because their parents were never formally married. *See id.* at 228-31.

20. *See id.* at 234 ("Upon the point thus decided, this court is equally divided; and no opinion can therefore be given.").

21. 96 U.S. 76 (1877).

22. *See id.* at 78-79.

relationship between William Mowry and a woman identified by the court as Mary, the daughter of an Indian named Pero.[23] William and Mary married in Michigan and had a daughter, Elizabeth. Seven years after their relationship began, William died intestate. Subsequently, Elizabeth married Isaacs and they sold some of her father's land in Pittsburgh to Meister. Meister brought suit to eject the defendants from the land. The defendants claimed that they owned the lot in question as it had been conveyed to them by William's mother. They argued that William's marriage to Mary was invalid because its celebration had not conformed with the Michigan statute's requirement that a minister or magistrate be present at the ceremony. Since William never married, they claimed, his lands belonged to his mother after his death, and she was the only person authorized to sell them.[24]

The lower court charged the jury that if it found that neither a magistrate nor a minister was present at William and Mary's marriage, then it must find that the marriage was invalid and that the defendants had rightful title to the land.[25] The jury found for the defendants.[26] The Supreme Court reversed, holding that William and Mary's marriage was valid. The Court adopted the view that most states had already accepted, using language that, while formally an interpretation of Michigan law, reverberated well beyond Michigan: "Marriage," it held, "is everywhere regarded as a civil contract."[27] State marriage statutes prescribing methods of matrimonial solemnization and celebration, therefore, were not mandatory; they were "merely directory, [and not] destructive of the common-law right to form a marriage relation by words of present assent."[28] Marriage statutes, the Court expounded, did not invalidate informal marriages "unless they contain[ed] express words of nullity."[29]

B. *Proponents' Arguments*

By the dawn of the last decade of the nineteenth century, the majority of states recognized common law marriages, and the doctrine had received the support of prominent treatise writers of the day.[30] Courts recognizing common law marriages grounded their opinions, first and foremost, on the

23. *See id.* at 76.
24. *See id.*
25. *See id.* at 77.
26. *See id.*
27. *Id.* at 78.
28. *Id.* at 79.
29. *Id.*
30. *See id.*; *see also, e.g.*, TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURT OF CHANCERY 306-16 (Albany, William Gould & Son 3d ed. 1867).

premise that marriage is a civil contract.[31] This was a powerful argument at a time when the paradigm of contract exerted extraordinary influence in legal thought:[32] "The sanctity of contract competed, perhaps on equal terms, with the notion of the sanctity of marriage."[33] The Supreme Court thus invoked powerful forces when it declared authoritatively that "[m]arriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, but they do not confer the right."[34]

Since marriage was a contract, courts reasoned, persons should be able to form a marriage on their own without any formal officiation by a third party. The basis of marriage, like other contracts, was consent, not formality. As a Louisiana court wrote, "Marriage is regarded by our law in no other light than as a civil contract, highly favored, and depending essentially on the free consent of the parties capable by law of contracting."[35] Similarly, Tapping Reeve observed in his influential treatise on domestic relations that "[t]here is nothing in the nature of the marriage contract that is more sacred than that of other contracts."[36]

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31. *See, e.g.*, Travers v. Reinhardt, 205 U.S. 423, 440 (1907); Maryland v. Baldwin, 112 U.S. 490, 494 (1884); *Meister*, 96 U.S. at 78; Great N. Ry. v. Johnson, 254 F. 683, 684-85 (8th Cir. 1918); Graham v. Bennet, 2 Cal. 503, 506 (1852); Askew v. Dupree, 30 Ga. 173, 176-77 (1860); Holmes v. Holmes, 6 La. 463, 470 (1834); *In re* Hulett's Estate, 69 N.W. 31, 33 (Minn. 1896); Town of Londonderry v. Town of Chester, 2 N.H. 268, 278 (1820); Commonwealth v. Stump, 53 Pa. 132, 136 (1866). The notion of marriage as a civil contract extends back at least to Blackstone, who wrote, "Our law considers marriage in no other light than as a civil contract. . . . [T]he law treats it as it does all other contracts." WILLIAM BLACKSTONE, COMMENTARIES *421.

As will be discussed below, all participants in the debate on common law marriage grounded their arguments in the relationship of marriage to other contracts.

32. It has become a truism that, throughout the 19th century, legal relationships were evolving from status to contract. *See* HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (Ashley Montagu ed., University of Anz. Press 1986) (1861) ("[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*."). On the importance of contract in this period, see generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 160-210 (1977).

Like many truisms, the status-to-contract narrative is limited in its historical accuracy. *See* Tomlins, *supra* note 12, at 69. It does not, for instance, accurately describe the evolution of marital relations. As will be discussed below, *see infra* Subsection III.C.1, the language of contract did not accurately reflect the marriage relationship even as it ceased to be a pure status relationship. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2147 (1996) [hereinafter Siegel, *The Rule of Love*] ("[T]he conventional 'status to contract' story told about the nineteenth-century reform of marriage law obscures as much as it reveals about the evolution of the marital relationship in the modern era."); *see also* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2133-41 (1994) [hereinafter Siegel, *Modernization*].

33. Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth-Century America*, 80 GEO. L.J. 95, 107 (1991); *see also* Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988).

34. *Meister*, 96 U.S. at 78.

35. *Holmes*, 6 La. at 470.

36. REEVE, *supra* note 30, at 307. In fact, as I discuss *infra* Part III, marriage differed from other civil contracts in myriad salient ways. In that part, I analyze more fully the judicial choice of contract language and its underlying social agenda. In this section, I lay the foundation for the later discussion by illuminating the social preoccupations that peek through the arguments from legal doctrine in the judicial opinions recognizing common law marriages as contracts.

While the marriage-as-contract formulation was the central trope punctuating judicial recognition of common law marriages, courts did not argue exclusively from first principles of contract law. Embedded in the legal language of contract were instrumental preoccupations with what jurists perceived as threats to social order. Various practical concerns pressed courts to recognize sexual unions as matrimonial in nature and to grant these unions the imprimatur of the state. Specifically, in civil cases involving the validity or invalidity of common law marriages, courts were often called upon to decide questions of women's financial support and children's legitimacy.[37]

Women initiated most of the cases seeking recognition of common law marriages.[38] In many instances, women whose long-term partners had left them or died came before state courts to request the benefits that would have accrued to them had their unions been formal marriages.[39] In 1896, for example, Lucy Hulett petitioned the court for the widow's allowance of the homestead of Nehemiah Hulett.[40] While Nehemiah Hulett was "reputed to be a bachelor" when he died in July 1892,[41] Lucy claimed that she had been secretly married to Nehemiah "by mutual consent, but without any formal solemnization" and that she had a contract that they had signed to that effect.[42] According to Lucy, she had been Nehemiah's housekeeper before she

37. Beyond the civil cases discussed in this Note, courts sometimes interrogated the validity of common law marriages in the context of criminal prosecutions for bigamy, adultery, or criminal conversation. In these cases, common law marriages were recognized less frequently than in the civil cases because the standard of proof for proving a marriage for a criminal conviction was higher than in the civil cases. *See, e.g.*, State v. Hodgskins, 19 Me. 155, 157 (1841); REEVE, *supra* note 30, at 308 n.1.

As Hendrik Hartog observes, courts in the 19th century were reluctant to label the types of situations that arose in common law marriage impediment cases as bigamous: "'Bigamy' as a legal category is precisely what the courts did not apply to these cases, and it was, in any event, a contested concept." Hartog, *supra* note 33, at 122 & n.106. Timothy Gilfoyle argues that the fact that convictions for bigamy increased after the Civil War implies that, by that time, "the marital bond was considered a more sacrosanct, contractual relationship." Timothy J. Gilfoyle, *The Hearts of Nineteenth-Century Men: Bigamy and Working Class Marriage in New York City, 1800-1890*, 19 PROSPECTS 135, 151 (1994). Gilfoyle also argues that many 19th-century couples, particularly men dissatisfied with their relationships, "treated bigamy as an informal means of common-law divorce." *Id.* at 141.

38. *See* Bowman, *supra* note 13, at 711.

39. *See, e.g.*, Great N. Ry. v. Johnson, 254 F. 683 (8th Cir. 1918); Richardson v. Smith, 80 Md. 89 (1894); Redgrave v. Redgrave, 38 Md. 93 (1873); Denison v. Denison, 35 Md. 361 (1871); *In re* Hulett's Estate, 69 N.W. 31 (Minn. 1896); Atlantic City R.R. v. Goodin, 62 N.J. 395 (1898); Pearson v. Howey, 6 N.J. 12 (1829); Rose v. Clark, 8 Paige Ch. 574 (N.Y. Ch. 1841); Fenton v. Reed, 4 Johns. 52 (N.Y. Sup. Ct. 1809); Offield v. Davis, 40 S.E. 910 (Va. 1902); *In re* McLaughlin's Estate, 30 P. 651 (Wash. 1892); *see also* KOEGEL, *supra* note 5, at 8. Koegel's study of common law marriage was conducted for the Bureau of War Risk Insurance following World War I in response to the wave of requests by women for financial support after the war-related deaths of their alleged common law husbands.

It is important to note that while many of these women sought to be declared legal widows, widowhood itself was often "virtually synonymous with impoverishment" in the 19th century. CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860, at 12 (1987). The female plaintiffs in these cases, however, faced with a legal regime that offered them no alternative claim, made the best argument available to them.

40. *See In re* Hulett's Estate, 69 N.W. at 31.

41. *Id.*

42. *Id.* At the hearings before the probate court, Lucy produced the following document signed by her and Nehemiah:

"moved into his room" and they began to live as husband and wife.[43] They agreed, however, to keep their marriage secret.[44] The Minnesota court recognized the marriage between Lucy and Nehemiah and, therefore, Lucy's entitlement to financial support as a widow. "The law views marriage as being a mere civil contract," the court wrote. "The essence of the contract of marriage is the consent of the parties."[45]

The court thus deployed contract principles to resolve the material question of Lucy's financial support. Nonetheless, the court's self-erected boundaries demarcating what it posited to be the limits of legitimate judicial action reveal that more than contract principles guided the decision. Despite recognizing Lucy's claim for support, the court refused to accept Lucy's argument that her marriage to Nehemiah automatically revoked his will. The court noted that at common law a man's will was revoked by the birth of his children, but not by marriage.[46] The reason for this common law distinction was that a man's wife was provided for outside of the will by dower, whereas if his will was not revoked by the birth of children, "the natural object of his bounty, would be wholly unprovided for."[47] The court reasoned that while dower was statutorily abolished in Minnesota, the statute "makes provision for the widow, independently of the act of the husband, much more liberal than the common law did."[48] Although the court recognized that there was growing sentiment that marriage should revoke a man's will, it noted, in revealingly gendered language, that "[a]ny such rule would leave the body of the common law very much emasculated."[49] Because a widowed wife had alternative channels of support, it was unnecessary to abrogate the common law rule.

While many cases grappling with common law marriage involved claims for support like those of Lucy Hulett, not all such claims were brought by the

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Contract of marriage between N. Hulett and Mrs. L.A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written

Id. at 31-32.

43. *Id.* at 33.

44. *See id.* The former-housekeeper-to-common-law-wife scenario is not uncommon in the cases addressing the validity of common law marriage. These cases seem continuous with the support contract cases that Lawrence Friedman describes as prevalent in early 20th-century Wisconsin. *See* LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 36-38 (1965) In these cases, an owner of land conveyed the property to someone, usually a close relative, in exchange for the recipient's promise to support the original owner. *See id.* at 36. In the period before the rise of the modern welfare state, such contracts were one way to ensure support in one's old age. The former-housekeeper-to-common-law-wife scenario that replayed itself in a number of common law marriage cases could be a variation of the same theme. I am grateful to Professor Robert Gordon for helping me to develop this possible connection.

45. *In re* Hulett's Estate, 69 N.W. at 33.

46. *See id.* at 34. By contrast, at common law, a woman's will was automatically revoked by her marriage: "[A] married woman having no testamentary capacity, her will was no longer ambulatory." *Id.*

47. *Id.* at 35.

48. *Id.* These provisions included a life estate in the homestead of the deceased, an undivided third in fee simple, and most of his personal estate. *See id.*

49. *Id.*

women themselves. In so-called "settlement cases,"[50] one town brought a claim against another town to decide which municipality was responsible for the support of a woman pauper; if she was married, her legal place of settlement was that of her husband, regardless of where she resided. In *Town of Londonderry v. Town of Chester*,[51] for example, the question was "in respect to the marriage between the pauper and Samuel Aiken, who was admitted to have a legal settlement in Chester."[52] The Town of Londonderry set out to prove that "the pauper" was not its responsibility because of her marriage to a man in Chester. The case turned on whether the minister who performed their marriage was qualified to do so according to the language of the state marriage statute.[53] The court readily recognized the alleged marriage, again invoking the language of contract while addressing the underlying issue of support. Noting that the statute did not mandate that a marriage performed in another manner was void, the court observed that marriage "is a mere civil contract. . . . It is one of the corruptions of popery that marriage itself is a 'sacrament'; and, therefore, that the contract cannot be consummated or completed without the presence and aid of a priest."[54]

Oftentimes in tandem with matters concerning women's support, courts grappled with a second threat to social order: the potential illegitimacy of the offspring of unsolemnized sexual relationships. In recognizing such relationships as common law marriages, many courts and commentators cited the need to legitimate children as a compelling reason to recognize relationships as matrimonial in nature.[55] The specter of large numbers of

50. *See, e.g.*, State v. Hodgskins, 19 Me. 155, 157 (1841) (discussing the standard of proof in settlement cases).

51. 2 N.H. 268 (1820).

52. *Id.* at 268. It is worth noting that the woman in this case, although her name was known, is impersonally called "the pauper," *id.*, a practice that occurs in other cases as well, *see, e.g.*, Dunbarton v. Franklin, 19 N.H. 257 (1848).

53. The statute provided that a priest or a justice of the peace was qualified to perform a marriage ceremony "where he is settled, or hath permanent residence." Town of Londonderry v. Town of Chester, 2 N.H. at 269. The defendant disputed whether the minister, Jonathan Brown, was a qualified priest; he had been enjoined from preaching a decade before, and he never resettled in a particular town after the injunction was lifted. *See id.* at 268-69.

54. *Id.* at 278.

55. *See, e.g.*, Maryland v. Baldwin, 112 U.S. 490, 495 (1884); Meister v. Moore, 96 U.S. 76, 81 (1877); Holmes v. Holmes, 6 La. 463, 470 (1834); Commonwealth v. Stump, 53 Pa. 132, 136 (1866); Bashaw v. State, 9 Tenn. (1 Yer.) 177, 197 (1829) (Peck, J., dissenting); *see also* REEVE, *supra* note 30, at 311 n.1; Robert Black, *Common Law Marriage*, 2 U. CIN. L. REV. 113, 114, 132 (1928) (arguing that recognition of common law marriages serves the public policy goal of preventing illegitimacy). Hendrik Hartog suggests an interesting twist on the narrative of courts' concerns for legitimating children. In the case of *Graham v. Bennet*, 2 Cal. 503 (1852), a woman sued a man, who claimed to be her husband, for abducting her children. The man claimed that the children were rightfully his because he and the plaintiff were married at common law. Reversing a guilty jury verdict, the California court found that though the common law marriage between the plaintiff and the defendant was invalid in this case (because the defendant had another wife), the offspring of the union were not illegitimate. The children, therefore, were entitled to their father's support and their father was entitled to their custody, as fathers always had the right to the custody of legitimate children. Commenting on *Graham*, Hartog observes that "[o]ne suspects the point of this cause of action was to establish the illegitimacy of the children. As a result, Catherine, as mother, would establish her sole legal right to custody." Hartog, *supra* note 33, at 125. Hartog's reading

illegitimate children loomed before nineteenth-century courts as a prospect to be avoided through any means possible.[56] A Pennsylvania court, for example, observed that requiring people to observe the strictures of the state's marriage statutes "would bastardize a vast majority of the children which have been born within the state for half a century."[57] The Supreme Court echoed these sentiments in *Meister v. Moore*.[58] Melding the leading doctrinal and pragmatic tropes of the judiciary in the debate, the Court held Michigan's marriage statutes to be directory, not mandatory, for three reasons: "because marriage is a thing of common right, because it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of the law."[59]

C. *The Social Context of the Common Law Marriage Debate*

The common law marriage cases present striking historical documentation of the number of heterosexual couples throughout the nineteenth century whose unions fell outside of the legal boundaries of marriage. To be sure, some of these extralegal relationships still existed squarely within the social norms of marriage. Others, though, conformed to neither the legal nor the social norms. Similarly, as the Supreme Court noted in *Meister*, some of the couples undoubtedly were unaware that their unions did not meet the legal requirements for a valid marriage. Others made a more conscious choice to live outside of traditional norms.[60]

The cases, unfortunately, offer limited insights into the choices that lay in the parties' pasts. It is particularly difficult to infer matters of subjective understanding from the case law. The cases, for example, rarely speak to the

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suggests that perhaps beneath the court's concern for the legitimacy of offspring lurked a concern for preserving the patriarchal order of the family.

56. On the changing status of illegitimacy in the 19th century, see MICHAEL GROSSBERG, GOVERNING THE HEARTH 196-233 (1985).

57. Rodebaugh v. Sanks, 2 Watts 9, 11 (Pa. 1833).

58. 96 U.S. 76 (1877).

59. *Id.* at 81. Koegel vehemently disputes the Supreme Court's assessment that parties to common law marriages were ignorant of their wrongdoing, and berates the Court for offering this as a reason to support recognizing such marriages:

> [V]ery few, if any, of these persons really believe that they are married. . . . Few of such persons believe that children of these unions are legitimate. But, says the Supreme Court, a strong reason for upholding such marriages is to legitimate the offspring of many parents conscious of no violation of law. The first part of this statement expresses a noble sentiment but the latter part borders on the ridiculous.

KOEGEL, *supra* note 5, at 102. *But cf.* Gilfoyle, *supra* note 37, at 142 (arguing that in entering a marriage while already formally married to another woman, many men "considered their bigamous action innocent or justified").

60. *See, e.g.*, State v. Walker, 36 Kan. 297 (1887) (describing an "autonomistic marriage" ceremony created by the parties in which they "den[ied] the right of society" to interfere with the terms of their union).

question of whether the parties thought of themselves as living within or without the social and legal norms of marriage.[61] Such ambiguities complicate the task of determining whether, in recognizing common law marriages, courts were primarily reflecting social understandings of informal marriages or were more actively regulating the social meaning of unconventional practices, forcing intentionally "square peg" nonmarital relations into the comforting "round hole" of legal matrimony.[62]

One element of subjective understanding that is clear from the cases, however, is that courts faced with common law marriage cases were alert to the social reality parading before them. In the diversity of relations presented to them, nineteenth-century judges recognized a society in which the legal practice of marriage was—in practice, if not in ideology[63]—a highly contested one, at least among the socioeconomic class likely to bring common law marriage suits.[64] In this respect, the common law marriage cases provide a series of snapshots capturing the diversity of heterosexual unions throughout the nineteenth century, a diversity that reflects the varying degrees of reverence with which different communities viewed legal marriage.

Community norms, of course, varied tremendously across decades and geographical regions. There does, however, appear to be a class-salient story that one can tell with respect to patterns of nonmarital coupling. Timothy Gilfoyle, for instance, has revealed the prevalence of bigamy among working class men in nineteenth-century New York.[65] With divorce largely unavailable, urban men (and, to a lesser extent, women)[66] concocted their

61. In considering one unsolemnized union, Justice Holmes speculated that "James Travers and Sophia V. Grayson lived together for many years, calling themselves man and wife, when they were not man and wife and *probably knew that they were not man and wife*." Travers v. Reinhardt, 205 U.S. 423, 443 (1907) (Holmes, J., dissenting) (emphasis added).

62. I argue below that the doctrine of common law marriage was, in fact, a form of social regulation. *See infra* Part III. The relationship between legal pronouncements and social norms is, of course, a highly contested one. *See, e.g.*, William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767; William E. Forbath et al., *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 761-62; Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899; Martha Minow, *"Forming Underneath Everything That Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819; *cf.* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 226-31 (1982) (arguing, in evaluating the effects of married women's property acts, that law is not merely "a derivative phenomenon that reflects larger social needs and conditions," but rather that "[l]aw has an autonomy of its own").

63. The 19th-century culture of heterosexual courtship was certainly one in which marriage loomed as the ultimate goal. *See* ELLEN K. ROTHMAN, HANDS AND HEARTS: A HISTORY OF COURTSHIP IN AMERICA 57-59 (1984).

64. The common law marriage cases, with the exception of the settlement cases, appear to reveal the lives of middle class families—not wealthy enough for the woman to be financially stable without court intervention, but not so poor that there would be no familial resources from which a court could ensure her support.

65. *See* Gilfoyle, *supra* note 37.

66. Norma Basch has argued that incidents of women abandoning their husbands, as an extralegal means of divorce, are a better indication of women's autonomy than those incidents in which women actually sought a divorce in court. *See* Norma Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815-1870*, 8 LAW & HIST. REV. 1, 17 (1990). Basch argues that while

own remedies for unhappy marriages, in the form of self-executed dissolutions of failed relationships and then subsequent "remarriages," albeit informal ones.[67] Thus, these relationships did not necessarily lie outside of the social norms of marriage, but did lie self-consciously outside its legal bounds. These extralegal solutions reflected an increasingly urban and transient society and the resulting "breakdown of older, rural patterns of community control over marital and sexual behavior."[68]

Some men left their wives in such deliberate acts of self-help divorce; others left for financial reasons independent of any dissatisfaction with their relationships. Motivations aside, the results in all such cases looked alike: a woman no longer able to rely on her male partner for financial support. Christine Stansell notes that the incidents of deserted women probably increased in nineteenth-century working class communities as "[t]he difficulties men experienced in supporting their families made it more likely they would leave them . . . in the perennial search for work."[69] Although Stansell's data focuses on New York, economic necessities appear to have operated similarly in the South, where "[f]ew poor whites and free blacks had the resources or time to pursue a divorce . . . and many unhappy couples simply went their separate ways without a legal decree."[70]

While pragmatic legal and financial concerns no doubt shaped working class patterns of behavior regarding marriage and divorce, deeply ingrained community values were another salient factor in some instances. These norms were particularly important among postbellum communities of freedpeople, in which "it was ultimately the substance of the relationship and the community's recognition of it, not the legal contract, that constituted the marriage."[71] Freedpeople were, of course, differently situated within the social hierarchy than the white parties to the common law marriage cases who are the subject of this Note. Despite their differences in social position, however, "many common whites lived at the periphery of legal marriage, even though they were more firmly rooted in its culture than freedpeople."[72]

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legal divorce could be seen as a "woman's remedy," to frame it as such would elide the financial uncertainty of divorce for all but independently wealthy women. *Id.*

67. *See* Gilfoyle, *supra* note 37, at 136-37 (noting that in 19th-century America bigamy became "a more viable solution to marital unhappiness").

68. *Id.* at 146. Linda Gordon has similarly observed the rise in the number of "deserted" women, particularly in large cities, by the turn of the 20th century. Very few of these women ever got legal divorces. *See* LINDA GORDON, PITIED BUT NOT ENTITLED 20-21 (1994).

69. STANSELL, *supra* note 39, at 12.

70. PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 34 (1995).

71. LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 57 (1997).

72. *Id.* at 60. Methodologically, Edwards notes that "[t]he private lives of common whites are more difficult to reconstruct because they operated from a position of greater power than African Americans and, consequently, experienced less state intervention." *Id.*

With emancipation, freedpeople had their first opportunity to form marital unions within the formal confines of the law. Legally prohibited from contracting, and therefore from marrying, slave unions were "relationship[s] governed by custom and community, not laws."[73] While many freedpeople rushed to embrace the legal construct of marriage, with its attendant rights and obligations, nineteenth-century post-emancipation African-American communities shunned a single compulsory form of marriage.[74] Some valued legalized marriage as a way to bring a new stability to their families; others were uninterested in seeking legal sanction for their unions, believing that "harmonious relationships, not the sanctity of the institution of marriage, promoted the public good."[75] For some freedpeople, legal marriage was only possible after deciding which relationship to formalize as matrimonial. The cruelties of slavery destabilized familial relations so that after emancipation, "[m]any ex-slaves faced awkward dilemmas when spouses presumed to be dead or long-lost suddenly reappeared."[76] For various reasons, then, many relationships between freedpeople were never solemnized as legal marriages in the postbellum era.[77]

Most white southerners actively encouraged freedpeople to marry, viewing marriage as a "containment" tactic to reel in the potential dangers of communities of African Americans with their own ideas and morals.[78] Marriage was thus framed as a bundle of obligations, not a package of rights.[79] Other white southerners, however, opposed granting freedpeople the privilege of state-sanctioned marriage, seeking to withhold social privileges from former slaves in order to ensure the persistence of a segregated society.[80]

This social tension, between the power of marriage as a containment tool (i.e., marriage as a set of obligations) and its power as a social equalizer (i.e., marriage as a bestower of social and legal rights), resonates throughout the century-long common law marriage debate. Faced with graphic evidence of

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73. *Id.*

74. *See id.*; Laura F. Edwards, *"The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*, 14 LAW & HIST. REV. 81 (1996).

75. Edwards, *supra* note 74, at 111.

76. TERA W. HUNTER, TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR 39 (1997). As Hunter reports, when faced with such a situation, "[o]ne woman lived with each of her two husbands for a two-week trial before making a decision." *Id.*

77. *See* 3 ARTHUR W. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY 43 (1919).

78. *See* Edwards, *supra* note 74, at 93.

79. *See* EDWARDS, *supra* note 71, at 38.

80. *See* 3 CALHOUN, *supra* note 77, at 39. Calhoun quotes a Mississippi physician who was appalled at what he viewed as the rise in status that would accrue to African Americans if their marriages were deemed the social equivalent of whites' marriages:

> And by God, sir, youah so-called constitution tears down the restrictions that the fo'sight of ouah statemen faw mo' than a century has placed upon the negro race in ouah country. If it is fo'ced on the people of the state, all the damned negro wenches in the country will believe they're just as good as the finest lady.

Id. at 40.

what judges perceived to be growing social disarray, courts struggled with these dual effects of granting to unsolemnized unions the label of marriage. On the one hand, to bestow the marriage label was to bring the untraditional within nonthreatening parameters; on the other hand, to do so was, perhaps, to grant legitimacy to the very life choices that judges sought to dissuade. The alternate approaches of the judicial proponents and opponents of common law marriage reveal how this tension unfolded in legal doctrine.

II. THE CASE AGAINST COMMON LAW MARRIAGE

A. *Opponents' Arguments*

Proponents of common law marriage couched their pragmatic concerns in the doctrinal language of contract. Opponents of common law marriage, by contrast, reasoned more explicitly from public policy. To opponents of common law marriage, the doctrine embodied vast dangers of social and moral disintegration. Recognizing common law marriages, they argued, granted the imprimatur of the state to the very immoral and illegal relationships that the state should actively condemn and prevent. While recognizing the social and financial needs of the women and children involved in the lawsuits, judges opposed to the doctrine of common law marriage argued that the courts' duties transcended the needs of the individual parties to cases. Courts had a treble duty to protect not only individuals, but also families and society at large from the dangers inherent in condoning illicit sexual relationships.

One year after Chancellor Kent's opinion recognizing common law marriage in *Fenton v. Reed*,[81] Chief Justice Parsons of the Massachusetts Supreme Judicial Court articulated the opposing view in *Milford v. Worcester*.[82] *Milford* was a settlement case to decide which town was responsible for the support of a family of paupers, Stephen and Rhoda Temple and their six children. The parties agreed that Stephen was a legal resident of Worcester; the question was whether Rhoda was his lawful wife and, therefore, a legal resident of the same town, or whether she was a resident of Milford.[83] The evidence presented at the trial suggested that, in 1784, Stephen and Rhoda asked Mr. Dorr, a justice of the peace in Worcester, to marry them. Dorr "refused 'to take an active part,'" but the couple exchanged vows in his presence and agreed to be married.[84] There was conflicting testimony at the trial concerning whether Dorr encouraged or sanctioned the event.[85] The judge instructed the jury that if Dorr had sanctioned the proceedings, then it

81. 4 Johns. 52 (N.Y. Sup. Ct. 1809) (per curiam).
82. 7 Mass. (5 Tyng) 48 (1810).
83. *See id.* at 48.
84. *Id.* at 49 (quoting a witness).
85. *See id.*

should find for the plaintiff town of Milford (i.e., Worcester would have to support the whole family).[86] The jury found for Worcester and the plaintiff appealed, claiming that as consent is the essence of the marriage contract, the couple was validly married.[87]

Chief Justice Parsons upheld the jury finding that no legal marriage had occurred between Stephen and Rhoda. Although Parsons began with the seemingly Kentian observation that "[m]arriage is unquestionably a civil contract,"[88] he proceeded to explore the ways in which social necessity dictated that the state control access to that contract. It was critical that the state regulate marriage, Parsons argued, in order to define who may marry, to "preserve the purity of families," to "guard against fraud, surprise, and seduction," "to encourage marriage, and to discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals, and a dissolution of manners."[89] Marriage statutes, then, were not merely directory; they were mandatory. Parties could not validly marry themselves and, in fact, such unformalized relationships were subject to prosecution for fornication.[90]

For the remainder of the nineteenth century, state courts aligned themselves with either the Kent or the Parsons camp, citing and following the language of one of the two leaders in the debate. While the majority of courts shunned the Parsons view in favor of Kent's approach, a vociferous minority of state courts dissented, holding their state marriage statutes to be mandatory and common law marriages to be invalid. Opponents of common law marriage scoffed at the thought of granting any legal approval to nonmarital sexual unions. As one court wrote, "The common law is the guardian of the morals of the people, and their protection against offences notoriously against public decency and good manners."[91] Always invoking the language of protection rather than contract, courts opined that the stability of the family, the very foundation of society, was at stake.[92]

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86. *See id.*

87. *See id.* at 49-50.

88. *Id.* at 52.

89. *Id.* at 52-53.

90. *See id.* at 57. Parsons concluded with a solemn moral warning:

> [E]very young woman of honour ought to insist on a marriage solemnized by a legal officer, and to shun the man who prates about marriage condemned by human laws, as good in the sight of heaven. This cant, she may be assured, is a pretext for seduction; and if not contemned will lead to dishonour and misery.

Id.

91. Grisham v. State, 10 Tenn. (2 Yer.) 589, 594 (1831).

92. *See, e.g.*, Offield v. Davis, 40 S.E. 910, 913 (Va. 1902) ("The question before us [of common law marriage] involves the best interests of society,—the preservation of home and family, the foundation of all society."); *In re* McLaughlin's Estate, 30 P. 651, 657 (Wash. 1892) ("This question [of common law marriage], involving as it does the best interests of society and the preservation of the home and family,—the foundation of all society,—has ever been regarded as a most important one.").

In addition to crafting affirmative arguments about protection, opponents of common law marriage refuted their adversaries' arguments that the doctrine was supported by the marriage-as-contract theory. In so doing, they pointed to the ways in which marriage represented a hybrid of status and contract.[93] The New Hampshire court's reasoning in the settlement case of *Dunbarton v. Franklin*[94] typified the objections to the marriage-as-contract theory:

> It is singular that the most important of all human contracts, on which the rights and duties of the whole community depend, requires less formality for its validity than a conveyance of an acre of land, a policy of insurance, or the agreements which the statute of frauds requires should be in writing. It would be stranger still if the law should be such as to offer a temptation to illicit intercourse, where such a contract lightly made could be easily repudiated.[95]

The New Hampshire court, exhibiting a mode of argument typical of opponents of common law marriage, thus delineated three classic objections to the marriage-as-contract approach to the doctrine. First, marriage was not a contract like any other. Rather, as the Washington Supreme Court echoed, it was "[t]he most important of all human contracts [which] should not be left free from all impediments or restrictions, or with no formalities requisite for its realization."[96] Second, opponents of common law marriage argued, simply branding marriage as a contract did not lay a sufficient foundation to establish the proposition that any two parties should be able to enter such a contract without restriction. Other contracts, they argued, had restrictions and safeguards of various kinds. And third, jurists opposed to common law marriage feared what they foresaw as the dangerous corollary of the marriage-as-contract formulation: If marriage was a contract that could be entered into like any other, then what was to keep parties from dissolving it like any other contract?[97] To these nineteenth-century jurists, the notion of easily acquired, consent-based divorce was anathema.[98] Just as the New Hampshire court had worried before it, the Washington Supreme Court articulated this anxiety clearly: "If a mere contract between the parties, to which there are no

93. *See infra* Section III.A.

94. 19 N.H. 257 (1848).

95. *Id.* at 264-65.

96. *In re* McLaughlin's Estate, 30 P. at 657.

97. There is some historical evidence to suggest that this fear was justified, at least in terms of couples' practices. As Timothy Gilfoyle has argued, with regard to working class marriages in 19th-century New York, "Many couples subscribed to a notion of individual sovereignty, probably inherited from an older English common-law tradition. Just as many couples accepted common-law marriage, still others adapted it to include a form of 'common-law divorce.'" Gilfoyle, *supra* note 37, at 145.

98. On the difficulty of obtaining a divorce in 19th-century America, see Hartog, *supra* note 33, at 113-20.

witnesses, is to be recognized as valid, it is evident that a contract thus lightly made might as easily be repudiated."[99]

Opponents of common law marriage recognized the strength of their judicial adversaries' argument that the doctrine was needed to avoid rendering illegitimate the offspring of many unsolemnized unions. Nevertheless, they argued that the need to protect society outweighed the need to legitimate even innocent children.[100] As George Elliot Howard, a leading opponent of common law marriage, argued in his history of marriage: "Far better that the children of a delinquent minority should bear the stain of illegitimacy than that the welfare of the whole social body should be endangered."[101]

While courts and commentators opposed to common law marriage presumed that the children of unsolemnized unions were the innocent victims of their parents' choices, they did not view the women seeking legal recognition of these relationships as innocent or deserving. On the contrary, entwined in the opponents' utilitarian balance between society's rights and those of the women and children in question was a fundamental distrust of the female plaintiffs involved in the cases. Commentators suspected the motives of women seeking court intervention to attain financial support. Recognizing common law marriages, opponents argued, would only benefit gold-digging women, "open[ing] the door to fraud and perjury, and . . . expos[ing] every estate to the rapacity of designing adventurers."[102] As one commentator opined, "[T]he doctrine of informal marriage favors the harlot and the adventuress and paves the way for them to claim the rights of common-law widow upon the death of some man of wealth."[103]

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99. *In re* McLaughlin's Estate, 30 P. at 658. As Sarah Barringer Gordon suggests, the potential dissolubility of a consensual, seemingly permanent union was a political, as well as a social, issue for America in the Civil War era. *See* Sarah Barringer Gordon, "The Twin Relic of Barbarism": A Legal History of Anti-Polygamy in Nineteenth-Century America 197-98 (1995) (unpublished Ph.D. dissertation, Princeton University) (on file with author). Gordon examines contractualism in the shadow of the Civil War, "a war that was fought, after all, to preserve a union created by the consent of the parties, and from which one half sought to withdraw, arguing that it no longer consented to the marriage." *Id.* at 197; *see also* Sarah Barringer Gordon, *"The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America*, 83 J. AM. HIST. 815, 832-40 (1996) [hereinafter Gordon, *The Liberty of Self-Degradation*].

100. *See, e.g.*, Wilmington Trust Co. v. Hendrixson, 114 A. 215, 223 (Del. 1921); Bashaw v. State, 9 Tenn. (1 Yer.) 177 (1829); *see also* 3 GEORGE ELLIOT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 184 (1904); Errol Clarence Gilkey, *Validity of Common Law Marriages in Oregon*, 3 OR. L. REV. 28, 46 (1923). At least one state, Washington, while vehemently rejecting common law marriages, took some alternate precautions to temper the problem of illegitimacy. By statute in Washington, if a couple had an out-of-wedlock child and subsequently married, their child was deemed legitimate. *See In re* McLaughlin's Estate, 30 P. at 659.

101. 3 HOWARD, *supra* note 100, at 184.

102. Sorenson v. Sorenson, 100 N.W. 930, 934 (Neb. 1904); *see also* Milford v. Worcester, 7 Mass. (5 Tyng) 48, 52 (1810) (describing civil marriage as an institution designed to guard against "fraud, surprise, and seduction").

103. Gilkey, *supra* note 100, at 46.

In a series of four articles on marriage published in the *Atlantic Monthly* in 1888,[104] Frank Gaylord Cook brought the arguments against common law marriage to the public, strongly invoking the language of protection. The protection of society and families, he argued, necessarily trumped the protection of any particular individual woman or child. Common law marriage, he maintained, was "the assertion of the rights of the individual at the expense of the rights of society."[105] By recognizing common law marriages, courts failed to protect individuals, who need state-enforced "sobering, warning, and restraint" before casually entering the marriage contract; families, within which parents should be ensured that their consent is a prerequisite to a child's marriage; and society as a whole.[106] In Cook's words,

> Industrial struggle and discontent and social evils are rife in the community. In view of these facts, are we fortifying our social institutions, and strengthening the foundations of social order? And the family,—the unit and the source of society,—are we guarding its dignity and confirming its approaches by the sanctities of religion and the safeguards of law? Nay, our courts are forsaking, not protecting, are tearing down, not building up, "the very basis of the whole fabric of civilized society."[107]

B. *Opponents' Arguments in Their Social Context*

Opponents of common law marriage conceived of marriage as a public relationship. Marriage was the very foundation of the public order, rather than a private contract arranged between individuals. As a public institution in which the state had an interest and a right—perhaps even a duty—to intervene, marriage was fundamentally at odds with the private arrangements legitimated by the doctrine of common law marriage.

Critics of common law marriage equated the recognition of informal marriages with the myriad threats that they perceived to the social order, thereby fixing marriage as the fulcrum of social control. Critics focused primarily on what they perceived to be decreasing social respect for the institution of marriage and the concomitant increasing acceptance of divorce.[108] Samuel Dike, for instance, a leader in the anti-divorce National Divorce Reform League, blamed this trend at least in part on the framing of

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104. *See* Frank Gaylord Cook, *The Marriage Celebration in Europe*, 1888 ATLANTIC MONTHLY 245; Frank Gaylord Cook, *The Marriage Celebration in the Colonies*, 1888 ATLANTIC MONTHLY 350; Frank Gaylord Cook, *The Marriage Celebration in the United States*, 1888 ATLANTIC MONTHLY 520 [hereinafter Cook, *Marriage in the United States*]; Frank Gaylord Cook, *Reform in the Celebration of Marriage*, 1888 ATLANTIC MONTHLY 680.

105. Cook, *Marriage in the United States*, *supra* note 104, at 528-29.

106. *Id.*

107. *Id.* at 530.

108. While still uncommon, incidents of divorce did rise over the course of the 19th century. *See* RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 457-73 (1988).

marriage as a contract. Conceiving of marriage as purely contractual in nature, Dike argued, offers no "recognition of the family as the outgrowth of marriage and a sacred unit of society . . . but contents itself in dealing with individuals in certain relations in a manner that . . . cheapens the family by its spirit and methods, as well as by the reasons for granting divorces."[109]

Testimony from the 1873 Illinois case of *Port v. Port*,[110] in which the court refused to recognize a common law marriage, paints a vivid picture of the changing patterns of social behavior that unnerved conservative courts. The complainant in *Port* claimed that she was Silas Port's widow. At the trial, in order to prove that the parties had never intended to marry, the defense produced a witness who testified that just weeks before Silas's death, the complainant had been afraid that her uncle was going to have her and Silas arrested for living in an adulterous state. According to the witness, the complainant reported that she had begged Silas to marry her, but he refused.[111] Having refuted that the parties intended to be married, the defense next produced a witness who testified that when the complainant was asked how she could flagrantly cohabit with a man out of wedlock, "her only reply was, that half of Chicago lived in that way."[112]

Critics of common law marriage envisioned social disarray in these unconventional relationships. As Cook's *Atlantic Monthly* articles exemplify, these images of disarray were deeply steeped in notions of class, race, and nativism, as well as the fear of granting social respectability through common law marriage to the very groups responsible for threatening the social order.[113] Cook observed that in earlier periods of American history, marital regulation was less critical: "[A]s settlers of the same race and faith usually dwelt together, there was unanimity of sentiment in the protection of the common interest and the maintenance of social order."[114] With a society in flux, however, he contended that social order was in danger: "Now, this is a great, rapidly growing nation. There exists the wildest diversity of race, religion, and sentiments."[115] Cook observed with particular anxiety that "the population congested in these cities is largely, in some mainly, foreign born."[116] The rise of judicial recognition of common law marriage, he

109. Samuel W. Dike, The Effect of Lax Divorce Legislation upon the Stability of American Institutions, Address to the American Social Science Association (Sept. 8, 1881), *in* 1881 J. Soc. Sci. 152, 155.

110. 70 Ill. 484 (1873).

111. *See id.* at 487.

112. *Id.* at 489-90.

113. *See* sources cited *supra* note 104.

114. Cook, *Marriage in the United States*, *supra* note 104, at 530.

115. *Id.*

116. *Id.* at 531. Cook argued that society owed it to the former slaves to ensure that only formal marriages were recognized:

> Another significant and startling fact is that this is the law also in localities possessing the largest negro population . . . . The worst effects of slavery upon the negro were not material, but intellectual and moral. Since the war, his material condition has been rapidly improving. Has

argued, had "carried our law back to the Middle Ages."[117] To its opponents, like Cook, the doctrine of common law marriage compromised the institution of marriage itself by bestowing the full dignity of marriage upon unworthy unions.

Opponents of the doctrine viewed marriage as the appropriate site for reining in a society that appeared to be spinning out of control. A few years after Cook's articles appeared, the Washington Supreme Court advocated extensive regulation of marriage as the solution for a catalog of social evils. Informal marriages, the court argued, should not be recognized because "prohibiting such marriages as far as practicable, would tend to the prevention of pauperism and crime and the transmission of hereditary diseases and defects."[118] These jurists saw the available regulatory options in stark terms: Courts could erect barriers and regulations to control entry into marriage, or courts could recognize informal marriages, thereby opening the floodgates to social disarray.[119]

Faced with the threat of nontraditional relationships in a changing society, opponents of common law marriage reacted by attempting to withhold the social imprimatur—and, therefore, the social privileges that accompanied it—from those relationships of which they disapproved. These jurists divided long-term heterosexual relationships into two distinct categories: licit and illicit. To gain access to the licit required the consent not only of the parties, but also of the state. Opponents of common law marriage thus attempted to quell the threat of the illicit by rewarding conventional relationships and ostracizing the unconventional.

III. RECONFIGURING THE DEBATE: BEYOND THE INDIVIDUAL-VERSUS-SOCIAL-RIGHTS MODEL

Despite the portrait painted of them by their judicial adversaries, proponents of common law marriage also perceived elements of social change

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his social condition made equal progress? The responsibility of the community for its weaker classes is generally recognized. How can it be better discharged than by a speedy and adequate amendment of the law of the celebration of marriage?

Id.

117. *Id.* at 527.

118. *In re* McLaughlin's Estate, 30 P. 651, 658 (Wash. 1892).

119. One motivating fear behind such regulation was, of course, fear of interracial unions. *See* Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 77 J. AM. HIST. 835, 839 (1991). Berry argues that, in the 19th-century South, laws controlling sexual acts had their origins in the impulse to protect marriage: "Every southern state discouraged fornication . . . . The primary reason for the prohibition was to protect the sanctity of marriage, not to prevent sexual activity as such." *Id.* at 838.

On the defeat of common law marriage in the 20th century, see Bowman, *supra* note 13, at 732-47, and John E. Semonche, *Common-Law Marriage in North Carolina: A Study in Legal History*, 9 AM J LEGAL HIST. 320, 323 (1965). The trend away from common law marriage was documented by opponents of the doctrine as early as 1919. *See* HALL & BROOKE, *supra* note 18, at 31.

as threatening. In recognizing common law marriages, judges following the Kentian model did not intend to deem acceptable a vast spectrum of alternative heterosexual couplings. Like the doctrine's opponents, its proponents ultimately strove to ensure social stability through traditional marital structures.[120] Rather than ostracize the unconventional, however, proponents of the doctrine sought to quash the threat by transforming the unconventional into the conventional. Through the labeling of unsolemnized sexual unions as marriages, they affirmed state support for the institution of marriage and all its attendant obligations.[121] By recognizing common law marriages, courts subverted the danger of informal relationships by erasing their existence, transforming them into the most nonthreatening of private relationships.[122]

Proponents of common law marriage fought the threat of illicit unions by invoking, not jeremiads on moral decay, but the simple idiom of contract.[123] As the language of the cases frames the parameters of the discourse, then, its theoretical underpinnings seem to fit a familiar paradigm of legal debate: a stark battle between the prioritization of individual and social rights. On one side, the proponents of common law marriage champion individual freedom of contract and individual autonomy without state interference. On the other side, the opponents of common law marriage vigilantly protect the social order, seemingly at the expense of private contract and autonomy. Moreover, the two positions appear to have starkly gender-salient implications. Proponents of common law marriage seem to be concerned not simply with the rights of individuals, but also with the rights of individual *women.* By contrast, the doctrine's opponents appear indifferent to the plight of women situated within a system that afforded them few other paths through which to seek redress.

Despite the rhetoric of these competing bodies of case law, this dichotomy is misleading. Even Chancellor Kent, the progenitor of the supposed individual rights side of the debate, argued in his *Commentaries on American Law* that "[p]rivate interest must be made subservient to the general interest of the

120. *See* GROSSBERG, *supra* note 56, at 72.

121. *See* Cott, *supra* note 10, at 120.

122. Hendrik Hartog has made a similar argument with reference to 19th-century judicial treatments of divorce. Hartog argues that bigamous marriages were less threatening to 19th-century courts than divorces because of the perceived need to maintain conventional social order. As Hartog writes, "[H]usbands (and wives) who abandoned first spouses were understood as morally wrong to have done so. . . . Yet, when they made new 'marriages' that demonstrated their commitment to the conventional order of marriage, courts saw little reason to challenge the order they had reestablished in their lives." Hartog, *supra* note 33, at 126. By contrast, Hartog argues, courts refused to recognize the private arrangements regarding separation that couples attempted to enact: "Such couples put into question the capacity of public marriage to unite a couple within the bonds of matrimony, to transform them permanently into husband and wife. Ultimately that subversion was much the greater danger to orthodox views on marriage." *Id.* at 127. Hartog concludes that "a stable and public identity as a husband or a wife took precedence over the formalities of monogamous marriage." *Id.* at 129.

123. For an analysis of the history of notions of free contract, with a particular emphasis on the importance of slavery, marriage, and labor, see AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (forthcoming 1998) (manuscript at 1-55, on file with author).

community."[124] Most significantly, as judicial proponents of common law marriage knew, marriage was not a contract like other contracts. Instead, "[t]he basic terms of a marriage contract were fixed by law and the parties deemed powerless to alter them."[125] Thus, as has been commonly observed, marriage created not simply a relation of contract, but also one of status.[126]

A. *On Status, Contract, and Status Contract*

While the story of an evolution "from status to contract"[127] suggests a clear demarcation between the two categories, that line was blurred in the context of domestic relations. Marriage in the nineteenth century, like master-servant relations, existed as a hybrid of the two categories: a "status contract."[128] As such, it was "oriented toward the total social status of the individual and his integration into an association comprehending his total personality."[129] Entry into marriage thus signified one's consensual, or contractual, entry into a fully formulated relationship. After the initial act of consent, mutual consent was insufficient to alter the terms of the relation.

Consent was not always even a sufficient basis to enter into marriage. At the point of entry, the state regulated who could contract a marriage with whom.[130] Once entered, the terms of the relationship could not be altered by contract; to sanction such individual power would have been to threaten the legitimate interests of the state and society in the marriage relationship.[131] Courts thus refused to recognize contractual alterations, such as interspousal contracts for wives' household labor.[132] Most critically, unlike in other contracts, parties could not exit the marriage contract at their will.[133] The language of contract thus suggested the existence of negotiable authority where

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124. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *340 (photo. reprint 1989) (O.W. Holmes, Jr. ed., Boston, Little, Brown & Co. 1873).

125. Siegel, *Modernization*, *supra* note 32, at 2182-83; *see also* JAMES SCHOULER, A TREATISE ON THE LAW OF HUSBAND AND WIFE § 12 (Boston, Little, Brown & Co. 1882).

126. *See, e.g.*, Cott, *supra* note 10, at 113; Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082-85 (1994); Siegel, *Modernization*, *supra* note 32, at 2181-82.

127. *See supra* note 32.

128. ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 56 (1991). Steinfeld draws this concept from Max Weber. *See* 2 MAX WEBER, ECONOMY AND SOCIETY 674 (Guenther Roth & Claus Wittich eds., University of Cal. Press 1978).

129. 2 WEBER, *supra* note 128, at 674.

130. Most states, for example, prohibited interracial marriages. *See* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE §§ 308-311 (Boston, Little, Brown & Co. 6th ed. 1881).

131. *See* STEINFELD, *supra* note 128, at 59; Gordon, *The Liberty of Self-Degradation*, *supra* note 99, at 834, 836.

132. *See* Siegel, *Modernization*, *supra* note 32, at 2181-82.

133. *See* SCHOULER, *supra* note 125, § 12, at 19-20 ("Mutual consent, as in all contracts, brings them together; but mutual consent cannot part them. Death alone dissolved the tie . . . ."); Stanley, *supra* note 33, at 477.

there was none.[134] By labeling marriage a pure contract, judicial proponents of common law marriage obscured the hybrid nature of the marriage relationship and the important ways in which marriage was a status relation.

In the remainder of this part, I examine the doctrinal shortcomings of the marriage-as-contract formula and its simultaneous appeal as a mode of judicial argument. I begin, in the next section, by analyzing Elizabeth Cady Stanton's critique of the language of contract employed by proponents of common law marriage. In the succeeding section, I explore the ways in which, as Stanton recognized, the marriage-as-contract formulation failed to reflect judicial attitudes toward marriage. I argue that within the framework of contract, courts effectively privatized the dependencies of women and children within the private sphere of the family.

B. *Elizabeth Cady Stanton's Critique of Common-Law-Marriage-as-Contract*

As noted in Part I, most common law marriage cases asked courts to provide for the financial support of women who, for one reason or another, were estranged from their potential male providers. In light of the clear gender salience of the cases, and the material gains to destitute women, it seems curious at first that an outspoken critic of the doctrine of common law marriage was one of the century's most ardent champions of women's concerns and rights: Elizabeth Cady Stanton.[135] From Stanton's perspective, the doctrine of common law marriage was inextricably intertwined with larger problems endemic to the institutions of marriage and divorce.[136]

In Stanton's view, the doctrine of common law marriage had dangerous long-term repercussions for women, despite the immediate financial benefits that accrued to many of the female plaintiffs who sought judicial recognition of informal marriages. Like several of the courts that discussed the repercussions of recognizing informal marriages as legal, Stanton evaluated the doctrine of common law marriage in tandem with divorce laws. But while courts opposed to common law marriage feared that the Kentian marriage-as-

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134. *See* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 269 (1993). Tomlins observes this phenomenon in the context of 19th-century master-servant relations: "[R]epresenting employment relations in the voluntarist language of contract thus mystified the existence and exercise of power in the employment relationship." *Id.* at 269-70.

135. As Ellen DuBois has observed, although Susan B. Anthony has received more scholarly attention,

> [f]or the movement's first half-century, Stanton was its chief ideologue and theoretician. . . . Stanton saw her primary political task as the liberation of women from the conservative habits of mind to which domesticity had trained them, into the generous and progressive politics of which she knew them to be capable.

Ellen DuBois, *On Labor and Free Love: Two Unpublished Speeches of Elizabeth Cady Stanton*, 1 SIGNS 257, 257-58 (1975).

136. It should be noted that Stanton's views on these subjects were more radical than those of most of her colleagues. Even among other members of the woman's rights movement, her views on marriage, and particularly on divorce reform, earned her a reputation as a radical. *See* Clark, *supra* note 14, at 34-46.

contract model was a prescription for easy access to divorce,[137] Stanton's concerns were the opposite. Stanton feared that, in a time when women were unable to divorce their husbands except in very limited circumstances, the doctrine of common law marriage would act as a trap, pulling women inadvertently into marriages from which they would be unable to exit.[138]

Stanton articulated her critique through an evaluation of the marriage-as-contract formulation. She believed that marriage should be conceived of as a contract, to be entered and exited at will.[139] The critique that she crafted in an 1854 speech, therefore, focused not on the abstract construct of marriage as a civil contract, but rather on the contradictions inherent in the ways that courts used the construct. The hypocrisy lay, Stanton argued, in invoking the language of marriage-as-contract while simultaneously shielding marriage from one of the most basic principles of contract law: the ability to dissolve a contract through the mutual consent of the parties. "[I]f you regard marriage as a civil contract," Stanton argued,

> then let it be subject to the same laws which control all other contracts. Do not make it a king of half-human, half-divine institution, which you may build up but cannot regulate. Do not, by your special legislation for this one kind of contract, involve yourselves in the grossest absurdities and contradictions.[140]

In an 1870 speech, Stanton spoke of her fear that the combination of lax marriage laws and strict divorce laws would entangle women in permanent relationships that they had not intended to be life-long unions.[141] Marriage,

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137. *See supra* notes 97-99 and accompanying text.

138. Stanton openly advocated reform of divorce laws, a position for which she was publicly criticized. *See* Elisabeth Griffith, *Elizabeth Cady Stanton on Marriage and Divorce: Feminist Theory and Domestic Experience*, *in* WOMAN'S BEING, WOMAN'S PLACE: FEMALE IDENTITY AND VOCATION IN AMERICAN HISTORY 233, 242-43 (Mary Kelley ed., 1979). For a brief general discussion of Stanton's views on divorce and common law marriage, see WILLIAM LEACH, TRUE LOVE AND PERFECT UNION 151-52 (1980). Although divorce was increasingly available in the 19th century, Norma Basch has argued that it was still not available for many women and, even when available, that it was not necessarily a viable financial option except for independently wealthy women. *See* Basch, *supra* note 66, at 9.

Stanton was generally critical of the coercive nature of marriage. She once described marriage as "a compulsory bond enforced by the law and rendered perpetual by that means." DuBois, *supra* note 135, at 265. DuBois argues that this unpublished speech from 1870 "clearly places [Stanton] within the tradition of free-love radicalism." *Id.* at 264.

139. For a discussion of Stanton's views on marriage and contract, see Clark, *supra* note 14, at 36-41.

140. Elizabeth Cady Stanton, Address to the Legislature of New York (Feb. 14, 1854), *in* THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 240, 245 (Ann D. Gordon ed., 1997). As Ann Gordon points out, Stanton did not actually deliver this speech to the legislature. Rather, Stanton addressed the 1854 woman's rights convention, which then printed her speech and distributed it to the legislature. *See id.* at 240.

141. For a modern version of this argument, see Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 317-18, which argues that the doctrine of common law marriage should not turn all cohabitational relationships into marriage because people should have the option of choosing to cohabit outside the institution of marriage.

she began, is a civil contract.[142] Yet, unlike other contracts, "in the marriage contract which the State allows to be formed so thoughtlessly, ignorantly, irreverently, the parties have no control whatever, though ofttimes in its formation and continuance all laws of decency and common sense are set in defiance."[143] "Nothing could be more reckless," she argued, "than our present system, when merely to be seen walking together may be taken as evidence of intent to marry and going through the ceremony in jest may seal the contract."[144]

Stanton's was a vision of social stability through freedom, not restriction.[145] In this regard, she parted ways with mainstream judicial opponents of common law marriage. Yet at least one court opposed to recognizing the doctrine of common law marriage criticized supporters of the doctrine for imposing permanence in relationships where it was never desired—an echo of Stanton's fear. The Washington Supreme Court observed that in recognizing common law marriages, courts

> undoubtedly in many instances indulge in refinements of distinctions that never entered into the minds of the parties, which sometimes resulted in holding the marriage relation to have been established by the conduct of the parties where there was no real intention to take each other as husband and wife.[146]

Stanton's solution to this problem, of course, importantly involved not only judicial rejection of common law marriage but also divorce reform. Judges opposed to common law marriage, however, were equally—even vitriolically—opposed to any measure that would increase access to divorce.[147]

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142. *See* Elizabeth Cady Stanton, Address to the Decade Meeting on Marriage and Divorce, *in* A HISTORY OF THE NATIONAL WOMAN'S RIGHTS MOVEMENT FOR TWENTY YEARS 59, 68 (photo. reprint 1971) (Paulina Davis ed., New York, Journeymen Printers' Co-operative Ass'n 1871).

143. *Id.* at 69.

144. *Id.* at 73. Of course, from a doctrinal point of view, Stanton's contract law analysis was as flawed as that of judicial proponents of common law marriage. It is highly unlikely that a court would ever have found a contract based on the parties' merely walking together.

145. Although some of Stanton's views on marriage have been described as approaching those of free-love advocates, *see* DuBois, *supra* note 135, at 267, Stanton did not advocate access to divorce to fulfill a vision of serial marriages or sexual anarchy. To the contrary, Stanton was concerned with protecting the stability of marriage relations through greater social leniency, not excessive legislative restriction. While many opponents of divorce law reform claimed that easy access to divorce would destroy happy marriages and families, Stanton contended that access to divorce would improve marital relations: "The freer the relations between human beings the happier. . . . Many a man who is tyrannical to-day, if he knew public sentiment would protect his wife in leaving him, would become kind and considerate." Stanton, *supra* note 142, at 71. In crafting her views on the subject, Stanton was guided by her observations of and experiences with destructive marriages. *See* Griffith, *supra* note 138, at 233-34, 241. Concerned with protecting women in such relationships, and convinced that society was not well served by perpetuating them, Stanton believed that both individual and social happiness would be benefited by abolishing the recognition of common law marriages and increasing access to divorce, thereby making entrance into marriage more difficult and exit more possible.

146. *In re* McLaughlin's Estate, 30 P. 651, 657 (Wash. 1892).

147. At the time of Stanton's speeches, for example, physical battery was not necessarily sufficient grounds for a woman to obtain a divorce in Massachusetts, unless it was sufficiently severe to be deemed

The judges who comprised the mainstream opponents of common law marriage attacked the doctrine for its laxity and the corollary abdication of state control over matrimonial access. Chief Justice Parsons and his followers feared that judicial recognition of common law marriage would lead to the decimation of marriage as a formal, respected, socially controllable institution. By contrast, Stanton's anxieties were the very opposite: Common law marriage, in her view, was a conservative, potentially coercive doctrine. Stanton feared that the recognition of common law marriage would fortify the institution of marriage as a social imposition on individuals, whether or not they desired or intended to join the institution.[148]

At least some of the nineteenth-century American crafters of the doctrine of common law marriage were well aware of the aspect of the doctrine that Stanton criticized. They too recognized the link between lax marital laws and harsh divorce laws. While it was not the focal point of their writings, common law marriage proponents occasionally acknowledged what Stanton pointed to as a lacuna in their marriage-as-contract formulations: Marriage was a contract for the sake of entry, but not for the sake of exit. As a South Carolina court of equity observed, "[T]he remarkable facility of contracting matrimony in this State, is strongly contrasted with the impracticability of dissolving the contract. No divorce has ever taken place within the State."[149] Or as a commentator, writing early in the twentieth century remarked, "The facility with which the status [of marriage] is formed contrasts most singularly with its indissolubility when established."[150]

Proponents of common law marriage thus extolled the doctrine for the very power inherent in it that Stanton most feared: its ability to facilitate easy entry into marriage without complementary ease of exit. The New Hampshire Supreme Court, for example, argued in 1820 that recognizing common law marriages was, in fact, the best way to protect and fortify the institution of marriage. "Under this view," the court wrote, "the purity and sacredness of the marriage contract will remain no less, but rather more inviolate, than under a different construction. For now the contract will never be annulled for any accidental or designed irregularity, not extending to the essential grounds of the contract."[151] Over the course of the century, other courts explicitly stated

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extreme cruelty. *See* Siegel, *The Rule of Love*, *supra* note 32, at 2132 (discussing *Bailey v. Bailey*, 97 Mass. 373 (1867), in which the Massachusetts Supreme Judicial Court held that not all personal violence amounted to cruelty for the purposes of divorce). As Siegel points out, courts' assessments of appropriate marital conduct varied depending on the class of the parties involved: Lower class couples were presumed to tolerate higher levels of domestic violence. *See id.*

148. As Hendrik Hartog observes, in contrast to the varied contemporary meanings of marriage, marriage in the 19th century was a defined public relationship: "All husbands were alike as were all wives." Hartog, *supra* note 33, at 97-98.

149. Vaigneur v. Kirk, 2 S.C. Eq. (2 Des.) 640, 643 (1817).

150. Plumb, *supra* note 4, at 48.

151. Town of Londonderry v. Town of Chester, 2 N.H. 268, 281 (1820). Some scholars have argued that in response to the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1994)),

that, once recognized, common law marriages were indissoluble at the will of the parties; marriage was a civil contract like all contracts, except insofar as it could not be undone.[152]

How often common law marriages branded as indelible relationships whose members had not desired them to be so—specifically, to address Stanton's fear, whose female members craved impermanence—is an empirical question that the available sources do not answer. Most of the evidence of common law marriages comes from court records, which mainly document cases of women seeking judicial recognition of common law marriages. What is certain, though, is that, in recognizing relationships as matrimonial, courts ignored basic rules of contract even as they invoked the contractual model. They proclaimed that marriage was a contract, even as they guarded its existence as a status. As Stanton recognized, the language of contract thus masked a conservative agenda inherent in the preservation of marriage as a status. With this insight, her critique looked beyond the short-term interests of the individual female plaintiffs seeking recognition of common law marriages and toward the long-term interests of women in general.[153]

C. *The Language of Contract*

1. *The Problems with Marriage-as-Contract*

Stanton was not alone in seeking to expose the ways in which courts invoked the law of contracts as they ignored basic contract principles. In the common law marriage context some courts clung to the idea that marriage was a pure contract. In other contexts, however, all courts, including the Supreme Court, acknowledged that marriage was also a status.[154] Stanton was hardly alone, then, in debunking the claim that marriage was, descriptively, a pure contract. Indeed, two of the nation's most prominent legal thinkers around the turn of the century, Joel Bishop and Oliver Wendell Holmes, levied similar

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which required the recognition of contracts made by blacks, some courts tried to redefine marriage as a status rather than a contract. Mary Frances Berry argues that the same courts that redefined marriage as status for the purposes of invalidating interracial marriages "continued to define marriage as a contract for whites." Berry, *supra* note 119, at 840.

152. *See, e.g.*, Askew v. Dupree, 30 Ga. 173, 179 (1860) (holding that common law marriage "amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties . . . *cannot dissolve*, and it is equally binding as if made *in facie ecclesiae*" (first emphasis added)); *In re* Hulett's Estate, 69 N.W. 31, 33 (Minn. 1896) ("The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties.").

153. It should be pointed out that Stanton had the luxury of being able to afford to look toward the long term. She was married to an abolitionist lawyer, Henry Stanton, and had the financial means to live in a home with a maid. *See* Siegel, *supra* note 126, at 1090-91. The terms of her critique perhaps suggest a disjunction between Stanton's goals as a leader of the woman's rights movement and the material lives of many women.

154. *See, e.g.*, Maynard v. Hill, 125 U.S. 190, 195 (1888); *see also* Cott, *supra* note 10, at 116-18.

critiques at courts that recognized common law marriages by relying on the marriage-as-contract formulation.

In the 1891 edition of his treatise on marriage, Joel Bishop recognized common law marriage as both an accepted and necessary doctrine. He argued, however, that the marriage-as-contract formulation was a falsehood. Even if parties entered a marriage through a process that resembled that of entering a contract, Bishop argued, an established marriage was different than any form of contract. As Bishop observed,

> to say that marriage is a contract, when speaking of the marital condition, not of the agreement to assume it, is, as we have seen, according even to the former utterances of most legal persons, inaccurate; since they further declare that it differs in many particulars from other contracts. And when the differences are pointed out, we see that they have covered every quality of the marriage, and left nothing of contract. All is submerged in the status. To term marriage, therefore, a contract, is as great a practical inconvenience as to call the well-known engine for propelling railroad cars "a horse," adding "but it differs from other horses in several important particulars;" and then to explain the particulars. More convenient would be to use at once the word "locomotive."[155]

Bishop, therefore, recognized both contract and status elements of the marriage relationship, but opined that, once contracted, the remainder of the marital relationship was more status than contract.

Bishop's critique was a theoretical one about the very nature of marriage as a status. By contrast, in 1907, Oliver Wendell Holmes offered a critique of judicial recognition of a common law marriage based, not on the theory of the nature of marriage, but rather on the doctrinal application of contract principles. In *Travers v. Reinhardt*,[156] Justice Holmes chastised the Supreme Court for incorrectly invoking the language of contract to uphold the validity of an informal marriage. Faced with similar facts in a nonmarital context, he chided, the Court would never have been able to find that the constitutive elements of a valid contract were present.[157]

The case that sparked Holmes's criticism involved the interpretation of James Travers's father's will. In the context of interpreting the will, the Supreme Court considered whether James Travers was validly married to Sophia Grayson.[158] In 1865, the couple had conducted a marriage ceremony

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155. JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION 14-15 (Chicago, T.H. Flood & Co. 1891).

156. 205 U.S. 423 (1907).

157. *See id.* at 442-44 (Holmes, J., dissenting). For Holmes's views on contract, see OLIVER WENDELL HOLMES, THE COMMON LAW 247-339 (Boston, Little, Brown & Co. 1881). *See also* GRANT GILMORE, THE DEATH OF CONTRACT 21-23 (1974).

158. *See Travers*, 205 U.S. at 442-44 (Holmes, J., dissenting).

in Virginia; unbeknownst to Sophia, the officiant at the ceremony was not really a minister. The couple left Virginia, stopping briefly in New Jersey, and settled in Maryland, where they lived for fifteen years, returning to New Jersey only shortly before James died.[159] Sophia claimed that their marriage was valid and, therefore, that she had the right to inherit under the stipulations of James's father's will.[160] Writing for the Court, Justice Harlan held that James and Sophia had a valid common law marriage. Although Virginia and Maryland did not recognize common law marriages, New Jersey did.[161] Therefore, Harlan argued, since the couple had cohabited as husband and wife while in New Jersey, they were married under the common law.[162]

In dissent, Justice Holmes disputed that a valid contract could have been formed between the couple.[163] The basic principles of contract law, he argued, would not allow it. No valid contract could have been formed in either state that did not recognize common law marriage.[164] The evidence of the couple's "habit and repute," which was offered to prove the existence of an informal marriage, was insufficient to create a marriage in a state that did not recognize common law marriages.[165] Thus, while James and Sophia called themselves husband and wife throughout their relationship, Holmes rejected this as evidence of a common law marriage in New Jersey:

> When an appellation shown to have been used for nearly 18 years with conscious want of justification continues to be used for the last month of lifetime, I do not see how the fact that the parties have crossed a state line can make the last month's use evidence that in that last moment the parties made a contract which then for the first time they could have made in this way.[166]

"A void contract," Holmes concluded, "is not made over again or validated by being acted upon at a time when a valid contract could be made."[167]

Holmes demanded consistency: If contract law was to be invoked, its basic tenets should be applied, regardless of whether the context was marital. This was not the first time Holmes leveled such a critique at his brethren. In 1888, while on the Massachusetts Supreme Judicial Court, Holmes had chastised the court in a dissent for invoking the contract principle of consideration but then

159. *See id.* at 433 (majority opinion).

160. Nicholas Travers's will provided that each of his sons would inherit a portion of his wealth. If a son died with a wife, then she could inherit in his place. *See id.* at 429-30.

161. *See id.* at 439-40.

162. *See id.*

163. *See id.* at 443-44 (Holmes, J., dissenting).

164. *See id.* at 443.

165. *Id.*

166. *Id.*

167. *Id.* at 444.

failing to apply it because the facts of the case involved a marital situation.[168] Holmes's dissents expose the judicial contradictions underlying the marriage-as-contract formulation. While courts invoked contract principles in marital situations, they did so selectively, carefully preserving a private marital domain beyond the reach of contract doctrine.

Holmes and Bishop, then, each confirmed what Elizabeth Cady Stanton had posited: The contract law basis of common law marriage, both in theory and as applied, was a doctrinally precarious one. Although courts insisted that they were obliged to recognize informal unions as marital because of basic contract principles, closer scrutiny reveals that, at least in some instances, basic contract principles actually militated against such recognition.

2. *On Contract and Coercion*

The theoretical implication of Stanton's critique was thus a powerful one: The ostensibly liberating language of contract could coexist, or even support, coercive state power.[169] This insight gains particular explanatory force if it appears that jurists were invoking contract out of its doctrinal context. If correct, Stanton's critique begins to erode the distinction between the seemingly oppositional judicial projects of the proponents and opponents of common law marriage. The language employed by proponents of common law marriage elided the role of the state in the marriage relationship, painting the relationship as a private contract between two consenting parties. By contrast, opponents of the doctrine overtly invoked the role of the state in the marital relationship. Yet both sides of the debate were fundamentally committed to state control over marriage in the interest of stability.

Of course, as the cases reveal, the doctrine of common law marriage was not necessarily coercive of women in each particular instance.[170] Women

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168. *See* Merrill v. Peaslee, 16 N.E. 271, 275-76 (Mass. 1888) (Holmes, J., dissenting). *Merrill* involved an interspousal contract according to which Hiram Peaslee agreed to pay his estranged wife $5000 in exchange for her returning to him and agreeing not to proceed with a divorce suit. The court held the contract unenforceable as a contract for marital services. *See id.* at 273-74. On the place of this case in the history of judicial refusal to recognize interspousal contracts for wives' services, see Siegel, *Modernization*, *supra* note 32, at 2188-90.

169. This claim is, perhaps, no longer shocking to our post-Legal Realist sensibilities. Reva Siegel, for instance, analyzes how courts can distort legal language to employ it for purposes counter to the intent of the doctrine. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). In some sense, Stanton's critique presciently foreshadowed the modern feminist critique of contract law. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

170. The question of whether the doctrine was or was not coercive in some meaningful sense is embedded within larger questions of systemic coercion. Female plaintiffs' invocations of the doctrine of common law marriage no doubt reflect, in part, the manner in which the law constrained the types of claims that women could successfully invoke to gain financial support. A woman who found herself in a position similar to that of many of the plaintiffs in common law marriage cases (i.e., separated from the man on whom she was financially dependent) had little choice but to claim that she had been married to the relevant man. If they were not married, she had no claim to his finances. *See, e.g.*, Cropsey v. Sweeney, 27 Barb. 310 (N.Y. App. Div. 1858) (rejecting the plaintiff's claim that she deserved financial support from

plaintiffs who came before nineteenth-century courts seeking financial support through judicial recognition of common law marriages were in dire need. In applying the doctrine to their situations, courts afforded these women monumental concrete benefits.

The power of legal doctrines, however, often transcends their material effects. As Robert Gordon has recognized, the law's power resides not only in its direct, coercive force, but also "in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live."[171] Analyzing the effects of the doctrine of common law marriage, therefore, requires one to look beyond the material benefits awarded to individual female plaintiffs in specific cases and beyond judges' motives, to the broader social implications of the doctrine. In championing the doctrine of common law marriage, courts surrendered to, and simultaneously fortified, narrow social conceptions concerning acceptable forms of female relations to men and to the state.[172] Invoking contract language, courts perpetuated the notion that women are properly dependent on individual men for their material support.

By knotting the state into the marriage relationship, each side of the common law marriage debate harnessed the state's power to counter a particular set of social concerns. For opponents of common law marriage, those concerns centered upon policing what William Novak has called a "well-regulated society."[173] For proponents of the doctrine, by contrast, those concerns focused on privatizing threatening forms of dependency. The social project of the opponents of common law marriage was thus more immediately visible in the language of state intervention and social protection. By contrast, the social project of the doctrine's proponents was more subtly executed through the language of contract.

As noted above, marriage was not the only contract whose consensual element was confined to the point of entry into the relationship.[174] Free labor relations, a subcategory of domestic relations in the nineteenth century, were similarly consensually entered but categorically predefined.[175] Thus, while

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the estate of her deceased partner, even though their alleged marriage had been void, because of the services she had rendered him). I thank Professor Hendrik Hartog for pointing me to this case.

In addition, it is important to note that judicial recognition of a common law marriage most certainly had a coercive impact on the newly recognized husband who was thereafter financially responsible for his wife. The import of this coercive element, however, is minimized by the high percentage of dead husbands implicated in the relevant cases.

171. Gordon, *supra* note 62, at 109.

172. On the mutually constitutive nature of law and social practices, see *id.* at 104, 111-12.

173. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 47 (1996); *see also id.* at 19-50.

174. *See supra* note 134.

175. *See generally* STANLEY, *supra* note 123 (manuscript at 9-10) (discussing the parallels between the authority relations of marriage and wage relationships). As Christopher Tomlins has argued, "Marriage and unenslaved service were distinguished from involuntary relations by their foundation on contractual assent. At the same time, that assent applied to entry into a relationship already defined at common law, not consent to entry upon a mutual process of voluntarist definition." Tomlins, *supra* note 12, at 70.

contract in the nineteenth century was often represented as the private sphere of individual consent, marriage was not the only context in which contract straddled the line between consent and coercion. The labor context, in fact, helps to illuminate the "paradoxical links between contract and compulsion" that existed.[176] Postbellum charity reformers, for example, advocated vagrancy laws that mandated forced labor for beggars, all the while extolling the ideal of free labor. By coercing beggars into the market economy via the work force, these charity reformers "laid bare the place of compulsion in a free-market economy."[177] This tension was most salient, Amy Dru Stanley argues, in the postbellum South where northern workers disparaged the Black Codes while simultaneously preserving a system of forced labor. Freedmen's Bureau workers thus sent former slaves a double message: They were free, but "freedom barred dependence."[178] Ironically, then, "victors and vanquished, ostensibly still struggling to implement opposing visions of emancipation, were adopting similar methods of labor compulsion."[179]

Like charity workers, proponents of common law marriage were confronted with cases of unmitigated dependence.[180] In an era before the rise of a formal welfare state, dependence was viewed as a profound threat to the social order.[181] In a time when certain dependencies were shameful and "others were deemed natural and proper," single women, especially those with children, represented a subversion of socially acceptable patterns of dependence.[182] A woman was supposed to be dependent on her husband, not on the state. Moreover, the practical contingencies of real life did not alter this paradigm.[183] Thus, for example, "[w]hile many laboring women found it difficult in the changing social and economic circumstances . . . to sustain their actual dependencies on male-headed households, the *ideology* of female dependency still informed popular notions."[184] A single woman turning to a

176. Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1268 (1992).

177. *Id.* at 1277.

178. *Id.* at 1283.

179. *Id.* at 1285.

180. On the ideological implications of dependency, see Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency: *Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 9 (1994).

181. As the settlement cases discussed *supra* Part I reveal, the support of paupers was handled locally, varying from town to town. On poverty relief and laws in the 19th century, see generally MICHAEL B KATZ, IN THE SHADOW OF THE POORHOUSE 3-113 (1986); DAVID MONTGOMERY, CITIZEN WORKER 71-83 (1993); and THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 92-100 (1992)

182. Fraser & Gordon, *supra* note 180, at 15.

183. In fact, by the end of the 19th century, the number of women employed in the work force and contributing to their family's income belied the myth that women were, or could be, solely dependent on their husbands. As Stanley notes, "The wage system disrupted the fundamental premise of the marriage bond: the relation of male protection and female dependency." Stanley, *supra* note 33, at 491-92

184. STANSELL, *supra* note 39, at 20. Throughout the 19th century, this growing disjunction between the ideology of dependency and the material needs of many households was common. *See, e.g.*, BARDAGLIO, *supra* note 70, at 131; JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 115-17 (1990). Of course, even if a husband's wages were sufficient to support the family financially, the ideology of dependency insidiously obscured the ways

court of law in search of financial relief because of the absence of a male partner was an unacceptable and threatening social spectacle.

Faced with this spectacle of women in potential relationships of dependency with the state, judicial proponents of common law marriage wielded the language of contract, shifting such dependencies back to what was perceived to be their natural and proper place. Contract was the antithesis of dependency in an "intellectual tradition that dissociated relations of personal dependency from transactions based on voluntary contract."[185] Contract demarcated the private sphere of individual decisionmaking and consent. If dependent women could be placed in contractual relationships with men, those men would provide for their financial and social needs. By invoking the existence of a contract, judges ensured that the dependencies of the women before them remained firmly planted in the private sphere of the family, thereby shielding the state from responsibility for their care or support.[186] The existence of dependency was veiled by the language of voluntarism.

As Stanton noted, one danger of this contract language was that women could be coerced into relationships that they did not desire.[187] The contractarian project of common law marriage, however, harbored another layer of social meaning that was of potential concern to women: As judicial proponents of common law marriage shielded the state from female dependency, their rhetoric simultaneously shielded the marriage relationship from intervention by the state. Contract was the quintessentially private relationship in the nineteenth century. In fact, the sanctity of a private contract was such that the government was constitutionally prohibited from making any laws that would impair the relationship.[188] Thus, by relying on contract language, judicial proponents of common law marriage created a private sphere

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in which the family was structured to render the husband "independent" and the wife "dependent," despite the husband's complete dependence on his wife to perform all of the functions without which he could never maintain the facade of independence. As Christopher Tomlins argues,

> [The] discourse of agency expressed a continuation of a strategy of preventing too great a trespass of household demands on the master's independence—a continuing displacement of substantial responsibilities for securing survival onto subordinates, one built on the same foundation of inside hierarchical social relations that presumed the master's control over the disposition of the household's total product and the activities of its producers.

Tomlins, *supra* note 12, at 73.

185. Stanley, *supra* note 176, at 1272.

186. On the social construction of the family as a site for the privatization of dependency, see Fineman, *supra* note 11, at 2187-88.

Of course, in settlement cases, *see supra* notes 50-54 and accompanying text, one local municipality was still responsible for the financial support of an impoverished woman. By restricting a woman's access to poor relief to the town in which her husband was a resident, however, courts shielded society at large from the threat of roving dependence.

187. As Hartog documents, not all women shunned the vision of dependency that Stanton denounced. *See* Hartog, *supra* note 12, at 93. Mrs. Packard, the subject of Hartog's analysis, far from denouncing the paradigm, "asked for legal confirmation of some version of a distinctively female dependent status." *Id.* She sought what Hartog calls the "right to be a married woman." *Id.*

188. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

in which the state would not intervene, exposing women who were trapped in that sphere to the dubious comforts of absolute domestic privacy.[189]

IV. CONCLUSION: GOVERNING THROUGH CONTRACT

Contract language in the nineteenth century elided the boundaries between consent and coercion and between private and public. Judicial proponents of common law marriage wielded the power of the state to create a private domain. They thus augmented the coercive powers of the state through the quintessential language of individual consent and private action. While opponents of common law marriage overtly sought to govern a well-ordered society by bringing the state into marital relationships, proponents of the doctrine more covertly governed through contract.[190] Lawrence Friedman has argued that in the nineteenth century "[p]rivate contract . . . could be used to further policy where more direct public action would be used in the twentieth century."[191] In the case of common law marriage, the language of private contract shielded the state from responsibility for poor women.

It was not until the second decade of the twentieth century that a formal public support system was put into place to help single women, first in the form of mothers' pensions.[192] Not until 1935, with the passage of the Social Security Act,[193] was there any guarantee of federal aid.[194] Even most private forms of relief targeted at women in the nineteenth century were restricted to married women who could provide marriage certificates to verify their status.[195] Single women were thus forced to rely on the meager programs of local municipalities. Given the paucity of available relief, the doctrine of common law marriage was one way to facilitate support for women, granting a judicial imprimatur to confining support to the private sphere of the family.

The power of this historical dynamic of governing through contract as a mode of controlling threatening forms of female dependency echoes today in the welfare reform arena. As recent welfare reform legislation replaces welfare benefit programs with "workfare" programs, the state is once again engaged

189. On the connection between the family as the site for privatizing dependency and the family as shielded from state intervention, see Fineman, *supra* note 11, at 2205. On the rise of privacy language to protect male prerogatives within the family, see Siegel, *The Rule of Love*, *supra* note 32, at 2150-74. On the dangers of ensconcing the family in an entirely private sphere, see Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

190. *Cf.* Jonathan Simon, *Governing Through Crime*, *in* THE CRIME CONUNDRUM 171, 174 (Lawrence M. Friedman & George Fisher eds., 1997) ("By governance I mean not simply the actions of the state but all efforts to guide and direct the conduct of others.").

191. FRIEDMAN, *supra* note 44, at 147.

192. *See* GORDON, *supra* note 68, at 37-42; SKOCPOL, *supra* note 181, at 9-10.

193. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397(e) (1994 & Supp. I)).

194. *See* GORDON, *supra* note 68, at 3-6, 253-63.

195. *See* STANSELL, *supra* note 39, at 70-71.

in the project of shifting female dependency into contractual relationships. This time, the contractual paradigm envelopes not poor women and private male providers, but poor women and private employers who provide jobs that women are required to take in lieu of entitlements to cash benefits.[196]

Workfare is billed as an antidote to dependency, as a shift from a system in which women were compelled to rely on the state, to one in which they can rely on themselves.[197] Yet, once again, the line between contract and coercion is a slippery one. One welfare advocacy group, for instance, has branded workfare "'nothing less than slavery.'"[198] Like the nineteenth-century vagrancy laws discussed above,[199] workfare programs institutionalize the message that poor people do not have the choice to do nothing. Unlike vagrancy laws, welfare reform does not criminalize doing nothing. It does, however, compel women to work or receive no financial benefits for themselves and their families.[200]

Perhaps, then, the story of nineteenth-century common law marriage has come full circle. Common law marriage in the nineteenth century privatized the dependencies of women and children through individual contracts, thereby shielding the state from financial responsibility. In the early decades of the twentieth century, the rise of welfare programs formally shifted responsibility for dependent women and children to the state. Today, the state is once again attempting to govern through contract in order to define the proper relationship between the state and dependent women. Only now, employment contracts, not marriage contracts, are the tool with which states seek to re-privatize female dependency.

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196. Although many workfare participants have been assigned to jobs in the public sector, private sector opportunities are increasing. *See* Alison Mitchel, *White House Visitors Vow Support of Welfare Hiring*, N.Y. TIMES, May 21, 1997, at B7 (describing President Clinton's "campaign to encourage the private sector to produce one million jobs for welfare recipients over the next four years").

197. *See, e.g.*, Victoria Benning, *In Virginia, A Shift from Dependency to Self-Sufficiency*, WASH. POST, Mar. 28, 1996, at B1.

198. John Rather, *Wary Support for Pataki Welfare Plan*, N.Y. TIMES, Dec. 1, 1996, § 13 (Long Island), at 1 (quoting Therese Scofield, the coordinator of Welfare Warriors, a group of single mothers receiving welfare); *see also* Cynthia A. Bailey, *Workfare and Involuntary Servitude—What You Wanted To Know But Were Afraid To Ask*, 15 B.C. THIRD WORLD L.J. 285, 315-21 (1995) (arguing that workfare violates the Thirteenth Amendment).

199. *See supra* text accompanying notes 177-179.

200. *See* Bailey, *supra* note 198, at 287 (arguing that workfare is "coerced labor"); *see also* Jason DeParle, *Getting Opal Caples To Work*, N.Y. TIMES, Aug. 24, 1997, § 6 (Magazine), at 33; Jason DeParle, *Welfare Crucible*, N.Y. TIMES, May 7, 1997, at A1; Jason DeParle, *The Welfare Evolution*, N.Y. TIMES, June 30, 1997, at A1.