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Marital Exits and Marital Expectations in Nineteenth Century America

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LECTURE

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This lecture sketches a bit of the legal normative universe within which antebellum American women and men lived their lives as wives and husbands. I focus here on the nineteenth-century judicial treatment of two familiar forms of exit from unsatisfactory marriages: by contractual agreement and by judicial divorce. The story I want to tell is a paradoxical one. On the one hand, I mean to show how seriously courts took their commitment to conserve and enforce the received institution of marriage against the efforts of various couples to negotiate private understandings about (and endings to) their marriages. On the other hand, I also want to show the contradictory willingness of courts to recognize and legitimize a variety of private, individualized, marital arrangements.

When I began working on this lecture, I thought of it as an opportunity to set out the terms of the institution of marriage in antebellum America. It would provide a preface to my ongoing, long-term project: a history of legal struggles between husbands and wives since the early nineteenth century. I wanted to set the scene of the institution first, before I moved on to the legal lives and stories of the women and men who lived within the institution.

I quickly found, however, that a formal distinction I had drawn—between the institution of marriage and the identities of the persons who lived within that institution—kept breaking down. At times it appeared that legal marriage was nothing but the legal identities of husband and wife. At other times particular courts insisted on the existence of a marriage where there was no longer functionally either husband or wife. I was confused and, sometimes, I still am.

What is marriage? Today, a marriage is commonly viewed as the private property of husbands and wives who mold their marriages to suit their pur-

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poses and identities. There are, then, as many types of marriages as there are married couples, each one the product of the distinctive choices and investments of its partners.

By contrast, all participants in the antebellum Anglo-American legal culture understood what marriage was.[1] At least until the middle years of the nineteenth century, being married meant subjecting oneself to a known and coercive public relationship. By the 1840s there was a growing industry of legal reformers proposing revisions, modifications, and transformations of the received rules of marriage. But what reformers were challenging was never at issue. Reformers knew their enemy, just as defenders of the status quo knew what they were defending. Marriage had an unambiguous and inescapable set of meanings (although, like most unambiguous and inescapable terms, the meanings of marriage could be elaborated and extended in confusing ways, and to every principle there were exceptions that under the right circumstances might engulf it).[2]

What was marriage? According to the mid-nineteenth-century edition of Webster's dictionary, marriage was "the act of uniting man and woman, as husband and wife, for life."[3] To nineteenth-century eyes, that definition had four overlapping elements: (1) marriage *united* a man and a woman, giving them a singular identity; (2) marriage *transformed* men and women into hus-

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1. By defining the legal culture as Anglo-American, I mean to exclude from my generalization those who lived under and subscribed to Spanish and Mexican legal regimes of marriage. *See* Hans W. Baade, *The Form of Marriage in Spanish North America,* 61 CORNELL L. REV. 1 (1975). Who "all participants" included within the Anglo-American legal culture is, of course, a complex issue. Obviously, African American slaves and Native Americans should not be viewed as participants. On the other hand, my reading of the case law has convinced me that it is a mistake to assume that the law of marriage and coverture had relevance only for the relatively well-to-do. A large portion—I suspect the vast majority—of the married white population would have taken the normative understandings I explore in this chapter as descriptive of their situations.

2. On the continuing restrictiveness of the legal definition of marriage, consider that a leading scholar of American family law could write as late as 1975 that marital relations among the Cherokee did not qualify as real marriages, using the received Anglo-American definition. Henry H. Foster, *Indian and Common Law Marriages,* 3 INDIAN L. REV. 83 (1975). He described the Native American relation of husband and wife as existing in a "state of nature," that "may bear a marked similarity to the utopia recommended by Kate Millet, Shulamith Firestone, and others who have been influenced by Frederick Engels and Lewis Henry Morgan." *Id.* at 89-90. There were no status incidents, no obligation of fidelity, no marital property nor economic rights incident to the relationship, and child rearing was more of a community undertaking. *Id.* at 90. In short, Native American marriage served a different function than that served by Anglo-American marriage.

3. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 695-96 (1856) (revised by Chauncey Goodrich). The English judge, Lord Penzance, in the case of Hyde v. Hyde and Woodmansee, 1 L.R.-P. & D. 130 (Mass., 1866), defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others." *Id.* at 133. This definition has since been repeated by courts on both sides of the Atlantic. *Hyde* dealt with the marriage of a Mormon couple, both of whom were single at the time of their marriage. But, because polygamy was contemplated and encouraged by the tenets of their religion, their union was not exclusively of one man and one woman. Accordingly, it was not a marriage recognized by English law. *Id.* at 138.

bands and wives; (3) marriage produced a public relationship, the terms of which were *not negotiable* by the parties; and (4) marriage effected a *permanent* transformation, one that would continue as long as both husband and wife survived.

These themes hardly exhaust the social and legal implications of marriage. Other aspects of the widely accepted understanding of marriage were so foundational as to be beneath the contemplation of a nineteenth-century legal consciousness. The definitional certainty that marriage was only available to heterosexual couples is one example. Still, these four themes do help frame the landscape of marriage, and in this lecture I will take two of them—the notion of marriage as a non-negotiable public relationship and the notion of marriage as, by definition, permanent—as my particular subjects.

What did it mean to be married? In the 1840s, as today, it meant that a man and a woman had become husband and wife. However, what it meant to be a husband or a wife then was strikingly different than today. In legal understanding today (and probably in the experience of many), a wife and her husband are two individuals who have contracted to live together, as a result of which they jointly acquire legal and social privileges and some duties and responsibilities. The identities of husband and wife are held lightly, if at all. We (a complicated "we") generally retain our prior identities as separate and unrelated individuals. In the words of Justice Brennan, a married couple is "not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."[4] To use the language of the model Uniform Marriage and Divorce Act, to be married is legally nothing more than an agreement to enter into "a personal relationship between a man and a woman arising out of a civil contract."[5] One always remains an individual. Just married. Or not.

By contrast, the lawmakers and the theologians who constructed the nineteenth-century marriage ceremony, as well as the women and men who entered into it, expected that the individual identities of women and men would be changed permanently by the ceremony. To become a husband or a wife was to inhabit a legal role, a legal personality, that carried with it strong and stringent public expectations as to conduct and responsibility. That legal person, that collection of legal rights and duties—the husband, the wife—existed regardless of an individual's relative discontent with the identity.

A marriage was created by the contract of a woman and a man. Yet, the terms of the identities marriage created could not be understood as the product or the creation of the will of two particular individuals. All husbands

4. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
5. UNIF. MARRIAGE AND DIVORCE ACT, pt. II, § 201 (1973).

were alike as were all wives. And it is to the generalized characteristics of the legal personality of wife and husband that judges and others referred when it might appear that they ought to have been discussing particular, historically situated individuals with particular and distinctive life histories and identities.[6]

It is important not to forget that the stories in the judicial history of marriage are about the ways that the individuals who embodied legal identities diverted marital narratives away from expected paths and imposed individualized and distinctive meanings on marital histories. The pages of the case reports are full of women who wanted to keep their property and earnings away from their husbands, about men who saw no reason to continue to support their wives or children, about women who committed adultery, about women who insisted on their right to keep custody and control over their children at the time that the law ostensibly refused them that right, about men who wandered away from their families, and about women who refused to live under their husband's roofs. In particular, these case reports are full of stories about husbands and wives who either separated or divorced and who negotiated with greater or lesser success about the terms of their partings.

But these stories are also about the sometimes successful efforts of judges and other legal authorities to reimpose predictable and generalized legal order on those individual lives and about the punishments visited on those whose individual lives diverged too sharply from their expected legal roles. The individuals who brought marital conflict to courts were first subject to legal categories, and only secondarily considered the subjects of individual marital histories. Husbands and wives were repressed by their legal identities, even as they also struggled to change and to impose new meanings on their legal personalities.

I. CONTRACTUAL EXITS

What did it mean to be married? All marriages were intended for life. But in 1840, as now, many couples separated, and when they did so, they needed to renegotiate the terms of their relationship. What was the body of law that then confronted them?

The answer is complex, but can be illustrated by a relatively well-known English judicial history. That history begins when Lord and Lady Lanesborough separated.[7] Like many other separating couples both in England

6. For a helpful mapping of the moral and social significance of various legally ascribed identities, see AMELIE RORTY, *Characters, Persons, Selves, Individuals, in* MIND IN ACTION 78-100 (1988).

7. *See* Ringstead v. Lanesborough, 99 Eng. Rep. 610 (1783).

and in America, the Lanesboroughs negotiated a "separate maintenance" agreement, leaving property with Lady Lanesborough in trust, "to her sole and separate use." By the agreement, she gained the right to live alone and assumed responsibility for her own debts. His lordship moved to his lands in Ireland, while she remained in England. In England, she contracted debts, and, when the creditors sued her for payment, she asserted her coverture (*i.e.*, her identity as a married woman).[8] As a wife, as a feme-covert, she could not be held liable for debts contracted to supply her with "necessaries." Such debts were legally considered contracted with the implied consent of her husband.

According to settled eighteenth-century law, the creditors should have been nonsuited—that is, creditors should have been compelled to seek their remedy from Lord Lanesborough (or, rather, the executors of his estate, since he was dead by the time the case came to trial). The agreement between husband and wife that the wife should henceforth be responsible for her own debts was, as Lady Lanesborough's defense indicated, a nullity.[9] A contract to vary the public terms of the marital agreement violated a fundamental notion of what it meant to be married. Even very wealthy and aristocratic parties should not be able to slough off the duties and responsibilities that accompanied marital rights.

Yet, when Chief Justice Lord Mansfield came to decide the case in 1783, he noted the prevalence and innocence of these "separate maintenance agreements" that recreated the wife as a single woman, a feme-sole. Mansfield understood, of course, that, at common law, a wife had "no civil capacity or power of acting without her husband, under whose absolute control she [was] supposed to be."[10] But, to Mansfield, separate maintenance agreements reflected a successful alteration of societal norms. Such agreements should be binding on wives because "the law must adapt itself to the various situations of mankind."[11] Alternatively stated: "The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law."[12] Thus, in the Lanesborough case, and in two famous succeeding cases, Lord Mansfield held that a wife who negotiated with her husband for

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8. *Id.*

9. Formally, the agreement was between the husband and the wife's trustee and *prochein ami* (next friend or legal representative) since husband and wife could not contract with each other. In theory the separation occurred "through the intervention of trustees." ROPER SAMUEL DONNISON ROPER, A TREATISE ON THE LAW OF PROPERTY ARISING FROM THE RELATION BETWEEN HUSBAND AND WIFE 272-73 (London, 1824).

10. Ringsted v. Lady Lanesborough, Scone Palace Manuscripts, Box 68, No. 29, *quoted in* Jim Oldham, *Background Essay, in* THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY ch. 22 (forthcoming 1992).

11. Barwell v. Brooks, 99 Eng. Rep. 702, 703 (1784).

12. *Id.*

the right to act and receive credit as a feme-sole should be liable as such.[13]

According to a familiar expectation of Anglo-American legal history, this would be the end of the story, and a status relationship would have become a contractual one. Like other areas of law infected by contractualism (labor law is usually taken as the paradigm), domestic relations law would have confirmed the contractual capacity of wives and recognized the validity of separation agreements.[14] Mansfield certainly intended in these and other cases to make it possible for husbands and wives to agree under delimited circumstances to change given terms of the marital relationship.[15]

But, instead, in 1800 Mansfield's successor as chief justice, Lord Kenyon, overruled all Mansfield's decisions concerning married women's contractual capacity. In *Marshall v. Rutton,*[16] the language of which provided the clichés of marriage law in England and America for a century, Kenyon held that, at least for common law decisionmaking, a contract between husband and wife that altered the terms of the marriage relationship would never be enforced. Such a void contract, Kenyon wrote,

> has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. . . . [I]t may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage, while it subsists. . . .[17]

Relying on *Marshall v. Rutton,* Lord Eldon, the English chancellor, refused in 1805 to allow English courts of equity to determine the circum-

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13. Ringsted v. Lanesborough, 99 Eng. Rep. 610 (1783); Barwell v. Brooks, 99 Eng. Rep. 702 (1784); Corbett v. Poelnitz, 99 Eng. Rep. 940 (1794). *See generally* R.J. Peaslee, *Separation Agreements Under the English Law,* 15 HARV. L. REV. 638 (1902).

14. It should be noted that historians today recognize that the shift from status to contract was never as smooth as legal historians and legal theorists once imagined. *See generally* R. STEINFELD, THE INVENTION OF FREE LABOR (forthcoming 1991). On the general incommensurability between received understandings of legal history and the history of family law, see generally Michael Grossberg, *Crossing Boundaries: Nineteenth Century Domestic Relations Law & the Marriage of Family & Legal History,*" 1985 AM. B. FOUND. RES. J. 799, 799-848.

15. In Rex v. Mead, 97 Eng. Rep. 440 (1758), for example, he ruled against the writ of habeas corpus taken out by John Wilkes for the return of his wife. She had left him after he had "used her very ill," *id.* at 440, and the two of them had negotiated articles of separation including the provision that he was "never to disturb her or any person with whom she should live." *Id.* In his decision, Mansfield ruled that this agreement was "a formal renunciation by the husband, of his marital right to seize her, or force her back to live with him." *Id.*

16. Marshall v. Rutton, 101 Eng. Rep. 1538 (1800).

17. *Id.* at 1539.

stances that would justify a voluntary separation. Indeed, he regarded contracts to separate as absolutely unenforceable in equity. No attention, he thought, should be paid to the "impertinent and scandalous" dicta in Mansfield's opinions that appeared to recognize a separated wife as the equivalent of a feme-sole.[18] The uniform understanding of marriage was, rather, that the original marital contract should be indissoluble and permanent, on the principle that "after that sacred contract [husband and wife] should feel it to be their mutual interest to improve their tempers. . . . The contract of marriage cannot be affected by any [other] contract between the parties."[19]

Words to live by, and words American courts repeated constantly throughout the first half of the nineteenth century. According to the Kentucky Supreme Court, for example, ruling in an 1836 case involving a couple who had already lived apart for many years, a wife could not enforce a separation agreement in the absence of legitimate grounds for divorce.[20] Her very right to appear was, according to the court, against the current of legal authority.[21] At common law, husband and wife could not contract with each other. Even in equity, a wife could not usually sue under her own name. According to the court, however, the principle was "of deeper consequence" than "mere adherence" to common law and equitable precedent.[22] It went directly to the public policy of maintaining the inviolability of marriage. "The well-being of society, as well as the policy of the law and the objects and duties of the marital contract require, that those who are united in marriage should live together."[23] The court, in a touch of realism, noted that the law provided "no coercive remedy" to enforce this duty.[24] But the law had created powerful incentives to keep couples together, chief of which was the knowledge that courts would not enforce agreements between husband and wife.

> [I]n this very disability to contract with each other, in the utter incapacity, by their own mere will, to absolve each other from the reciprocal rights and duties which the law of their [marital] contract has imposed upon them, in the consequent dependence of the wife upon the husband, and the continued liability of the husband to support the wife, the law furnishes powerful motives, which operate most strongly upon those who might be least moved by other considerations, to the promotion of harmony and peaceful cohabitation in married life.[25]

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18. St. John (Lord) v. St. John (Lady), 32 Eng. Rep. 1192, 1194 (1805).
19. *Id.* at 1194-95. *See generally* LAWRENCE STONE, ROAD TO DIVORCE 154-56 (1990).
20. Simpson v. Simpson, 34 Ky. (4 Dana) 140 (1836).
21. *Id.* at 141.
22. *Id.*
23. *Id.* at 142.
24. *Id.*
25. *See id.*

The image of compulsory matrimony, enforced with truly blind justice, on a couple that would surely never again live together, is striking and mysterious.

It was also a pervasive image, one marshalled repeatedly in orthodox legal writing. Consider the case of poor Mrs. Beach of Oneida County in New York, who in 1842 appealed the dismissal of her slander suit against Mrs. Ranney.[26] According to Mrs. Beach's complaint, Mrs. Ranney had falsely called Mrs. Beach a thief and sexually incontinent. As a result, Mrs. Beach, who lived apart from her husband, claimed to have suffered "pain of mind and body." Her husband had "abandoned" her, that is, he had stopped recognizing her as his wife and no longer provided financial support. Her neighbors refused to assist her as they had before been accustomed to do. In particular, neighbors Smith and Raymond, who had previously provided her with fuel, clothing, and provisions, no longer would do so. She had been turned out of the local moral reform society, and local children threw stones at her house and called her a strumpet.[27]

The case before the New York Supreme Court revolved around the "deed" of separation between Mr. and Mrs. Beach that "allowed" her to live apart from him. This agreement contained a covenant by the husband that his wife could sue, either under her own name or in the names of herself and her husband, to recover property or "for any damage or injury which she might sustain to her person, character, goods etc.," and that he would do nothing "to hinder the progress of such suits, or in any way interfere therewith."[28] Such a provision was routine in separation agreements and, from the wife's perspective, one that was absolutely necessary if she were to have any security in her new "separated" life.[29]

When Mrs. Beach sued Mrs. Ranney, she sued in her husband's name as

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26. Beach v. Ranney, 2 Hill 307 (N.Y. Sup. Ct. 1842).

27. *Id.* at 310.

28. Beach v. Beach, 2 Hill 260, 261 (N.Y. Sup. Ct. 1842).

29. Under the existing legal rules, a husband possessed the right to recover for many legal wrongs done to his wife; he owned the cause of action. Slander was different. As a wrong done to a wife's personal reputation, a wrong done to her individual identity, a husband had to join his wife's name to the complaint when he sued. Like other forms of personal property that came to a wife during the marriage, her husband would own the money recovered in the suit after it had been "reduced to possession." However, he did not own the cause of action or the judgment itself. If he died before the property had been reduced to possession, the judgment would not become part of his estate, but instead would go to his wife. Thus, according to legal authorities, if he sued, he had to include her as a named party in the litigation. Nothing, however, in the existing law required him to sue to protect her reputation. In that respect, slander was no different than other legal wrongs committed upon a wife. Only a husband possessed the right to decide whether to initiate suit on behalf of his wife. Therefore, Mrs. Beach needed a contractual agreement with her husband that she had the right to use his name along with hers in a slander case. Otherwise, she would be remediless if he were unwilling to sue. *See generally* TAPPING REEVE, THE LAW OF BARON AND FEMME 212-20 (Amasa Parker & Charles Baldwin eds., 3d ed. Albany 1867).

well as her own, relying on her separation agreement for her right to do so. But, as she and the courts soon discovered, Mr. Beach had gone to Mrs. Ranney and her husband soon after she initiated suit and waived any right he might possess to sue them for slander. And so, when the case was set for trial Mrs. Ranney defended on the grounds that Mr. Beach had "released" all rights under the cause of action. The result was that the lower court dismissed Mrs. Beach's cause of action.[30]

Chief Justice Nelson, in his opinion for the supreme court, began by reviewing the English authorities. Since Lord Kenyon's opinion in *Marshall v. Rutton,* it was, he said, the unquestioned rule that husband and wife cannot "by any agreement between themselves, change their legal capacities and characters."[31] Public identities cannot be changed by private agreements. As a result, all of the "numerous covenants" typically contained within separation agreements, covenants intended to "enforc[e] a continuance of the separation," covenants that, among other things, "go to prevent a suit for restitution for conjugal rights, to restrain the husband from exercising personal control over the wife, to resign the children of the marriage to her," were void and not enforceable at law.[32] Nelson knew, and conceded reluctantly, that courts of equity had often enforced many of these provisions. But even an equity court would never, he believed, enforce the particular covenant at issue in this case, a covenant by which a husband appeared to delegate to his wife his legal right to sue. In any event, "in a court of law, where the rights, duties, disabilities and obligations arising out of this interesting domestic relation, exist in uncontrolled vigor notwithstanding the voluntary arrangement of the parties to the contrary, no such effect can be given to it."[33] Here, he concluded, such a written promise "is condemned as waste paper, by the soundest principles of policy, morality and law."[34]

Orthodoxy implies the existence of heterodoxy, and there were important alternative voices within American law. Notable among them was James Kent who, as chief justice of the New York Supreme Court, as Chancellor of New York, and as the author of the renowned *Commentaries on American Law,* consistently argued for a more realistic perspective on contracts between husbands and wives.[35] To Kent, the goal was not to insist on a fic-

30. Beach v. Ranney, 2 Hill at 316.

31. Beach v. Beach, 2 Hill at 262.

32. *Id.*

33. *Id.* at 264-65.

34. *Id.* at 265.

35. J. KENT, COMMENTARIES ON AMERICAN LAW (1st ed. New York, Da Capo 1926-30). There were a number of English treatises intended, at least in part, to be read as repositories of arguments justifying separate maintenance agreements. *See generally* JAMES CLANCY, A TREATISE OF THE RIGHTS, DUTIES AND LIABILITIES OF HUSBAND AND WIFE, AT LAW AND IN EQUITY (2d ed. New York 1837); JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS (Dublin 1790).

tional marital unity. It was, rather, to look at the parties in terms of their actual relationship and their moral responsibilities. To Kent, separation meant that there had been a real change in the relations between a married couple, a change that could not properly be ignored by a court.[36]

Other judges, particularly those sitting in courts of equity, shared Kent's legal judgment, even if they disagreed with his perspective. Some regarded it as settled law that certain provisions of well-drafted agreements between husband and wife, via trustees, would be enforceable in equity. They rhetorically hated those agreements, but they felt disabled by precedents that appeared to confirm their partial legitimacy. Thus, Chancellor Walworth, Kent's successor in New York, who had in 1834 labelled a contract between husband and wife as, among other things, "an assumption of a false character" and "contrary to the real status persona" of the parties,[37] later felt himself bound by established principles to enforce provisions of just such a contract.[38]

In part, but only in part, the differences between judges' views on orthodoxy and heterodoxy reflected the contrast between contending streams of precedents emanating from common law and equity courts respectively. Equity chancellors like James Kent identified their roles with a broader conception of institutional discretion and responsibility than did common law judges such as Samuel Nelson. The chancellors thought of themselves as properly looking behind the formal legal status; they also thought of themselves, at times, as protectors of the rights and interests of dependent women and children. The latter concern would not necessarily lead them to enforce contracts between husband and wife since, often, those contracts had the effect of leaving the wife without support. But equity law also provided a rhetoric for enforcing contracts not enforceable at common law. Indeed, the jurisdiction of equity has always been dependent upon the unavailability or inadequacy of common law remedies.

There is much more that ought to be said about the institutional locations of these decisions. For the moment it is important to note that both courts (common law and equity) and legal scholars acknowledged conflict over the

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36. *See* Fenner v. Lewis, 10 Johns. 33 (N.Y. Sup. Ct. 1813) (rule prohibiting a spouse from testifying against the other spouse did not apply to a woman who had a valid separation agreement with her husband).

37. Rogers v. Rogers, 4 Paige Ch. 515, 517 (N.Y. Ch. 1834).

38. People v. Mercein, 8 Paige Ch. 47 (N.Y. Ch. 1839); Champlin v. Champlin, 1 Hoff. Ch. 55 (N.Y. Ch. 1839); Heyer v. Burger, 1 Hoff. Ch. 1 (N.Y. Ch. 1839); Rogers v. Rogers, 4 Paige Ch. 516 (N.Y. Ch. 1834); Carson v. Murray, 3 Paige Ch. 483 (N.Y. Ch. 1832). When Walworth followed this course, he was retracing a path already worn by Lord Eldon, who had been unhappily compelled to the conclusion that he was bound to enforce a contract between a husband and a trustee for the benefit of a wife. *See* Helms v. Franciscus, 2 Bland Ch. 544, 554-56, (Md. Ch. 1830); Emery v. Neighbour, 7 N.J.L. 145 (1824).

contractual capacities of husbands and wives. The issue was almost always reduced to a question of the rights and capacities of a wife in a state of separation. Conflicting decisions, they knew, resulted from "different sentiments and different decisions, by different men, at different times."[39]

But even as judges and treatise writers acknowledged the contested nature of their doctrinal understandings, they also sustained their belief that contracts between husband and wife, in particular contracts that varied significant terms of the marital relationship (*e.g.*, separation agreements), were presumptively unenforceable and void. Judges like Chancellor Walworth who might, on occasion, rule in favor of the validity of such agreements, did so, always, with a long (and often long-winded) qualifying preface that such agreements were, by and large, inconsistent with marriage as it ought to be understood. (Kent is, again, an exception to this generalization.)[40]

We are left with two related mysteries. First, and the less interesting of the two, is how nineteenth-century American judges could continue to use the language of marital unity and marital transformation to describe marriages that had practically ceased to exist. So many of these cases involve couples who had separated and who had led separate lives for years. Indeed, typically, they came into court, not because one of the two had decided to enforce the terms of the separation agreement, but, to the contrary, because the other of the two had relied, at what we might consider a rather late day, on rights or expectations derived from the original marriage contract. The plaintiff or complainant's goal was to undo an agreement on which both spouses had relied, often for many years. Yet, the judges largely refused to recognize the reliance interest of the couples, refused to recognize their separated status, and insisted on an illusion of marital unity as the foundation for judicial decisionmaking.

We can mobilize stock explanations for this mystery. First, in deciding these appellate cases, the judges' concern was with the law and with public policy, not with the situation of the litigants before them. Recognizing and enforcing a contractual agreement would have given other potential litigants the "wrong" message, would have told couples that they could, at least

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39. *Emery*, 7 N.J.L. at 146.

40. Joseph Story's treatise on equity law summarized the law of separation as follows: The central principle of the law of separation was that a deed of separation did not relieve a wife from any of the ordinary disabilities of coverture. A separation agreement between husband and wife, without trustees, would be utterly void; a separation agreement with trustees would never be enforced as an agreement to separate, but only as far as maintenance was covenanted by husband, and he was exonerated from debts by the trustees. Husband and wife could not covenant against a future suit for restitution of conjugal rights, nor could they covenant for a future separation. If the couple reconciled, their doing so would void the agreement. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1427, at 761 (13th ed. 1988) (7th ed. 1857).

sometimes, renegotiate the terms of the marital relationship. And that would have had baleful consequences for the society. Secondly, judicial rhetoric about institutional power may have masked institutional struggles and concerns, among them fears that the courts were relatively incompetent at the task of evaluating what contracts were and were not legitimate. This may have been so particularly in the face of the relative weakness and dependence of married women. Courts could avoid having to confront the difficult questions involved in deciding when parties were coerced into agreements by relying on the bright-line proposition that marital terms were non-negotiable.[41]

Yet, the mystery does not disappear. Often, courts appeared to insist on their institutional obligation to protect the institution of marriage, which was threatened by contractual behavior. The threat, though, was phrased tautologically: when husband and wife contracted to change marital terms, they were destroying a marriage defined by non-negotiable terms. At times, judicial language seemed to lapse into near solipsism, as if by refusing to recognize the separation of interests implicit in the contract of marriage, judges were recreating marital harmony and unity.[42] Did they really believe in such a formalistic universe, in a marriage made from black letter legal categories? It doesn't seem likely; yet, I feel inadequate to the task of explaining, of demystifying, the mystery of their language.

Many of us have spent too much of our lives plumbing the obscurity of legal language. It may be that explaining judicial weirdness is nothing more than a legal academic's professional obsession, one that should be resisted, or at least understood in context. Judges helped construct a strange world of legal principles. We need to know what they did, and how they went about it. Understanding why they didn't realize the silliness of what they were about, is, however, both an unsatisfying and, potentially, an ahistorical enterprise.

On the other hand, the second mystery in this story is central to our historical enterprise. Why, in the face of consistent, and relatively effectual, judicial hostility to contractual separations, did so many men and women insist on their rights under such agreements? To pose the question somewhat differently, why did husbands and wives, often with the aid of lawyers, draft agreements that were presumptively void and would, under the best of conditions, be enforceable only under peculiar and unpredictable circumstances?

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41. On the notion of institutional competence, see generally Neil Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

42. The standard judicial line (usually heavily dependent on the language of Lord Eldon and Lord Kenyon) was that enforcing these agreements (between husbands and wives who were already living apart) would lead to a dereliction of marital duties, would tempt the parties (already long tempted, we might think) "to the voluntary repudiation of conjugal rights." And so, it would be the law that made them do precisely what they were already doing. Rogers v. Rogers, 4 Paige 516 (N.Y. Ch. 1834); *accord* Florentine v. Wilson, 2 Hill & Den. 303 (N.Y. Sup. Ct. 1844).

That many did so is clear. The number of cases appearing before the courts (particularly, but not exclusively, courts of equity) was large. And these cases must be, almost by definition, the tip of a relatively large iceberg of cases that ended in negotiated agreements or in unappealed and unpublished lower court decisions.[43] It is also clear that those who made and enforced separation agreements were not just the rich who needed to secure their wealth; they were also poor men and women like Mrs. Beach, who owned nothing but her once good reputation.

An odd feature of this mystery is the apparent changelessness of the terms of separation agreements. Courts struck down covenants identical in form and content with covenants struck down repeatedly years previously. For example, agreements to separate, that is, agreements for future separation (as contrasted with provisions dealing with the consequences of existing separations), were always held to be void by courts that dealt with them.[44] Yet, couples continued to make agreements for future separations.[45] It is almost as if they were oblivious to the legal enforceability of those agreements, until, of course, one or the other of them ended up in court trying to enforce aspects of an agreement. More oddly still, their lawyers, where lawyers were used, continued to draft provisions identical to ones previously struck down.

Why did couples rely on formal legal contracts as the foundation for their separations? Let me speculate a bit. One answer is that contract provided an extraordinarily powerful moral vision in American society. The sanctity of contract competed, perhaps on equal terms, with the notion of the sanctity of marriage.[46] One understood oneself as a person, as a competent being with

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43. I found 16 published New York cases between 1810 and 1850 dealing primarily with the legitimacy of separation agreements. This is a very conservative number, because a large number of divorce cases (both *vinculo* and *mensa et thoro*) are best understood as cases involving a failed separation agreement. The percentage of possible cases actually brought to court is impossible to determine. One might speculate that the uncertainty of the legal doctrine on separation agreements might have led to fewer of such nonjudicial remedies. Yet, against this must be posed the social cost of bringing these cases to court and making failed marriages a public affair. Stone comes to a similar conclusion that private separation agreements were used extensively in 19th century England, in spite of uncertainty in the law. STONE, *supra* note 19, at 158-59.

44. *Florentine*, 2 Hill & Den. at 305; *see also Rogers*, 4 Paige Ch. at 517 (law "does not authorize or sanction" voluntary separation agreements).

45. Stone notices the same phenomenon in England. STONE, *supra* note 19, at 163. It is important to note that most separate maintenance agreements asserted that they were confirming the terms of an already existing informal separation, often one of several years duration. *See, e.g.*, Separate Maintenance Agreement between Alexander Bartram and Jane Bartram, (Dec. 13, 1785) (copy on file at *The Georgetown Law Journal*) ("Whereas divers disputes and unhappy differences have arisen between the said Alexander Bartram and Jane his Wife, which have gone to such Length that it is altogether improper they should live together and they have accordingly lived separate for several years past . . ."). This separation agreement is discussed in Bodle, *Jane Bartram's "Application": Her Struggle for Survival, Stability, and Self-Determination in Revolutionary Pennsylvania*, 115 PA. MAG. HIST. AND BIOGRAPHY 185 (1991).

46. There is extensive literature on contractualism in 19th-century America. *See generally*

agency in the world, through the contracts one made.

For married women, the very act of contracting might, we may imagine, have been experienced as transformative and regenerative, as a way of asserting one's possession of an individual self capable of acting in and on the world. In making a contract with one's husband, one asserted a formal equality that was at war with conventional and legally approved understandings of a wife's identity. Furthermore, the act of drawing up an individual contract—and it is important to note that these agreements were deeply individualized in their terms, shaped by the particular circumstances that a couple had found itself in—would have given a wife a sense of herself as an individual, with individual needs and wants and an individual history.[47] Precisely because marriage denied the possibility of contract, contracting would become a necessary transgression. No wonder orthodox judges denied its legitimacy; no wonder wives (and husbands) insisted on it anyway.

When wives asserted their contractual capacity, marital unity was torn apart, the legally created identity of a wife replaced by the self of a contractually capable actor in the world. In place of the nearly unbounded relationship of husband and wife, in which a wife might experience herself as unable to resist or control her husband's power, a separation agreement posed a limited and mutually agreed upon list of rights and duties. In that sense, the very act of contracting was a crucial form of separation, a near emancipation. Thus, regardless of its ultimate enforceability, a separation agreement was an important emotional performance.

At the same time, it is important to underscore the instrumental uses and significance of a separation agreement. Spouses, as we have seen, could not be very confident of the enforceability of their agreements to separate. But not acting carried great dangers for both wives and husbands. If a wife had any hope of surviving the separation, she had to get her husband to agree to allow her to live alone. She needed a property settlement, or, at minimum, the use of the property she had brought to the marriage. (Usually, she would need a trust device and trustees to give effect to either of these.) She needed his clear agreement that she could use her own earnings. She needed his

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JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980); Elizabeth Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America,* 8 LAW AND HIST. REV. 25 (1990); Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation,* 75 J. AM. HIST. 471 (1988).

47. It is important to note that these agreements, like many contracts, were framed by the particularities of the individual situations of the contracting husbands and wives. Was the husband going to move away and be difficult to find if he missed a promised payment? Was the wife engaged in a trade (*e.g.,* running a tavern) that might embarrass (financially or morally) the husband? Was either spouse likely to end up in an asylum? The individual character of the agreements was not inconsistent with their formulaic character.

permission to live apart from him. She needed him to promise not to advertise her as a runaway, so that merchants and others would trust her and grant her credit. She needed him to promise to allow her to keep custody of their children. It may be that all or many of these promises were unenforceable in court. Still, in a society that placed great value on keeping one's word, contracting offered her hope that he would not trouble her.

Conversely, a husband, too, had good reasons to contract. Even if his wife lived apart from him, she remained his responsibility. He was legally obligated to provide for her and for their children's support, to supply them with their "necessaries."[48] Without a contract (or, in the alternative, a judicial decree declaring her the guilty party in an action for divorce), his duties remained unchanged, wherever she lived, no matter with whom, no matter the circumstances of her life away from him.

The point to remember is that all of the rights and duties of the marriage relationship would survive a separation, in the absence of an effective contract. And this point was not merely theoretical or legalistic. Indeed, in reconstructing the legal stories of various couples, I have gradually come to the conclusion that husband's marriage rights typically came into their full felt flowering only at the time of separation. During a "working" marriage the social expectation (and often the reality) was of accommodation and restraint in the exercise of power. Although not surprising, it is worth stating that in working marriages there was little need to talk about legal rights or duties. But once a separation had occurred, legal rights became the focus of marital discourse.[49] An angry and frustrated insistence on "my rights" and the absence of "your pretended rights," became the standard refrain of correspondence from husbands to their separated wives.[50]

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48. *See* Mott v. Comstock, 8 Wend. 544 (N.Y. 1832) (noting a husband's responsibilities upon marital separation).

49. *See* Cruger v. Douglas, 4 Edw. Ch. 446 (N.Y. Ch. 1844), *modified and aff'd*, 5 Barb. 225 (N.Y. Sup. Ct. 1848).

50. *Id.* For example, in his petition to the vice chancellor, at the beginning of his separation from his wife, Henry D. Cruger wrote:

> That while living in family concord, . . . your Orator, from delicacy, did not press . . . [his marital rights] to the performance of any part of their duty that might be unpleasant; but now, that he is foris-familiated, he claims all and whatever he is entitled to at their hands in strict right.

Cruger Divorce Case Paper and Pleadings 30-31 (1844) (typescript at N.Y.U. Law library).

Henry Cruger, again, several years of separation later, vowed that if he had the opportunity, he would not hesitate a moment to require of his wife that

> "submission in all things," which every Wife should render with "reverence," and "in a meek and quiet spirit"—which the Creator intended when in the beginning he made them male and female, and which he has enjoined throughout his revealed will. It is woman's most amiable position, and her only chance for respect and happiness . . . .

Id. at 591.

The very forcefulness with which marital rights would be articulated in the midst of marital conflict and dissolution provided additional incentives to try to find a contractual resolution. Contracts became meaningful, in large part, precisely because of the more sharply articulated vision of rights that accompanied marital conflict leading to separation. Suddenly, it became clear what one should be bargaining over. It became crucial to make an agreement, even in the midst of doctrinal uncertainty.

Finally, many husbands and wives contracted, not because they wished to end a marriage, but because they wished to continue it, separated. The structure of marriage they responded to was not merely one that posited marital unity and the transformation of the premarital self. It was also a structure unambiguously committed to the permanence of marriage. The point of a separation agreement was often not to create a private contractual form of divorce. Simple abandonment could produce that end. The point of a separation agreement was, rather, to resolve conflict within a marriage by allowing the parties to live apart from each other. Separation agreements modified the terms of the marriage; but the contracting parties remained, in legal theory and in their own minds, married. Contrary to our modern understanding of separation, nineteenth-century separated husbands and wives did not view their separations as a step on the road to divorce. Like most other men and women in nineteenth-century American society, they believed in the permanence of marriage.

II. DIVORCES

So, what did it mean to be married? Consider the odd case of Jane Williamson Parisien.[51] Jane, daughter of a New York shipmaster, married Peter Williamson in 1780.[52] Williamson was the British captain of a prison ship in the port of New York during the British occupation.[53] When the occupation ended in 1783 with the end of the Revolutionary War, he left, ostensibly for a short voyage. He and Jane had two small children; she was pregnant with a third.[54] He gave her only twenty guineas. All of his other property went with him.[55] Throughout their three years together, she had, she reported thirty years later, always "behaved to the said Peter . . . with the utmost affection and tenderness and discharged towards him and her children the

51. Williamson v. Parisien, 1 Johns. Ch. 389 (N.Y. Ch. 1815); *see also* Williamson v. Williamson, 1 Johns Ch. 488 (N.Y. Ch. 1815), *in* LEGAL PAPERS OF AARON BURR, 1756-1836, at reel 20 (available on microfilm from Microfilming Corp. of America, Glen Rock, N.J., 1977).

52. Williamson v. Parisien, 1 Johns Ch. at 389.

53. *Id.* at 391.

54. *Id.* at 390.

55. Williamson v. Williamson, 1 Johns. Ch. at 489.

duties of wife and mother with exemplary fidelity and discretion."[56]

According to Peter, he wrote Jane frequently after his departure, but was shipwrecked and unable to return to her. According to Jane, she heard nothing from Peter, and he went to Jamaica, became a wealthy man, and led a dissolute life. Jane, destitute and abandoned, had, as she put it, "to struggle with very great difficulties and distresses."[57] Nevertheless, her conduct remained "irreproachable and above suspicion," and "by the most indefatigable industry and the most rigid economy she did maintain herself and their said three children and brought up and educated those children in a reputable manner and suitable to there [sic] sphere in life."[58]

After seven years "passed in sadness and disappointment," she was advised, by whom we do not know, that she was released from her matrimonial obligations, free to make another marriage.[59] Still, she continued to hope that "Peter might return to a sense of his duty toward his wife and his children."[60] But, after another year, she decided that he really had abandoned her "and having no reason to expect that the said Peter, if living, would ever again return to the United States," she married again, to Philip Parisien, by whom she had six more children and with whom she spent the next twenty-three years.[61]

In 1792, shortly after she entered into her second marriage, Peter Williamson returned to New York, where he and Jane saw each other. Evidently, he made no claims at that time that she was still his wife, nor did he make any provision for their children, except for one gift of seventy dollars. He soon returned to Jamaica, and he would not return again to New York for twenty years.[62]

But in 1812, he came back and, for unexplained reasons, within a year he began an action before Chancellor Kent for divorce, on the grounds of Jane's adultery with Philip Parisien. Through her lawyer, Aaron Burr, Jane denied the charge. She claimed her conduct "hath ever been chaste and discreet and free from reproach or suspicion." By contrast, Jane claimed that Peter had led "a dissolute and licentious life." Specifically, she accused him of committing adultery with a number of black women. She also believed he was now

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56. Answer, Williamson v. Parisien, 1 Johns. Ch. 389 (N.Y. Ch. 1815), *in* LEGAL PAPERS OF AARON BURR, *supra* note 51 at reel 20, p. 310.

57. *Id.*

58. *Id.*

59. *Id.* at 311. Although she could have legally remarried in some states, *see* 1791 N.H. Laws ch. 94, § 732-33, New York recognized no such release from the marriage vow.

60. LEGAL PAPERS OF AARON BURR, *supra* note 51, at reel 20, p. 311.

61. *Id.*

62. *Id.* Sometime during the 1790s he seems to have sent for their eldest son, who was then brought to Jamaica.

keeping a woman as his mistress in New York.[63]

In her defense, Jane wrote that she had hoped Peter would have left her alone to live quietly with her present husband. But since he had acted "to vex and harass" her, she asked the court to force him to reveal his own adulterous relations. Thus, if the court decided that her marriage to Williamson still survived, it could grant her a divorce from him, award her alimony, and make him pay her court costs.[64]

Kent dismissed Peter Williamson's bill, on the technical grounds that he had introduced no evidence to prove that he was a resident of the state of New York.[65] Kent, however, took the occasion of the dismissal to comment that the circumstances of the case were extraordinary.[66] Williamson's conduct had "a cruel aspect," and Kent was happy to be compelled to dismiss the bill.[67] At the same time, Kent continued, one could not infer from the dismissal that the second marriage was valid. Indeed, it was undoubtably null and void. "[N]o length of absence, and nothing short of death, or the judicial decree of some Court, confessedly competent to the case, can dissolve the marriage tie."[68]

A few months later, Williamson again instituted divorce proceedings. We do not know what happened between the legally reunited couple in the interim, but this time Jane did not contest the adultery charge, instead allowing it to be taken "pro confesso."[69] Probably Jane and Peter, perhaps with the help of friends, had negotiated an agreement. She, we might imagine, had come to the sensible conclusion that if she confessed to technical adultery, she could put her past behind her (where pasts always belong), remarry her second husband, and get on with what remained of her life. Being divorced by reason of adultery would not be the worst thing that could happen. And so, once she had come to that decision, we and she might expect her first marriage to have come to a swift legal conclusion.

But Kent refused to allow the divorce to be taken by consent, and he resolved "to consider this case precisely as if a serious controversy existed."[70] The case, he began, should not be reduced to "the single dry question" of whether or not an act of adultery had occurred.[71] Technically, of course, it had. But the statute that gave the court of equity jurisdiction to order divorces where adultery was proved left discretion in the court, Kent insisted,

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63. *Id.*, manuscript of Oct. 16, 1813, catalogued on page 205.
64. *Id.*
65. Williamson v. Parisien, 1 Johns. Ch. at 392.
66. *Id.* at 392.
67. *Id.* at 393.
68. *Id.*
69. Williamson v. Williamson, 1 Johns. Ch. at 489.
70. *Id.* at 490.
71. *Id.* at 491.

to decide whether divorce was the appropriate remedy for the wrong.[72] Condonation (the conditional forgiveness by the wronged spouse of the act of the other) and recrimination (the proven adultery of the accusing party) were two legal situations justifying denial by the court of a divorce, even where adultery was proved. Kent thought he saw a similar situation in the *Williamson* case, framed both by the husband's negligence and the wife's relative innocence.[73] Thus Kent denied the divorce.

Jane, Peter, and Philip disappear from the records thereafter. We might suspect that Jane returned to her home with Philip and continued to live with him as his wife. But how did the case affect the "respect and good will" that she had previously earned from her neighbors? Perhaps, like many Americans in similar situations, she and Philip moved to another state, where they held themselves out as husband and wife. And what happened to Peter? If, as we might suspect, Peter began the divorce case because he wanted to marry someone else, did he marry her anyway? Did he return to Jamaica?

The legal effect of Kent's decision was that Jane and Peter were declared to be irrevocably and continuously married to each other, in spite of her twenty-three year "marriage" to another man and their shared desire to be divorced. Their long separation changed nothing; her long bigamous second marriage changed nothing; their joint desire to divorce changed nothing. Indeed, their very agreement, that is, their collusion, was itself a reason to deny the divorce. The unstated but inescapable moral conclusion of the Chancellor's opinion was that bigamy was a less serious moral and legal problem than an unfair but technically correct charge of adultery. Better two marriages than one divorce, even if that divorce was both desired by the parties and would have resolved their tangled domestic situation.[74]

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72. *Id.*

73. He wrote:

> In the present case, the husband returned in 1792, and found his wife recently married, in consequence of his long absence of eight years, and presumed death. Why did he not then reclaim her, or prosecute? He did neither; but departed again from this state, and lived continually abroad, for 20 years, acquiescing in this second marriage, and suffering her offence to aggravate and become inveterate. She has had several children, and has spent the best part of her life in connection with her present partner. If ever lapse of time, or long acquiescence, formed a just bar to this kind of prosecution, this is one. Can it be fit, or decent, or useful, that, without any reason or apology for this delay, he should now be permitted to come into Court to expose and disgrace this woman? Most certainly not . . . .

Id. at 493.

74. Twenty years after the *Williamson* case, Chancellor Walworth echoed his predecessor Kent, in holding against another man suing to divorce his abandoned and long remarried (indeed, widowed) wife:

> Although the wife does not appear to make any objection, public policy requires that a husband who has abandoned a wife for such a length of time, and suffered her to contract

To make sense of Kent's decision, we need to understand that in 1815, even as late as 1840, divorce was not conceptually part of the law of marriage. Today, divorce and marriage are legally inseparable. Divorce is understood to be the usual remedy for marital unhappiness, as well as for breaches of marital rights. What happens at the time of divorce is thought to explain what did or did not happen during the marriage. Indeed, in legal discussions today marriage at times appears to exist in the shadow of divorce; marriage appears almost as a residual category, as a situation that provides the reasons why people eventually (and almost inevitably) come to seek divorce. By contrast, Chancellor Kent and his contemporaries in the legal community viewed divorce as a public process available only for public reasons. If a husband and wife agreed to divorce because they, as private individuals, wanted a divorce, that agreement, all by itself, was reason enough to deny the divorce. "It would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it," declaimed Chancellor Walworth in 1828.[75] "Divorces should never be allowed, except for the protection of the innocent party, and for the punishment of the guilty."[76] Because of the danger of collusion and coercion in divorce proceedings, confessions were not taken as conclusive. A couple would be divorced (the passive tense is important here) because one or the other had so violated a public and legislatively defined norm that it became important for the moral identity of the innocent spouse to be freed from their identity with the other.[77]

Prior to the American Revolution, absolute divorces with the right to remarry, divorces *à vinculo,* were available only in the New England colonies. Other colonial legislatures followed English understandings of divorce as inconsistent with a well-run polity. After the Revolution, most of the new state legislatures passed statutes that created regularized divorce practices. By and large, these statutes articulated quite limited grounds for divorce.

> a second marriage on the supposition that she was released from the obligation of the first, should not four or five years after the death of the second husband be permitted to blast the character of his wife and bastardize the issue of the second marriage . . . .

Valleau v. Valleau, 6 Paige Ch. 207, 212 (N.Y. Ch. 1836).

75. Palmer v. Palmer, 1 Paige Ch. 276, 277 (N.Y. Ch. 1828).

76. *Id.*

77. KENT, *supra* note 35, at 82-83; *see also* Betts v. Betts, 1 Johns. Ch. 197, 200 (N.Y. Ch. 1814) (confession alone is insufficient).

The problem of collusion was important in other suits as well. In 1848, for example, Chancellor Walworth denied a petition for an annulment. Twelve years earlier, a 19-year-old boy had been convinced by his uncle to marry the younger sister of the uncle's wife. The girl was pregnant by the uncle. The nephew had never even lived with her. But, according to the chancellor, not only was the fraud unproven and now too far in the past, but allowing such suits would be to "produce collusion" between the two parties, "both of whom were willing to be released from the matrimonial tie." Montgomery v. Montgomery, 3 Barb. Ch. 132, 135 (N.Y. Ch. 1848).

Even so, the general public and legal recognition that there were circumstances justifying absolute divorce constituted an important break with past English practice. Moreover, the new American divorce jurisprudence resulting from these statutes provided the only significant change in marital legal rights to occur in post-Revolutionary America.[78]

Individual state legislatures defined differing norms for divorce.[79] South Carolina, alone, allowed no divorces up to the middle of the nineteenth century.[80] In New Hampshire, by contrast, the legislature in 1791 passed a statute granting both husbands and wives the right to seek from the Superior Court of Judicature complete divorces for incest, bigamy, adultery, abandonment for three years, or extreme cruelty.[81] Some state legislatures, notably Pennsylvania's, retained the right to grant discretionary "legislative divorces."[82]

There was an experimental quality to much public decisionmaking with regard to divorce. Several legislatures repeatedly varied their divorce regimes.[83] Additionally, courts often added complex interpretive glosses on the legislature's intended requirements and consequences of divorce. In an 1818 New Hampshire case, for example, the New Hampshire court denied a divorce sought by a woman whose husband had abandoned her for more than three years. The court reasoned that the husband was too poor to make any provision for her. To the judges, a divorce was only justified when it provided a support award to the divorced wife.[84] As late as 1850, New York's highest court declared that a wife who divorced her husband because

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78. Marylynn Salmon, *Republican Sentiment, Economic Change, and the Property Rights of Women in American Law, in* WOMEN IN THE AGE OF THE AMERICAN REVOLUTION 447, 448 (Ronald Hoffman & Peter Albert eds., 1989). Linda Kerber regards the absence of debate over divorce reform during the American Revolution as one of the missed opportunities of the period, particularly when compared to the debate that occurred during the French Revolution. Linda Kerber, *"History Can Do It No Justice": Women and the Reinterpretation of the American Revolution, in* WOMEN IN THE AGE OF THE AMERICAN REVOLUTION, *supra*, at 3; *see* Nancy Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts,* 33 WM. & MARY Q. 586, 586-614 (1976) (on divorce in 18th-century New England).

79. *See generally* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 58-80 (1986).

80. *Id.* at 64-66.

81. 1791 N.H. Laws ch. 94, § 732-33.

82. Thomas R. Meehan, *"Not Made out of Levity:" Evolution of Divorce in Early Pennsylvania,* 92 PA. MAG. HIST. & BIOGRAPHY 441 (1968), *reprinted in* LAW, SOC'Y & DOMESTIC REL. 384, 386 (1987); *see also* Emilie Fry's Petition for Divorce (Philadelphia, Bingwalt & Co. 1859) (legislative petition for discretionary divorce) (available on microfilm from Research Publications, Woodbridge, Conn., 1977).

83. Several states, notably Connecticut and notoriously Indiana, experimented with being divorce havens by loosening the grounds required and lowering the residency requirements. *See* CARLIER, MARRIAGE IN THE UNITED STATES 112-15 (1867); Salmon, *supra* note 78; *see also* N. NELSON BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES (1977).

84. Mary F v. Samuel F.—, 1 N.H. 198, 200 (1818).

of his adultery was still entitled to dower (*i.e.*, to a share of her ex-husband's estate after his death).[85] In an important sense, she remained married to him, even though they had been legally and fully divorced for twenty-five years.

By the first years of the nineteenth century, there already existed a diverse jurisdictional landscape of divorce. All states, however, understood divorce as a public process allowed only for public reasons. Divorce laws did not modify or impair the common law of marriage. If they had, they might have violated the federal constitution's prohibition on laws impairing the obligations of contracts. But, properly understood, all that divorce laws did, in the words of Chief Justice John Marshall, was "enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it [the marriage contract] has been broken by the other."[86] Legislators were simply providing a public remedy for a public need.[87]

New York's lawmakers were often congratulated by nineteenth-century treatise writers for the "purity" and consistency of their divorce statutes.[88] Meanwhile, New York's laws also became notorious for their rigidity and inflexibility.[89] New York first passed a divorce statute in 1787, a statute in which adultery provided the only grounds for divorce, and the chancellor in equity was to be the decisionmaker. In 1813, the legislature reconfirmed its understanding that only proof of adultery justified a full divorce. At that time, however, the legislature added that either a husband's proven adultery or his extreme cruelty would warrant a divorce *à mensa et thoro* (from bed

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85. Wait v. Wait, 4 N.Y. 95, 109 (1850).

86. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819).

87. In 1785 the Pennsylvania legislature passed a model divorce statute:

> "Whereas it is the design of marriage, and the wish of parties into that state that it should continue during their joint lives, yet where the one party is under natural or legal incapacities of faithfully discharging the matrimonial vow, or is guilty of acts and deeds inconsistent with the nature thereof, the laws of every well regulated society ought to give relief to the innocent and injured party."

12 PA. CONS. STAT. § 94 (1908).

In his treatise, Kent asked: "[H]ow far has the legislature of a state the right, under the constitution of the United States, to interfere with the marriage contract, and allow of divorces between its own citizens, and within its own jurisdiction?" 2 KENT, *supra* note 35, at 89. While Justice Story generally agreed with Marshall's observation in *Dartmouth College* that the Constitution did not restrict the general right of states to legislate on divorce, Story "was not prepared to admit a power in the state legislatures to dissolve a marriage contract without any cause or default, and against the wish of the parties, and without a judicial inquiry to ascertain the breach of the contract." *Id.* at 90.

88. *E.g.*, 1787 N.Y. Laws ch. 69, § 1813; 1787 N.Y. Laws ch. 102, § 197; 1787 N.Y. Laws ch. 8, §§ 76-78 (1836).

89. More than fifty years ago, my father, to whom this lecture is dedicated, came to this country. He came, in part, because his brother, who was living in New York, had written to his Dutch family that he had wished to divorce his wife and that in order to do so he was going to sleep with a prostitute in New Jersey (so his wife could then charge him with adultery). The family found this so odd that they asked my father to find out what was going on.

and board) in favor of the wife. Such a limited divorce was essentially a judicially ordered separation. As a result, a wife gained the right to live apart from her husband and might gain, at the chancellor's discretion, the rights to recover property brought by her to the marriage, to an alimony award, and, sometimes, to the custody of her children.[90]

There were minor adjustments in New York divorce law after 1813. In the late 1820s, husbands gained the same theoretical right as their wives to go to a court of equity and ask for a divorce *à mensa et thoro,* although very few ever did. At about the same time, the legislature added a penal provision to the divorce statute, in theory forbidding the guilty party from remarrying during the lifetime of the innocent spouse.[91] Other small changes occurred thereafter. But basically, New York's divorce law remained constant for 150 years.[92]

In New York, as in other jurisdictions, the idea of a "pure" divorce law, one that reflected public policies and did not complicate or modify the fundamental presumption of the marriage contract that it be for life, was qualified and undercut by the availability of extraterritorial divorces. New York's courts at various times limited their recognition of foreign divorces, on the principle that "[n]o sovereign is obliged to execute, within his dominion, a sentence rendered out of it."[93] Yet ordinarily, there was little that the courts could do if one or both spouses went to a neighboring state with a more liberal divorce law. Moreover, if one of the separated spouses remarried in a neighboring state, New York's courts generally recognized the legality of that marriage, even as judges like Kent insisted on the principle of New York's legal sovereignty.

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90. 1813 N.Y. DOM. REL. LAW ch. 102, §§ 10-11. The notion of extreme cruelty, borrowed from the English ecclesiastical courts was, in Kent's view, given a more expansive meaning in New York's law. English ecclesiastical law granted such limited divorces only for *propter soevitiam aut adulterium. Soevitia* meant a state of personal danger. "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to . . . that cruelty against which the law can relieve." STONE, *supra* note 19, at 203 (citing Evans v. Evans, 161 Eng. Rep. 467-68 (1790)). In New York, by contrast, such divorces "are not only for cruelty, but generally for such conduct on the part of the husband towards his wife, as renders it unsafe and improper for her to cohabit with him, and be under his dominion and control." 2 KENT, *supra* note 35, at 107.

91. 2 N.Y. REV. STAT. 197 § 4 (1828).

92. Until the constitution of 1846, when legislative divorces were forbidden, nothing in theory kept the New York legislature from granting additional divorces on petition, at its discretion. Yet, although there was a continuing flow of petitions, the legislature almost never acted on those petitions. As of 1839, they had granted a petition for a legislative divorce in only one instance. This was the famous case of Eunice Chapman, who had asked in 1817 to be divorced from her Shaker husband. WEISBROD, *supra* note 46 at 46-47; *Divorce Stories: Readings, Comments, and Questions on Law and Narrative,* B.Y.U. L. REV. (1991 forthcoming).

93. KENT, *supra* note 35, at 102. *See also* Mark De Wolfe Howe, *The Recognition of Foreign Divorce Decrees in New York State,* 40 COLUM. L. REV. 373 (1940) (discussing peculiarity of New York divorce laws generally).

It was not simply the availability of foreign divorces that threatened the "purity" and coherence of state divorce policy. It was also the availability of domestic legal processes which could be strategically manipulated. The policy might be clear and restrictive; only a wife or husband whose husband or wife had committed adultery was entitled to a full divorce. Yet, so long as a husband or wife were willing to confess publicly to adultery, whether or not adultery had actually occurred, in the end there was little a judge could do to avoid allowing couples to decide when and whether they would end their marriages. As Kent noted, sometimes the sin of adultery was committed for the very purpose of the divorce. Judges knew that many couples colluded in constructing a case that would meet the technical requirements of the law.[94]

New York's chancellors and vice chancellors faced the problem of collusion repeatedly as they tried to implement the state's divorce law. The procedure Kent had developed for the court of equity hinged on whether the accused party denied the charge of adultery or, in the case of a divorce *à mensa et thoro,* a charge of cruel treatment. If he (and it was more often he than she) did, then the factual issue of whether adultery or abuse had occurred was sent to a common law court to be presented to a jury as a feigned issue. If, on the other hand, the accused did not deny the accusation (*i.e.,* took the charge *pro confesso*) then the case was sent to an appointed master in chancery, who was to make a report to the court determining all facts.[95]

The danger of collusion did not disappear once a case was sent to a master for report. The masters (whose fees were paid for by the litigants) were notably and predictably lax in their examination of the facts in the cases. The judges wanted a report that established clear and convincing evidence of adultery. They required that masters hear testimony from at least one independent witness. Doctors were sometimes used for this task, particularly if they could testify as to venereal disease. Prostitutes and servants were also consulted on occasion. Even when a witness was provided by the litigants and reported on by the master in chancery, judges might reject the master's report. In one case, the vice chancellor rejected a report of adultery founded on the testimony of a witness who was allegedly peering through a window when the "crime" occurred. According to the vice chancellor, the witness could not have seen what he claimed to see because there was not enough light available. In another case, the witness was an illiterate prostitute who claimed to have slept with the respondent. However, her deposition read like a fill-in-the-blanks form, and thus was not regarded as probative.[96]

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94. KENT, *supra* note 35, at 88-89.

95. *Id.* at 83; *see* Betts v. Betts, 1 Johns. Ch. 197, 199 (N.Y. Ch. 1814) (chancellor found insufficient proof for divorce decree despite party's admissions).

96. Banta v. Banta, 3 Edw. Ch. 295 (N.Y. Ch. 1939); *see also* Hanford v. Hanford, 3 Edw. Ch. 468 (N.Y. Ch. 1841) (insufficient evidence to grant divorce decree without testimony of physician,

As far as the judges were concerned, the point was not so much whether or

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which was prohibited by statute); Bokel v. Bokel, 3 Edw. Ch. 376, 377 (N.Y. Ch. 1840) (witness's testimony insufficient to prove woman who lived with defendant was not his wife); Graves v. Graves, 2 Paige Ch. 62, 63 (N.Y. Ch. 1830) (implying that defendant must pay costs in order to prevent collusion).

What should such testimony look like? Consider the successful testimony of Maria Johnson, a servant, who was the primary witness in the divorce of elderly Aaron Burr (he was in his early 80s) from Madame Jumel in 1834-36. At first, Burr had contested his wife's claim that he had committed adultery with Jane McManus, a young adventuress who was a publicist for the Anglo colony in Texas. But, in the end, he too allowed the case to go forward *pro confesso*. The master's report included the following pieces of Maria Johnson's testimony:

> Q: Where was you when you saw them the first time?
> A: I came up stairs to fetch a pitcher of hot water to Col Burr through the front room and she saw Jane McManus on the settee and Col Burr had his hand under her clothes and she saw her nakedness-
> Q: Were they sitting or lying?
> A: They were sitting at the present time and Col Burr had his trousers all down-
> Q: Did they see you?
> A: They could not help seeing me when I came in the room with the pitcher of water
> . . .
> Q: When was it that you next saw them together?
> A: On Saturday afternoon-
> Q: Where was you then?
> A: I got up on the shed & turned the window blind & looked through it-
> . . .
> Q: Did you lay down in the shed Maria-
> A: I set down on my hunkies and turned the blind & looked in
> Q: Where did you see them when you looked into that window-
> A: On the settee-
> Q: Were they sitting or lying then-
> A: they were sitting-
> Q: Were there any bed clothes on that settee
> A: There was a cushion on it—but no bed clothes through the day-
> Q: Was there a fire in the room
> A: No sir it was warm weather in August
> Q: How close were [sic] they together
> A: About as close as they could set together
> Q: How long did you look at them
> A: I looked at them till they got through with their mean act and looked at them when they set up on the settee
> . . .
> Q: Do you swear that Col Burr at that time has sexual connection with Miss McManus
> A: Yes sir—and I saw him several times before
> Q: How old was he then
> A: She does not know exactly—he was a very old man
> . . .
> Q: Did you ever witness any thing between them at that house in Reed Street
> A: Yes she sometimes had her frock unpinned & open all behind
> Q: Did you ever catch them together there
> A: Yes sir I did one Sunday and Col Burr gave her a new pair of shoes not to tell—but I did tell and will tell & always meant to tell because I was ready to go to church and he gave me orders to go to Bear Market and get oysters for Jane McManus' dinner
> Q: When was it that she caught them together

not adultery had occurred. The true goal of the proceeding was to establish that there was "no collusion between the parties in laying a foundation for the suit."[97] In the words of one vice chancellor, "[p]arties bound together by the strongest ties may, in moments of irritation and disappointment, become dissatisfied with each other and be mutually willing to be divorced."[98] It was the duty of the judges to resist and to discourage that inclination.[99]

It may seem obvious that the judges must have been fighting a losing battle in their efforts to prevent collusion and strategic behavior. Even in the opinions of the chancellors and vice chancellors, one senses a growing irritation with the lawyers, litigants, and masters, who appeared to be frustrating the purposes of the law of divorce.[100] Collusive divorces may have been inevitable in a jurisdiction like New York with rigid and limited grounds for divorce.[101]

After all, imagine a couple no longer interested in living as a couple; perhaps each intends to remarry someone else. If the two agreed that they would do whatever it took to obtain a divorce, then the law became simply a landscape to be traversed by strategically-minded litigants on the road to

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A: Before she went to get the oysters

. . .

Q: What did you see

A: She saw Jane McManus with her clothes all up & Coln Burr with his hands under them and his pantaloons down

Q: What did Jane McManus say

A: She said Oh la! Mary saw us

. . . .

LEGAL PAPERS OF AARON BURR, *supra* note 51, at reel 25, pp. 372-76.

After the court ordered the divorce, Burr came back to ask for a rehearing, on the grounds that he was too old to have committed adultery. This was denied by the vice chancellor. *Id.* at 383.

97. Hanks v. Hanks, 3 Edw. Ch. 469, 470 (N.Y. Ch. 1841).

98. *Id.*

99. Indeed, from the judges' perspective, even after adultery had been clearly proved, the danger of collusion remained. In one 1835 case, husband and wife had come to an agreement as to a settlement after the master's report establishing his adultery had been accepted by the court. Her lawyer then suggested to the court that there was no need for a judicial decree of alimony. But Chancellor Walworth strongly disagreed. So long as the marriage continued, he noted, she lacked legal competence to make a valid contract with her husband. Daggett v. Daggett, 5 Paige Ch. 509 (N.Y. Ch. 1835). More importantly, such contracts, if permitted, would produce collusion. *Id.*

100. "It is surprising that solicitors and masters so often omit a part of what is required to be proved under orders of reference in cases for divorce," wrote Vice Chancellor Edwards in 1840. Dobbs v. Dobbs, 3 Edw. Ch. 377 (N.Y. Ch. 1840). Perhaps it would be "wiser and better or more conducive to the good order and well being of society" if the legislature changed the law of marriage, he wrote in a case the following year. But so long as the legislature did not do so, it remained the responsibility of the court "to see that something more than the mere forms of law are observed in these proceedings and that the use and abuse of the right to apply are not confounded." *Hanks* at 471 (1840).

101. Note, *Collusive and Consensual Divorce and the New York Anomaly,* 36 COLUM. L. REV. 1121, 1129 (1936). As we have already seen, there were alternatives to collusive divorces, among them, various forms of formal or informal separation and "foreign" divorces.

marital freedom.[102] The rules and practices designed to prevent collusion would become nothing more than directives or instructions that explain how to get away with a collusive divorce. If a persuasive witness were needed, a persuasive witness was found or created. If a deposition was not to read like a fill-in-the-blanks form, then a form was developed that did not read like a fill-in-the-blanks form.

Still, even as we wonder at the judges' resolve to fight a seemingly unwinnable battle,[103] we need to understand the intensity of their concern to separate marriage from divorce. Divorce was not intended to allow couples to escape from identities assumed in marriage. Divorce, to repeat the by now tired refrain, existed to achieve limited public purposes. It punished the guilty for criminal conduct. A convicted husband was theoretically dishonored; he became a man whose dependents were freed from his care. A convicted wife lost her public identity as a wife and lost the relationship expected to be the foundation for her sense of self. More practically, she was thrown into the world without the economic support and care of a husband.[104] Conversely, divorce allowed an innocent spouse to escape the moral contamination that might accompany continued cohabitation with a guilty spouse. In a world where marital unity meant something, it was important that divorce exist. Divorce provided a form of public punishment for a spouse who had knowingly and criminally violated his or her public vows of marriage.[105] At

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102. Formally, the party at fault, the one confessing to adultery, was not permitted to remarry. I wonder, though, if a large part of the agreement between the two would have included negotiations over moving to another state, where remarriage would not have been prohibited.

103. *See* Note, *supra* note 101, at 1127 (there is no satisfactory way to prevent collusive divorces).

104. *See* Argument for the Defendant, Cox v. Cox (New York, Bryant & Co. 1856) (summing up to the jury). I do not mean to suggest that these were equivalent punishments. Nor did the judges. Reading the divorce cases of the first half of the 19th century has impressed on me the judges' intense protectiveness of wives' legal rights, driven by their assumption that once a wife's reputation was lost, she would be quite destitute. In one 1828 case, the Chancellor noted that the effect of a divorce *à mensa et thoro* at the request of the husband was that "the wife would have no claim on his property for her support. He will be released from the obligation of supporting her, and she will be turned off penniless upon the community, unless she has separate property for her maintenance." Palmer v. Palmer, 1 Paige Ch. 275, 277 (N.Y. Ch. 1828). The statute gave the court no authority to provide for her support out of the husband's property. "It must therefore, be a very strong case which will induce this court to grant a final separation on the application of the husband." *Id.* at 278. In their treatises, legal scholars often mentioned the double standard that regarded a wife's adultery as a greater wrong than that of her husband (often on the theory that her adultery unpunished created the possibility that he would have to raise a bastard as his own child). *See* KENT, *supra* note 32, at 88-89. In practice, judges regarded the existence of a social double standard, the reality of the far greater social cost faced by an errant wife, as reason enough to look with greater suspicion on a husband's accusations of a wife. *See generally* ROBERT GRISWOLD, ADULTERY AND DIVORCE IN VICTORIAN AMERICA, 1800-1900 (Institute for Legal Studies, Legal History Program, Working Papers Series 1, 1986).

105. Bishop and Swift regarded divorce as morally less problematic than legalized separations, which created continuing temptations to the commission of adultery. JOEL PRENTISS BISHOP,

the same time, in the orthodox view, divorce was not to be understood as a form of voluntary exit available to all married couples.

Couples continued to exit from unhappy marriages, both with and without judicial sanction. Often, when they did so, one or the other spouse would remarry, with or without a formal divorce from the first marriage. Like Jane Williamson Parisien, they would assume—or hope—that their former spouse would not return to embarrass them.

If appellate court records are any indication of an underlying social reality, bigamy was rife in early America.[106] Surprisingly, when bigamous second (and sometimes third) unions were challenged in court, judges were remarkably accepting and accommodating to the bigamous pair. Indeed, one discovers the same judges who struggled to maintain the rigid purity of divorce law developing presumptions that protected bigamous second marriages from challenge.[107]

Judges refused to convict someone of bigamy on the basis of confession or reputation. The fact of the first marriage had to be proved by placing the actual recorded marriage license into evidence.[108] By contrast, the general legality of an informal, possibly bigamous, common-law marriage could be established on the basis of notoriety and, in general, could only be challenged

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COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 217-25 (Boston, Little, Brown 1852); ZEMPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 190-93 (New York, Windham 1795). There was also a tradition in Protestant theology dating back to Milton that justified divorce. To Milton, the spiritual justifications of divorce included, among others, the Christian's need to separate himself from evil and the Christian's need to end all relationships that interfered with his primary relationship with God. GLADYS WILLIS, THE PENALTY OF EVE: JOHN MILTON AND DIVORCE (1984); Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness, in* LAW IN EVERYDAY LIFE (A. Sarat ed.) (forthcoming).

106. I mean this statement as an invitation to someone to write a social history of bigamy in America. It is based on a reading of the fact patterns presented in the published cases. Lawrence Stone makes the same observation of England in the 18th and 19th centuries. STONE, *supra* note 17, at 142. Of course, the reader will understand that when I speak of "bigamy" in this sense, I mean the social experience or phenomenon of persons who have married again prior to the death of or divorce from a spouse. "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. For one example of the struggle over the public status of what one might call either serial monogamy without divorce or common law bigamy, consider the case of President Andrew Jackson. At the time of his marriage in 1791, his wife was still married to another man. ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF THE AMERICAN EMPIRE, 1767-1821, at 57-70 (1977); *see also* Lawrence Friedman, *Crimes of Mobility,* 43 STAN. L. REV. 637, 638 (1991) (characterizing late 19th-century bigamy as a crime of mobility).

107. On the rhetorical legal commitment to monogamy, see generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); Carol Weisbrod & Pamela Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Marriage,* 10 CONN. L. REV. 828, 834-36 (1978).

108. People v. Humphrey, 7 Johns. 314, 315 (N.Y. Sup. Ct. 1810).

by a pre-existing spouse.[109] After 1830, in New York, a second marriage contracted in good faith, where the first husband or wife had been absent for five or more years, was voidable, not absolutely void.[110] The aggrieved spouse's only remedy would be to file a bill and proceed to annul the voidable marriage. If the second husband and wife continued to live together after the decree, then the legally recognized spouse had adultery grounds for a divorce. But, as Chancellor Walworth noted in 1836, the complainant's own adultery would provide a "perfect answer" to the complaint.[111]

Courts implicitly analogized issues of serial matrimony to property disputes. The existence of an apparent marriage by a man and woman who held themselves out to the public as husband and wife (*i.e.*, present possession) was, if not nine-tenths of the law, at least very important presumptive evidence of a valid marriage. Theoretically, a husband or wife harmed by the later marriage of their spouse, could impugn the title of that later marriage. But, as with adverse possession in property law, so in these cases the "rightful title holder" could eventually lose the capacity to challenge the marriage if he sat on his rights in the face of his wife's "open and notorious" adultery (*i.e.*, living as the wife of another man).[112] The second, originally bigamous, marriages would have become legally acceptable by the very absence of anyone capable of challenging them.[113]

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109. Fenner v. Lewis, 10 Johns. 38, 38 (N.Y. Sup. Ct. 1838); *see also* GROSSBERG, *supra* note 107 (on common-law marriage).

110. *See* 2 N.Y. REV. STAT. 139 § 6 (1830).

111. Valleau v. Valleau, 6 Paige Ch. 207, 208-09 (N.Y. Ch. 1836). Because the second marriage in the *Valleau* case was probably entered into prior to passage of the statute, the chancellor relied instead on the *Williamson* case to hold that the complainant husband was barred from challenging his wife's second marriage because her "adultery" was open and notorious, and he had done nothing to stop it for more than five years. *Id.*

See McNeil v. McNeil, 3 Edw. Ch. 550 (N.Y. Ch. 1842) (chancellor has no jurisdiction once wife leaves state); Lewis v. Lewis, 3 Johns. Ch. 520 (N.Y. Ch. 1820) (same). In *Lewis* an abusive and intemperate husband abandoned his wife. When she brought a petition for divorce, he admitted to adultery but refused to answer when asked whether he had contracted a second marriage. *Id.*

112. *Valleau*, 6 Paige Ch. at 211. The story in this case is virtually identical to that in the *Williamson* case. As with the *Williamson* case, this was a collusive suit; the wife in *Valleau* made no objection to the suit. Yet, Chancellor Walworth strongly objected to efforts to "blast" her character in a divorce proceeding (*id.*); *see also In re* Deming, 10 Johns. 232 (N.Y. Sup. Ct. 1813), where Deming's wife remarried J.S. after he was convicted of the crime of counterfeiting which made him, in law, civilly dead. When he was pardoned, he sued for the return of his children on the theory that his parental rights revived with the pardon. The court agreed, but at the same time, emphasized that the pardon could not operate to divest someone of rights acquired in reliance of the conviction and civil death. " 'Policy and humanity' required that he get as complete a restoration of his private rights as may be consistent with the intervening rights and interests of others." *Id.* at 233-34. The image propounded by the court was of wife and second husband as something close to bona fide purchasers.

113. In this way, the emergence of an American law of common-law marriage was the necessary complement of the general unwillingness of the courts to sanction bigamy. *See generally* GROSSBERG, *supra* note 107, at 64-101.

Consider the case of Abigail Rose, who in 1841 asked the Rensselaer county surrogate for her widow's portion of her "husband's" estate.[114] Fifty years earlier, she had married Jonas Frink. However, they soon separated. Shortly thereafter, Jonas married another woman and moved to Massachusetts. In 1830, he died in the poorhouse in Hoosick, New York. Meanwhile, Abigail worked as the housekeeper of one J. Owens. Around the turn of the century, she married S. Thurston, who left her the next day "and never claimed her as his wife." She then lived with Owens as his wife, and she used his name until his death in 1826. Two or three years later (but prior to the death of Jonas Frink), she married Rose. She continued to live with Rose until his death in 1838.[115]

According to the surrogate, her original marriage to Rose was void. However, after Frink died, there were sufficient facts to warrant the inference of a de facto marriage to Rose. Accordingly, he ruled that she should be awarded a wife's portion of Rose's estate. The chancellor agreed.[116]

Alternatively, consider the story of Tillatha Catherine Bennett and Isaac Graham, both early Anglo settlers of California. Isaac had deserted a first wife in 1830 in Tennessee. In 1845, he married twenty-one year-old Catherine, who lived with her mother and brothers on land near Graham in Santa Cruz. They had married by signing a document prepared by Graham, presumably because there was no available protestant minister. Her mother disapproved of the "marriage" and tried to get the local justice of the peace and the United States consul in San Francisco to separate the two. The justice of the peace wrote to the consul concerning Graham's refusal to comply: "[because] other Gentleman . . . approved of his Marriage, . . . nobody could force a separation."[117]

In 1849, a son from Graham's first marriage arrived in California and learned, unexpectedly, that his father was still alive and living north of Santa Cruz. A few months later, while Graham was away with his son on business

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

115. *Id.* at 574-75.

116. *Id.* at 582-83. To take a second example, when the widowed Hannah Van Buskirk asked for her dower rights in 1820, it was revealed that her husband of more than 35 years had been married previously. He and his first wife split up around 1783. She went to Long Island, from there to Canada, and had never since been heard from. He stayed and married Hannah. The New York Supreme Court declared that Hannah was entitled to dower. According to Chief Justice Spencer, all that was known was that Van Buskirk had once cohabited with another. There was no evidence of marriage. Even if they had been married, the first wife must be presumed dead around 1790, at the end of seven years absence. What of the fact that Hannah had married Van Buskirk well before 1790? No matter, declared the court. Continuous cohabitation provides conclusive evidence of a marriage. Jackson, *ex. dem.* v. Claw, 18 Johns. 346, 350 (N.Y. Sup. Ct. 1820). The court relied on Chief Justice Kent's decision in Fenton v. Reed, 4 Johns. 52 (N.Y. Sup. Ct. 1811). *See generally* GROSSBERG, *supra* note 107 (on common-law marriage).

117. DOYCE NUNIS, JR., THE TRIALS OF ISAAC GRAHAM 67 (1967).

in San Jose, Catherine took their two children and a disputed amount of gold and fled. In a letter published in a San Francisco newspaper, she would later explain her flight on the grounds of Isaac's cruelty: "I was so tired of being beat and having bowie knives drawn over me . . . (for twice that old brute Graham drew his bowie knife across my throat till the blood ran down my breast, and I expected every day he would kill me)."[118]

Catherine's flight took her, dressed as a man, to Hawaii and then to Oregon, where she was discovered by her husband, who took the children and what was left of the gold from her.[119] She then went back to Santa Cruz and brought suit against Graham for custody of the children. Suit followed countersuit between them. One judge granted her custody rights. But when Isaac seized the children, while she was in San Francisco on a business trip, another judge confirmed his right to their custody.[120]

Catherine sued Isaac for personal damages and assault and for ruining her good name by inveigling her into a bigamous relationship.[121] One 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. When the case came to trial, the central question was whether Graham had married her in good faith. He claimed that he believed his first family had been massacred by Indians on the way to Texas. He also said that he believed that his first wife had remarried and had had an illegitimate child and that Texas law allowed a marriage to be invalidated after seven years absence. At the end of the trial, he was held liable and ordered to pay $2500 damages.[122]

On appeal, however, the California Supreme Court reversed in a decision that incorporated common-law marriage into California's law. "Marriage is a civil contract, and no form is necessary for its solemnization," declared Justice Heydenfelt.[123] Where parties are "able to contract, an open avowal of the intention and an assumption of the relative duties, which it imposes, are sufficient to render it valid and binding."[124] Where, as in this case, there was such a marriage, a father's children were "entitled to look for and demand from him, his care, maintenance and protection. And he has the same right to their custody, control and obedience."[125] The mother, legally noth-

118. *Id.* at 119.

119. Meanwhile, his son by the earlier marriage had managed to kill Catherine's brother and to wound her mother. *Id.* at 74-97.

120. *Id.* at 68.

121. *Id.* at 67-70.

122. He was acquitted of assault. *Id.* at 70.

123. Graham v. Bennett, 2 Cal. 503, 506 (1852).

124. *Id.*

125. *Id.*

ing but a wife, was left without any rights at all.[126]

CONCLUSION

In the eyes of the law, at least through the first half of the nineteenth century, bigamous marriages were less threatening to the permanence of marriage than either voluntary divorces or contractual separations. How can that distinction be explained? One senses that for some judges the tacit recognition of a second, more or less informal, marriage represented a recognition of the existence of human fallibility and change. Family law could not demand that husbands and wives lead perfect lives. The ideal of the abandoned wife, who remained at home, like Penelope sewing (or taking in laundry, or farming, or whatever), chaste and pure, waiting for her one, true, but long absent husband, was an important cultural icon in nineteenth-century America. But, in the real world, wives knew they needed husbands to survive, and divorces were expensive and, in states like New York, largely unavailable. The need for a husband was exacerbated by a legal order that left a wife (a feme-covert) ordinarily without the means of contracting or engaging in most legal or business affairs. So, like Jane Williamson and Abigail Rose, they often remarried. And when their cases came to court, judges like Chancellor Kent recognized the felt necessities of their situations.[127]

Likewise, husbands (and wives) who abandoned first spouses were understood as morally wrong to have done so. They would have to live with their sin throughout the rest of their lives. 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. In typical American fashion, the judges were giving precedence to the present over the dead hand of past entanglements and obligations.[128]

Judges hearing these cases gave crucial weight to the new or newer couple's leading a life that substantively reflected a public understanding of being married. That is, it was important that the couple held themselves out publicly as married, and that there was a present community that recognized them as married. As the California Supreme Court held in the Graham case, it was crucial to find that there was a real "assumption of the relative duties" that marriage imposed. Being married in a way that a court might recognize

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126. *Id.* at 507. Although common law marriage bore some resemblance to the "marriage by bond" relied on by the English settlers of Spanish North America as a way of avoiding Catholic conversion, Hans Baade has demonstrated that the decision of the California Supreme Court was not an application of pre-annexation Mexican California law. The "uncertainties" of Spanish and Mexican marriage law may, however, have made common-law marriage doctrine particularly attractive to the judiciary. Baade, *supra* note 1, at 78-79.

127. *See supra* note 104 and accompanying text.

128. *See generally* J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

required evidence that a couple lived a conventional married life: as if man and woman had been united in marriage, as if their identities had been transformed, as if they had no right to vary the terms of their relationship, as if their relationship was necessarily one for life. If a couple lived as if those conditions were necessarily true, then the technical and legalistic reality that these conditions articulated roles that a man and woman were assuming voluntarily and privately would give way to the practical reality that the man and woman had become husband and wife.[129]

By contrast, married couples, who made contracts with one another to live apart and to change the received terms of their marriages, or, worse yet, who colluded with each other to subvert legal processes in order to gain "legal" divorces from unhappy marriages, challenged the public structure of marriage. Their lives defied orthodox expectations. Their willingness to alter legal rights and remedies through strategic use of the law, sometimes through perjury, undercut the law's legitimacy. 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.[130]

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129. For a modern example of a very similar analysis, see the decision of the California Supreme Court in the famous 1976 case of Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

130. In conversation, J. Willard Hurst described this overstated and unsuccessful concern with the sanctity of the legal process as framed by the judges' institutional egoism.

It is difficult, perhaps impossible, to gauge what the actual public demand for divorce reform was throughout the 19th century. A simple answer is that if the majority of voters had wanted divorce reform they would have gotten it. We might well imagine that an ambivalent and contradictory legal structure that both upheld the permanence of marriage and, at the same time, provided forms of partial or complete exit for those couples that could no longer live together, met the desires of a large percentage of the population. On the other hand, another plausible view is that the existing law constrained would-be reformers. Posed more positively, millions who wanted divorce may have been kept from it by repressive political and religious authorities. The latter sentiment is nicely captured in a late 18th-century English poem, describing what would happen if the law (which at that time recognized no forms of divorce, except by private bill before Parliament) appointed "A Popular Functionary," to release couples from the bonds of matrimony:

> Did but the law appoint us one,
> Tired couples to release again,
> What shoals of all degrees would run,
> To break their matrimonial chain!
> The widow old, Herself and gold
> Who to the healthy spendthrift gave;
> And the rich churl, Who took a girl,
> Poor wretch! with one foot in the grave.
> Prudes, who at men would never look,
> Yet slyly tasted Hymen's joy;
> And wild coquets, who husbands took,
> When they could get no other toy:
> Millions would try The know [knot] to untie:

The quiet defense of serial bigamy in nineteenth-century law found reinforcement and analogies in many areas of American jurisprudence. Just as there was in American constitutionalism a persistent, although often suppressed, critique of restrictive definitions of citizenship, so in American family law one finds a persistent critique of formalistic categories which were restrictive of marriage and which created traditional barriers to entry.[131] More importantly, judges drew on a strong tradition of what I think of as functionalism or realism in the law. This tradition required judges, as a correlate of their political legitimacy, to recognize "real" relations as they existed in the world. Rights holders were those who did what rights holders do. Those who acted as autonomous individuals—choosing, constructing, protecting, destroying—grew entitled to rights identified with the choices they had made. So, when men and women chose to live together as husband and wife, taking on the transformed identities and limitations that those roles implied, they grew entitled to be considered as husband and wife.[132]

Still, the irony is inescapable. The point of marriage was to create a public structure of rights and duties, not alterable by the wills, goals, or desires of husbands and wives. The legal act of marriage united a man and a woman in a permanent relationship, one that gave each prescribed and non-negotiable identities. Every one of the four themes implicit in the definition of marriage—themes of unity, identity, non-negotiability, and permanence—might become contested and contradictory in particular contexts. All could be challenged as narrow expressions of an antiquated orthodoxy. All were regarded, however, as inextricably bound to marriage as it was (as opposed to what it might become)—that is, to marriage as a public structure.

Yet, out of the very concern of judges to protect the institutional integrity of marriage, to protect its nature as a public institution, came a recognition of marriages made as knowing expressions of the private wills, goals, and desires of men and women publicly incapable of so doing. And what that ironic result suggests to me is that for the judges, as for other public officials, the most important feature of marriage was the public assumption of a relationship of rights and duties, of men acting as husbands and women acting as

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Toward the goal of liberty,
Lord! what a throng
Would crowd along,
And in the midst my wife and me!

Charles Dibdin, *A Popular Functionary, in* ROGER LONSDALE, THE NEW OXFORD BOOK OF EIGHTEENTH CENTURY VERSE 624 (1984).

131. *See* GROSSBERG, *supra* note 107, at 103-26 (discussing the general attack on barriers to entry to marriage). On constitutionalism, see Hendrik Hartog, *The Constitution of Aspiration and The Rights That Belong to Us All*, 74 J. AM. HIST. 1013, 1019 (1987).

132. Hartog, *supra* note 131, at 1019; Elizabeth Clark, *Religion, Rights, and Difference in the Early Woman's Rights Movement*, 3 WIS. WOMEN'S L.J. 29, 58 (1987).

wives. The legitimacy of common-law marriages rested, I suspect, on their reflection of a widely recognized structure of power and rights that shaped the conduct of all who would be understood as being husbands and wives.

What did it mean to be married in 1840? It meant that one assumed the character of a husband or a wife and that, in consequence, one was joined in a permanent relationship of power and submission. The point to be drawn from the bigamy cases is that a stable and public identity as a husband or a wife took precedence over the formalities of monogamous marriage. The law of marriage did not, in this sense, make men and women into husbands and wives. Marriage, as experienced and as understood in the law, rested on the structured, interrelated, and predetermined legal identities of husbands and wives, not the other way around.

I began this inquiry into the institution of marriage in the nineteenth century thinking that a picture of marriage as an institution was a necessary preface to the legal history of marital conflict. I now think that the legal history of struggles over rights and powers between husbands and wives is the necessary preface to the history of marriage as an institution. A version of the tail wagging the dog, perhaps, but a story that continues to our own day.