# The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930

REVA B. SIEGEL*

## INTRODUCTION

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover,* she performs everything . . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either one of them acquire by the marriage.
>
> —Blackstone's Commentaries (1765)[1]

> At common law the husband and wife are under obligation to each other to perform certain duties. The husband to bring home the bacon, so to speak, and to furnish a home, while on the wife devolved the duty to keep said home in a habitable condition. Following this it has been held that an agreement by the husband to pay his wife for performing the ordinary household duties was not only without consideration, but against public policy.
>
> —Lewis v. Lewis (Ky. 1922)[2]

Today Blackstone's account of marital status law is notorious: evidence of feudal and patriarchal traditions once enshrined in the common law. For centuries the common law of coverture gave husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names. During the nineteenth century, however, statutes enacted in the United States and England gave wives the capacity to enter into legal transactions and granted them rights in their property and earnings. Yet the married women's property acts and earnings statutes did not fully emancipate wives from the common law of marital status. While scholars have long described the reform of coverture as elevating married women from relations of

* Professor of Law, Yale Law School. B.A. 1978, M.Phil 1982, J.D. 1986, Yale University. I owe thanks to Hugh Baxter, Alan Hyde, Raoul Ibarguen, Carol Rose, Lea VanderVelde, and Joan Williams for their comments on the manuscript, and to Jill Morrison, Jane Park, and Peggie Smith for their research assistance.

1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (citations omitted).

2. 245 S.W. 509, 511 (Ky. 1922).

"status to contract,"[3] this article will instead consider how statutory reform modernized the common law of marital status to accord with gender mores in the industrial era.

Statutory reform modified but did not abolish the law of coverture, as opinions like *Lewis v. Lewis,*[4] a divorce-related case from 1922, illustrate. In 1922 Mrs. Lewis was entitled to hold property in her own name, to enter into contracts, and to claim her own earnings. Yet despite these significant reforms, the common law of marital status continued to govern Mrs. Lewis's economic status, during and after marriage. At the outset of this divorce dispute Mrs. Lewis held title to 365 acres of land, but the court awarded the property to her ex-husband on the ground that he had provided the money to purchase it. Mrs. Lewis argued that the property "was paid [for] out of both of our work," that, whether or not she received wages, her labor in tending the store and raising eleven children "ought to be worth something,"[5] but the court thought otherwise: "[It] plainly appears that the wife had no interest whatever in the land, except as the spouse of her husband. She neither bought nor paid for it."[6]

In ruling that Mrs. Lewis did not contribute to the purchase money for the property, the court reasoned from the common law of marital status. Mrs. Lewis' household labor gave her no claim on the family's assets, the court held, because "[a]t common law" a wife had a "duty to keep... home"; consequently "an agreement by the husband to pay his wife for performing the ordinary household duties was not only without consider-

---

3. *See infra* notes 18-22 and accompanying text.

4. *Lewis,* 245 S.W. at 511.

5. *Id.* at 510. Trial transcripts quoted by the appellate court reveal Mrs. Lewis to have been quite insistent on this point. When questioned as to who paid the purchase money on the land, she replied: "It was paid out of both of our work; I stayed in the store, and he went out part of the time." On cross-examination her testimony continued:

> Q. Did you ever work for wages or get anything for your work at any time?
> A. I worked in the store, but did not get any wages. I suppose my work was worth something, when I was attending to two little children and stayed in the store, too; it looks like it ought to be worth something.
>
> Q. Did you work as one of the family, and help Mr. Lewis in the store, didn't you?
> A. Yes, sir; but a great deal of time he was not in the store.
>
> Q. The money for the farm was paid by Mr. Lewis?
> A. Paid by us out of what money we made by both of us out what we made in the store.
>
> Q. Was it paid by yourself or by Mr. Lewis?
> A. It was paid out of our work in the store.
>
> Q. I will ask you if you paid it personally?
> A. I know it was paid.
>
> Q. Did you pay it personally?
> A. I helped to pay it—just the same as paid it.

*Id.*

6. *Id.* at 511.

ation, but against public policy."[7] There was, moreover, "no implied obligation on the part of the husband to pay the wife for such services as she renders outside of the ordinary household duties";[8] consequently, Mrs. Lewis had no claim to share in the profits of the family business.

> Although Mrs. Lewis may have performed great services in the store of her husband . . . she was not entitled to recover of him any part of the profits or other compensation, for . . . her assistance in the store was as a member of the family without pay or expectation of reward, save to aid the husband in making a living for the family, including their 11 children.[9]

To support this ruling, the Kentucky court invoked the doctrine of coverture as quoted in the opening epigraph—explaining the common law of marital status in cadences reminiscent of *Blackstone's Commentaries*, but in an idiom peculiar to the industrial era: "At common law the husband and wife are under obligation to each other to perform certain duties. The husband is to bring home the bacon, so to speak, and to furnish a home, while on the wife devolved the duty to keep said home in a habitable condition."[10]

As the Kentucky court explained the law of coverture in 1922, a husband had a duty to perform market labor ("bring home the bacon"), while a wife had a duty to perform household labor ("keep . . . home"). This account of marital duties dates from the industrial era, when men's work was progressively separated from the household and household labor was "gender-marked" as a "wife's work."[11] Reform of the common law incorporated this gendered understanding of household labor into the law of coverture itself. Once legislatures granted wives rights in their labor, wives began to assert claims on assets that accrued from their work in the household setting. Courts interpreting the reform statutes now had to determine whether women like Mrs. Lewis had rights in the labor they performed for their families. Courts uniformly rejected such claims.[12] A wife might claim rights in her market wages, but, as the *Lewis* court held, the value of a "wife's work"—her household labor—remained a husband's by marital right. By examining how courts interpreted the laws that granted wives property rights in their labor, it is possible to recover a lost chapter in the history of housework.

---

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *See infra* notes 266-267.
12. *See infra* Part III.C.

This article continues a story recently begun in *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880.*[13] In *Home As Work,* I examine the efforts of the nineteenth-century woman's rights movement to reform the doctrine of marital service, the common law rule that gave a husband property rights in his wife's labor. To secure for wives property rights in the value of their labor, the early feminist movement claimed for wives a joint property right in family assets. Feminists argued that a wife was entitled to joint rights in family assets because a wife's household labor played a central role in the accumulation of family wealth. Legislatures refused to redistribute title to family assets in this fashion. Instead of recognizing the joint property claim, legislatures enacted earnings statutes that gave wives a separate property right in their "personal" labor, ofttimes expressly excluding labor wives performed for husband or family. Under the common law doctrine of marital service, this unemancipated labor remained a husband's by marital right.

In this article I demonstrate how litigation under the statutes granting wives rights in their labor gave modern social content to the common law doctrine of marital service. In earnings statute litigation courts were called upon to determine whether a husband still had rights to the value of the work his wife performed in a variety of contexts: when she did wage work for third parties outside the household or, as was most commonly the case, inside the household (for example, doing piecework, sewing, washing, ironing, or keeping boarders); when she worked, as Mrs. Lewis and many other wives did, in the family business or on the family farm; and when she worked, as Mrs. Lewis and most other wives did, in the household raising, clothing, and feeding her family. In the decades between the Civil War and the New Deal, courts slowly shifted from a presumption that the husband, by right of marriage, had property rights in *all* products of his wife's labor to a presumption, however tentative, that a married woman owned the product of her labor—so long as judges deemed that labor "personal" or "separate," that is, distinct from the labor a wife owed her husband by reason of marriage. The labor all courts insisted a wife owed her husband by reason of marriage was the household labor she performed raising, clothing, feeding, educating, and nurturing her family. In this way, courts reformulated a putatively feudal body of status law so that the doctrine of marital service imposed upon the wife the duty to perform such work as is necessary to reproduce the labor force in a modern industrial economy.

Although the household labor wives performed was crucial to the functioning of the economy—or perhaps because it was—judges called upon to apply the earnings statutes were determined to insulate a "wife's work" from market exchange. The earnings statutes conferred on wives the

13. Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880,* 103 YALE L.J. 1073 (1994).

capacity to contract and a property right in their own labor, and so raised a possibility not contemplated at common law: that wives might contract with their husbands for the performance of household services and thereby introduce market relations into the family. Yet as earnings claims arising from interspousal contracts for household labor began to reach the courts in the late nineteenth and early twentieth centuries, courts uniformly refused to enforce them.[14] Courts construed the earnings statutes to prohibit market relations in the family setting; as courts employed marital status doctrines to differentiate the family and labor market in law, courts ensured that wives' work was to be performed subject to a different mode of exchange than their husbands' and so created the legal infrastructure of the separate-spheres tradition.

The courts that construed the earnings statutes drew upon the gender discourse of the industrial era to define family and market as spheres of "altruistic" and "interested" exchange. In the family, work was motivated by love and duty, while in the market, work was motivated by self-interest and the hope of material gain.[15] Courts brought this prescriptive judgment about work in the family to bear on the interpretation of the earnings statutes, where they invoked it as a justification for refusing to enforce interspousal contracts for household labor.[16] Under this regime of judicially enforced "altruism," exchange relations in the family could not be formalized at law. The distributive consequences of this regime for women were, quite literally, incalculable. Married women might exchange labor for livelihood in the family, but title to family assets would remain with the husband—much as it had before legislatures abrogated common law rules that formally vested title to family assets in the husband. In short, notwithstanding the putative abolition of coverture, women in the industrial era found themselves economically disempowered in marriage and impoverished at divorce—and still find themselves so today. Precisely because the doctrine of marital service was rearticulated in earnings statute litigation to accord with modern gender mores, it remains today scarcely perceptible as a body of status law. Ultimately, then, this study illustrates how a movement for egalitarian law reform can work to modernize and so naturalize an antiquated body of status law.

Part I of this article surveys the historiography of marital status reform. As I show, the stories we tell about the reform of marital status law reflect our intuitions about the justice of family/market relations in the modern era. Those who assume that family/market relations are essentially just have analyzed the history of marital status reform as a progression from

14. *See supra* text accompanying note 7 (quoting *Lewis* opinion); *infra* Part III.C.

15. The distinction was of course prescriptive: the court rejected Mrs. Lewis' claim to land purchased with the profits of her labor by *declaring* that Mrs. Lewis worked "as a member of the family without pay or expectation of reward." *Lewis*, 245 S.W. at 511.

16. *See infra* notes 255-276 and accompanying text.

"status to contract."[17] But if we do not view the structure of family/market relations as particularly just, we might pose different questions about the history of marital status reform. Rather than assume we are examining the abolition of an antiquated body of marital status law, we might approach coverture's reform with another possibility in view: that we are examining changes in an antiquated body of marital status law that modernized it to accord with contemporary gender mores.

To illustrate this modernization thesis, Part II analyzes the implementation of a nationally prominent reform statute, enacted in New York in 1860, that gave wives rights in their earnings. By examining several decades of earnings litigation, I show how the New York legislature and the New York Court of Appeals collaborated to preserve a husband's property rights in his wife's labor, even as they moderated many of the disabilities imposed on married women at common law. Part III leaves New York State to survey earnings litigation across the nation during the late nineteenth and early twentieth centuries. In this Part, I examine the evolving treatment of wives' earnings claims, first on third-party contracts for work performed in the home, and then on interspousal contracts for work performed in the family business. As I demonstrate, over the decades courts began to recognize earnings claims in each of these contexts, but no court in any jurisdiction in the nation would recognize earnings claims arising from interspousal contracts for work wives performed in the household. Examining judicial responses to intramarital contract claims arising under the earnings statutes reveals how courts reformulated the doctrine of marital service to accord with gender mores in the industrial era. Finally, in Part IV, I conclude by considering how reform of the doctrine of marital service transformed an antiquated body of status law into a socially acceptable body of status law, thereby enabling the common law to vest a husband with property rights in a "wife's work" in a fashion that accords with intuitions of justice in the modern era.

## I. NINETEENTH-CENTURY REFORM OF MARITAL STATUS LAW: AN OVERVIEW

The stories we tell about coverture and its reform are stories about status in American society. In a society that prides itself on its dedication to the liberty of individuals and to the equality of citizens, why was the power of the state ever used to subordinate one group to another? And if the institution of coverture demonstrates that the practices of American society in fact deviated from its founding ideals, does the reform of coverture in turn vindicate those ideals? The historiography of marital status law is haunted by such questions. Explicitly or implicitly, historians

17. *See infra* notes 18-22 and accompanying text.

describing coverture's nineteenth-century reform must present some account of the society that embraced, and then disavowed, the doctrine of marital unity. In this way historians of marital status law explore fundamental questions about the ordering principles of American society. The stories we tell about the state's role in establishing and disestablishing status relations in the past create a critical vantage point from which to analyze the state's role in establishing and disestablishing status relations in the present.

### A. HISTORIOGRAPHY OF MARITAL STATUS REFORM: THE "STATUS TO CONTRACT" STORY

Although the common law of coverture endured from the late middle ages until the twentieth century, scholars have persistently characterized this body of law as a relic of feudalism, at odds with the individualistic norms of capitalism.[18] For example, Roscoe Pound explained that "family law . . . is one of the earliest branches of the law to become fixed and hence preserves traces of an archaic condition in which group interests rather than individual interests were secured."[19] From this perspective, the

---

18. The characterization of coverture as feudal dominates twentieth-century family law treatises. *See, e.g.*, MORRIS PLOSCOWE ET AL., FAMILY LAW 829 (2d ed. 1972) (noting that the married women's property acts reformed "common law's feudalistic fiction of unity," although "[v]estiges of feudalistic doctrine still remain in a few states"); 1 JAMES SCHOULER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 5 (Arthur W. Blakemore ed., 6th ed. 1921) ("The statutes and decisions which reflect this great reform [of coverture] show clearly that the influence of the feudal system, which regarded only the rights of the man who could carry arms, has almost disappeared."). Many recent historians of the married women's property acts appear to have uncritically accepted the characterization of coverture as feudal. *See, e.g.*, LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 35 (1969) ("The theoretical basis for the married woman's loss of legal rights was the feudal doctrine of coverture."); PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 21 (1980) ("Common law had evolved to meet the needs of a feudal society in which one's legal status was in effect an expression of a property relationship between political superiors and inferiors within the feudal hierarchy . . . . It is a truism that once the reason for a rule ceases to exist, the remaining naked rule becomes irrational. So it was with the rules comprising the common law status of married women, whose irrationality became increasingly clear as the economy became more commercial."); *see also* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1044 (1972) (finding that common law doctrine of marital property takes shape in period following Norman Conquest).

In an interesting exception to this otherwise uniform characterization of coverture, Norma Basch observes: "But what is most striking about the long course of the concept of marital unity is its ability to serve the legal needs of three shifting social structures: the kin-oriented family of the late Middle Ages, the patriarchal nuclear family of early capitalism, and even the more companionate nuclear family of the late eighteenth century." NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 27 (1982). Historians of the married women's property acts are increasingly disposed to view the regime of coverture as an evolving body of law. *See, e.g.*, Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1385-89 (1983).

19. Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 187

reform of marital status law was inevitable. Status relations would give way to contract relations, in accordance with Henry Maine's thesis that "[t]he movement of the progressive societies . . . . has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account."[20] Thus, in *The Formative Era of American Law*, Pound described marital status reform as an historically progressive development, representative of American legislative activity in the period between the Revolution and the Civil War:

> For the most part it did away with survivals in seventeenth-century English law which had not been eliminated in the wake of the Puritan Revolution . . . . It abrogated rules and institutions which had come down from feudal England. It pruned away restrictions on free individual activity which spoke from the relationally organized society of the Middle Ages and had ceased to be applicable to a society organized on the basis of free individual competitive self-assertion.[21]

While the "status-to-contract" story continues to shape contemporary understanding of family law,[22] scholars have recently taken a new interest

---

(1916); *see* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1513 n.65 (1983) ("According to [the] 'lag theory,' changes in the family reproduce but lag behind those in the market.") (citation omitted).

20. HENRY S. MAINE, ANCIENT LAW 163 (Frederick Pollock ed., 4th ed. 1906). For the general statement of his thesis, see *id.* at 163-65. Writing in 1861, before statutory reform of coverture in England, Maine was hard pressed to account for the status of married women: "The status of the Female under Tutelage, *if the tutelage be understood of persons other than her husband,* has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract." *Id.* at 164 (emphasis added).

21. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 43 (1938). Pound's account of the nineteenth-century reform of coverture seems to have been shaped by Richard Morris's account of the common law's initial American reception. In his influential 1930 work, *Studies in the History of American Law*, Richard Morris argued that during the colonial and revolutionary period American courts significantly liberalized the common law of coverture. According to Morris, the common law of coverture was a feudalistic body of law at odds with the needs of a modern commercial society. American society, founded on a commitment to individual contractarian relations and in opposition to the prerogatives of status and crown, was more readily prepared than England was to do away with restraints on the capacities of married women: "The commercial revolution stamped its impress more speedily upon American legal economics than upon that of England, where the conservative policy of the common-law courts remained centuries behind economic progress." RICHARD B. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 128 (1930).

22. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 224 (1987) (footnotes omitted):

> The mainstream conservative notion that status relations tend to be supplanted over time in more and more domains by contractual ones has enough significant exceptions that one would be hard pressed to recall the rule . . . . The only major area in which one could make a plausible case that the present movement of the law is toward loosening status strictures is, perhaps ironically, the only one in which mainstream conservatives seem to be nostalgic for traditional status roles. To a

in the reform of marital status law. This interest springs, at least in part, from a changed perspective on the institution of coverture itself. Where coverture was once viewed as paradigmatically feudal, its patriarchal aspect is now most prominent. From a contemporary perspective, then, the progressive logic once assumed manifest in reform is precisely the point of historical curiosity. Why was a bastion of male prerogative felled in the mid-nineteenth century, prior to the appearance of an influential women's movement, and with relatively little conflict or outcry?

The story of a conflict between feudalism and capitalism does not provide a wholly satisfactory answer to this question. Analyzing the reform process more closely, historians observed that for centuries the common law was moderated by equitable rules allowing married women to hold "separate estates" which they could dispose of in any manner the trust instrument establishing the estate provided.[23] It was by statutory codification of equitable principles that common law reform began in the first half of the nineteenth century, with the enactment of married women's property acts that allowed wives to hold property in their own names.[24]

Historians have identified several concerns prompting the passage of the reform statutes. To begin with, the reform statutes enabled more families to avail themselves of the benefits of the equitable separate estate, previously available only to the wealthy few. Allowing wives to hold separate property in marriage facilitated intergenerational transmission of wealth from fathers through daughters; it also provided families with a flexible legal device for managing current assets. As Richard Chused has pointed out, the married women's property acts were enacted at the same time as the first homestead statutes, and for many of the same reasons.[25] The

---

limited extent, family law has been contractualized, at least as to property relations between spouses and nonmarried cohabitants.

23. At equity, a wife's capacity to engage in transactions concerning her separate property was governed by the trust instrument creating the estate and certain equitable doctrines on capacity that varied by jurisdiction. *See* Chused, *supra* note 18, at 1411 ("Equity courts frequently had construed trust instruments containing sole and separate use language . . . to deny married women the right to contract about or will separate estate assets."); *see also id.* at 1372 n.57, 1367 n.29 (discussing equitable constraints on beneficiary's capacity to manage and devise separate estates). Suzanne Lebsock has studied 170 separate estates in the legal records of Petersburg, Virginia between 1784 and 1860, and observes that the great majority of grantors conferred no powers on the beneficiary at all. The power to devise the property was granted 16% of the time, and the power to sell it was granted 25% of the time. SUZANNE D. LEBSOCK, THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860 78-79 (1984).

24. *See generally* Chused, *supra* note 18.

25. On passage of the homestead laws, see Note, *State Homestead Exemption Laws*, 46 YALE L.J. 1023, 1026-27 (1937) (describing rapid passage of homestead laws after 1839, including Georgia and Mississippi, 1841; Wisconsin, 1848; Iowa, Vermont, and California, 1849; and New York and Ohio, 1850). *See generally* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-

married women's property acts allowed families to hold assets in a wife's name and so enabled families to insulate property from a husband's creditors, thereby affording households a margin of security in the turbulent antebellum economy.[26] Finally, for states lacking chancery courts or engaged in merging chancery with common law courts, passage of the married women's property acts was part of a process of codifying equitable precedents generally. Crucially, this account of reform, emerging from the work of Richard Chused, Suzanne Lebsock, Peggy Rabkin, Marylynn Salmon, and others,[27] qualifies, if not refutes, the progressive premises of earlier historiography. Among the competing preoccupations driving reform—matters of land law, debtor-creditor relations, family welfare, codification, and capital accumulation—considerations of gender equity play a conspicuously minor role.[28]

---

1900 (1974) (providing state-by-state analysis). Richard Chused offers the most thorough analysis to date of the economic underpinnings of early marital property reform, with considerable state-by-state documentation. *See* Chused, *supra* note 18, at 1398-1404.

26. In fact, as Richard Chused points out, the early marital property legislation took two forms: some provisions insulated wives' separate estates from their husbands' creditors and others enabled married women to hold separate estates at law. In the years between 1839 and 1852, Mississippi, Maryland, Arkansas, Alabama, Michigan, Maine, Massachusetts, Iowa, New York, and Pennsylvania each adopted debt immunity statutes with separate estate provisions. For more detail, see Chused, *supra* note 18, at 1409-10 n.263. Many southern states that adopted debt immunity legislation in the antebellum period did not adopt separate estate provisions until the constitutional conventions of the Reconstruction period. *See generally* Suzanne D. Lebsock, *Radical Reconstruction and the Property of Southern Women,* 43 J.S. HIST. 195 (1977). On the other hand, some of the early separate estate statutes can be classified as such in name only, as they functioned exclusively as debt immunity legislation. Mississippi, which enacted the first separate estate statute in 1839, recognized only separate estates in slave property. The enabling statute stipulated that the husband would retain control and management of such slaves, and as construed, the income from their labor. *See* 2 JOEL P. BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN 6 (Boston 1875).

27. *See, e.g.,* KATHLEEN LAZAROU, CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY AND THE LAW OF TEXAS, 1840-1913 (1986); LEBSOCK, *supra* note 23; RABKIN, *supra* note 18; MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); Chused, *supra* note 18; Lebsock, *supra* note 26; Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution? in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 69 (D. Kelly Weisberg ed., 1982). *See generally Introduction* to ELIZABETH B. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861 (1987) (discussing literature on social forces contributing to the enactment of married women's property acts).

28. For example, Peggy Rabkin, examining reform in New York, situates passage of the state's first married women's property act in the context of a codification movement seeking to defeudalize the law of real property. RABKIN, *supra* note 18, at 69. By her account, reformers recognized a wife's separate estate at law in order to facilitate capital accumulation; the property act allowed fathers to secure intergenerational transfers of wealth as it descended through daughters. A paternalist, not egalitarian, logic motivated statutory reform. But, Rabkin emphasizes, if considerations of gender equity did not fuel reform, they were fueled by it. Coverture's statutory reform played a significant role in precipitating first wave feminism. *Id.* at 12, 156.

Like Rabkin, Richard Chused ascribes reform to economic considerations. He locates the immediate impetus for the married women's property acts in a turbulent antebellum economy,

Although this body of scholarship illuminates much about the genesis of the early married women's property acts, it provides an incomplete account of common law reform precisely *because* it focuses on the origins of the early property acts. To appreciate the significant role that gender conflicts played in precipitating changes in the law of marital status, it is necessary to look beyond the enactment of the first reform statutes in the early nineteenth century, to the middle decades of the century, when an increasingly vocal woman's rights movement began to lobby state legislatures and mount petition campaigns demanding suffrage and the reform of marital status law.

In a pioneering dissertation written in 1960, but not published until 1987, Elizabeth Warbasse demonstrated that the early woman's rights movement successfully agitated for marital status reform in many areas of the country during the mid-nineteenth century.[29] Norma Basch has since provided an in-depth analysis of the role that feminist advocacy played in the enactment of a prominent New York statute that expanded a wife's capacity to contract and sue, improved her rights in child custody and inheritance, and, most significantly, provided that "the earnings of any married woman, from her trade, business, labor or other services, shall be her sole and separate property . . . ."[30] As Basch showed, "[e]very provision of the 1860 statute . . . was a specific goal of the women's movement"; the statute was a "significant legislative realization of demands by women for women."[31] Analyzing earnings statutes enacted in Massachusetts and Illinois after the Civil War, Amy Stanley has also concluded that the legislation was responsive to feminist demands.[32]

The work of Warbasse, Basch, and Stanley provides abundant evidence that the lobbying and petitioning campaigns of the nineteenth-century woman's rights movement precipitated the enactment of numerous statutes modifying incidents of marital status law. In important respects, this body of scholarship rehabilitates the view that marital status reform manifested progressive social tendencies. As Warbasse, Basch, and Stanley demonstrate, early feminists protested the material and dignitary injuries

---

arguing that legislators recognized a wife's separate estate in order to provide families a method of securing assets against a husband's creditors. But unlike Rabkin, Chused links coverture's reform to a more wide-ranging assault on the patriarchal norms of the common law occurring during the industrial era. According to Chused, the hierarchical logic of coverture doctrine rendered it vulnerable to reform because it stood at odds with nineteenth-century gender norms, which ascribed to women an exalted status within the home—if not in civil society at large. Chused, *supra* note 18, at 1397-1412.

29. WARBASSE, *supra* note 27.

30. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157 ("An Act Concerning the Rights and Liabilities of Husband and Wife"); BASCH, *supra* note 18, at 164, 188-99.

31. BASCH, *supra* note 18, at 165.

32. Amy D. Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 482-87 (1988).

inflicted on married women by the common law, and legislatures responded to feminist demands for gender equality, moderating at least some of the more hierarchical features of the marriage relation. In her study of New York, however, Norma Basch emphasizes that a hostile judiciary constrained the transformative possibilities of the reform legislation, by interpreting the statutes to preserve common-law understandings of marriage.[33] "For this reason," Basch concludes, "the married women's acts cannot be construed as a revolution."[34]

How, then, did the reform statutes alter the law of gender status in nineteenth-century America? Does coverture's reform ultimately substantiate Maine's status-to-contract thesis, as Basch's story of an egalitarian legislative initiative frustrated by a tradition-bound judiciary suggests? These questions prompted me to reexamine feminist reform demands and their legislative and judicial reception. In a recently published article, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*,[35] I explore feminist efforts to reform the doctrine of marital service, the common law rule giving husbands property rights in their wives' labor. As *Home As Work* demonstrates, feminists demanded more far-reaching reform than nineteenth-century legislatures granted. The woman's rights movement originally sought to abolish the doctrine of marital service by enacting joint property laws that would give husbands and wives equal rights in family assets; the movement argued that wives were entitled to joint rights in marital property by reason of the labor they contributed to the family economy.[36] Legislatures entertained feminist arguments, but none enacted joint property laws or laws giving a wife rights in her family labor; instead legislatures enacted statutes giving a wife rights in her "personal labor" or in labor she performed "on her sole and separate account."[37] These earnings statutes amounted to a repudiation of

33. BASCH, *supra* note 18, at 200-23 (discussing the "weakness of the statutes relative to the strength of the common law" and noting the tendency of judges to interpret "the intent and spirit of the legislation as conservatively as possible").

34. *Id.* at 200; *cf. id.* at 224 ("Some legal scholars view the statutes as the 'silent revolution' that legitimated the erosion of the patriarchal family without extensive controversy. The New York experience, however, suggests that the process was neither silent nor revolutionary.") (citation omitted).

35. Siegel, *supra* note 13.

36. *See, e.g., id.* at 1113-15 (discussing joint property resolutions of early woman's rights conventions).

37. The earnings clauses of the statutes can roughly be divided into three categories. *See* Joseph Warren, *Husband's Right to Wife's Services* 38 HARV. L. REV. 421, 622 (1925). Some statutes entitled the married woman to earnings from her labor, or services for "her sole and separate use." *See id.* at 433-46. Another group entitled her to earnings she had acquired by trade, business, labor or services carried on or performed "on her sole or separate account." *See id.* at 622-43. Finally, the last group of statutes gave the married woman a right to earnings from her labor or services, but expressly excluded services performed for her husband, children, or family. *See id.* at 643-50. But this schematic division is of questionable utility. New York's earnings statute could be classified in Warren's first and second catego-

contemporary feminist demands for emancipation of wives' household labor.[38] Indeed, many states continued to protect a husband's property rights in his wife's household labor by enacting earnings statutes that expressly excluded the labor a wife performed for her husband or family.[39] Considered from this vantage point, when legislatures emancipated wives' "personal" or "separate" labor, but not their labor for the family, they were preserving and modernizing the doctrine of marital service. The feminist movement's unrealized joint property demands thus shed light on the common law of marital status as it was evolving in the market economy of mid-nineteenth-century America.

Industrialization does play an important role in this account of common law reform, but not the role posited by historians who assume a root antagonism between a putatively feudal law of status and the needs of a market economy.[40] I view family and market as interdependent institutions that evolve together in history. Work is performed in both spheres, under discrete but interlocking legal regimes that take modern shape in the nineteenth century. Simply put, changes in the law governing ownership of wives' labor occurred in conjunction with the evolution of the modern labor market.

Industrialization shaped both work *and* family relations: in the industrial era, men's work was separated from the household setting, while the work women continued to perform in the family sphere was "gender-marked" as distinct from market labor.[41] The reform of marital status law was an integral part of these developments in family/market relations, as this article demonstrates. The earnings statutes modified the doctrine of marital service in ways that reflected and reinforced the emergent, gender-marked distinction between market and household labor. As drafted and construed, the reform statutes gave a married woman property rights in her "personal" labor, but continued to protect a husband's rights in her "wifely" labor—redefining "wifely" labor for purposes of the common law doctrine of marital service as household labor a married woman performed for her husband or family. Courts construing the earnings statutes refused

---

ries. *See* Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157 ("An Act Concerning the Rights and Liabilities of Husband and Wife"). By contrast, Iowa's statute gave a wife rights in her "personal labor." *See* IOWA CODE tit. 15, ch. 2, § 2211 (1873) (quoted *infra* text accompanying note 169). More importantly, as we will see in Part III, judicial construction of the statutes tended to obscure differences and similarities in drafting.

38. For examples of state legislatures that repudiated feminist demands for joint property rights in marriage as they granted wives separate property rights in earnings, see Siegel, *supra* note 13, at 1135-46 (New York); *id.* at 1145 n.261 (Ohio); *id.* at 1172-73 (Connecticut); *id.* at 1173-74 (Oregon).

39. *See, e.g., id.* at 1180-81; Warren, *supra* note 37, at 643-50; *see also infra* text accompanying note 64 (discussing enactment of Maine statute granting married women "the wages of her personal labor, performed other than for her own family").

40. *See supra* notes 13-17 and accompanying text.

41. *See* Siegel, *supra* note 13, at 1092-94.

to enforce interspousal contracts for household labor, reasoning that such contracts would transform the marriage relationship into a market relationship.[42] In this way the law of marital status bounded the development of the modern labor market and helped to define the social meaning of market labor itself. In short, just as the evolution of the modern labor market shaped the law of marriage, the law of marriage shaped the evolution of the modern labor market. *The doctrine of marital service, as reformed by the earnings statutes enacted during the nineteenth century, is thus properly understood as an integral part of an industrial capitalist economy, not an archaic remnant of ancient feudal society.*

Scholars have generally depicted coverture's reform as supplanting ancient relations of status with modern relations of contract. By contrast, this study will consider how a movement for egalitarian law reform worked to modernize an otherwise antiquated body of status law so that it might continue to regulate gender relations in the emerging industrial economy.[43] This paradigm shift in turn alters the framework within which we are to assess the work of courts in implementing the marital status reform statutes of the nineteenth century. For once it is appreciated that legislatures both accommodated and frustrated feminist reform demands, the familiar story of tradition-bound courts resisting the progressive reform initiatives of state legislators no longer seems quite so compelling.[44] Instead, we need to consider how legislatures and courts might have collaborated in devising ways to reform the common law without threatening core aspects of the family relation. Preserving the essential features of family life during a period of wide-ranging social transformation requires creative strategies for accommodating change; simple intransigence will not suffice. I therefore approach the record with attention to the provisional strategies courts employed to make sense of the reform statutes, considering both the solutions judges embraced and those they rejected as they sought to answer the many questions legislatures delegated to them. When the reform process is analyzed from this vantage point, it emerges as a wide-ranging effort to forge a body of family law for the modern era—one that could accommodate social change and do justice to husband and wife,

42. *See infra* Part III.C.

43. Along similar lines, historians of labor law have recently begun to examine how the common law of master/servant shaped the body of employment law that emerged in the industrial era—the period otherwise associated with "freedom of contract." *See generally* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 (1991); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

44. *See, e.g.*, BASCH, *supra* note 18, at 200-23; *see also id.* at 202 n.2. (citing scholars commenting on the restrictive construction of marital status reform statutes).

while preserving intact those features of the marital relation that legislators and judges understood to define the institution.

### B. EARNINGS REFORM: RECONSIDERING THE "STATUS TO CONTRACT" STORY

Concerns about abolishing or preserving the law of marital status did not play a particularly prominent role in the initial stage of coverture's reform. Yet, over time, these concerns moved to the foreground of debate, so that those who advocated and opposed coverture's reform, as well as the legislators and judges who enacted and implemented the reform statutes, were quite self-consciously engaged in considering whether and how the status relations of marriage should be preserved. This section will examine the reform process in a bit more detail in order to demonstrate how those engaged in reforming the common law initially confronted questions about modifying the structure of the marriage relationship.

For these purposes, it is helpful to distinguish between two phases of coverture's reform.[45] Generally, reform began with the passage of married women's property acts that allowed wives to hold property in their own right;[46] sometimes these statutes conferred on wives limited dispositional powers over the property to which they now had legal title. A second wave of reform legislation, which I have referred to as "earnings statutes," allowed wives to assert property rights in their labor and granted wives various forms of legal agency respecting their separate property, including the capacity to contract and file suit.

In important respects, this second wave of reform was an outgrowth of the first. When legislators initially modified the common law, their object was to provide families economic security—not to empower or emancipate wives.[47] The early married women's property acts were thus drafted and construed in accordance with equitable precedents, to give wives limited dispositional powers over the property to which they now had legal title.[48]

---

45. In fact, the common law of marital status was modified in each state by numerous statutes of varying terms; differences among these statutes were both accentuated and obscured by the courts charged with administering them. *See, e.g., infra* Part II (discussing interaction between legislature and courts reforming the common law in New York). Yet if reform occurred in different jurisdictions by different paths and at different rates, it did occur in something roughly approximating a common progression. The following narrative simplifies the reform process in order to highlight some of its general features.

46. Sometimes these statutes simply protected a wife's equitable separate estate from a husband's creditors. For a discussion of these "debt-immunity" statutes, see *supra* note 26.

47. *See supra* notes 25-26 and accompanying text.

48. Courts construing the reform statutes recognized only such contracts as they deemed to be undertaken "with respect to" a wife's separate estate. This resulted in endless litigation over the question of what contracts might be said to "relate to, concern, refer to, [or] respect a married woman's separate property." *See* David Stewart, *Contracts of Married Women Under Statutes*, 19 AM. L. REV. 359, 369 (1885). For discussion of the equitable doctrines courts drew upon, see *supra* note 23 and *infra* notes 90-94 and accompanying text.

This hybrid property regime was, however, highly unstable. Husbands seeking to insulate assets from creditors could put title to the property in their wives' names. If the wife conveyed or encumbered the property or pledged it as collateral for her husband's debts, her legal incapacity could always be pleaded in defense to third-party claims. Faced with the contradictory claims of debtor-families, creditors in turn demanded that courts "pierce" the arrangements and regularize rules regarding wives' property. Courts vacillating between protection of family assets and protection of creditor interests developed a conflict-riddled law of capacity destined for collapse.[49] The limited reforms of the first phase of marital property reform precipitated a state of commercial confusion. The only sure resolution seemed to lie in recognizing in wives a general capacity to convey and encumber the property to which they now had title at law.[50]

The commercial havoc caused by the initial reform statutes provided an important stimulus to the passage of statutes granting wives contractual capacity and rights in earnings; yet this second wave of reform differed markedly from the first. In the years after the Seneca Falls convention of 1848, woman's rights advocates began to play an increasingly vocal role in the reform process. These early feminist advocates transformed a relatively uncontroversial matter of law reform into a controversial matter of political right, bringing to the foreground of debate the legitimacy of the patriarchal prerogatives coverture embodied.[51] The Declaration of Sentiments promulgated at Seneca Falls described the "history of mankind [as] a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny

---

49. For a flavor of this litigation, see BASCH, *supra* note 18, at 209-15 (New York); RABKIN, *supra* note 18, at 125-45 (New York); Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3 (1985) (Oregon Territory).

50. The currency of this argument for passage of the earnings statutes is reflected in the remarks of an opponent of further reform:

> The transfer to the wife of the control and ownership of her own property has probably been, on the whole, beneficial, and not justly to be complained of by any one; but the transaction of the husband or wife, or both of them, with third persons, dealing with reference to this property, has been the occasion of frequent and great wrongs, especially to the third persons so dealing with them, therefore, the claim is made that if the ownership is given to her instead of to him, so should the *power to contract,* with its consequences. This does not, by any means, necessarily follow, unless we ignore the other considerations which have manifestly influenced and controlled the legislative mind in the enactment of the most radical modern legislation on the subject,— that is to say the unity of person and the power and influence of the husband over the wife because of it, and *secondly,* the peace and well-being and support of the family which is incidental to the marriage relation.

James F. Mister, *Law of Married Women*, 20 AM. L. REV. 356, 363 (1886).

51. *Compare* Chused, *supra* note 49, at 6-7 (describing how creditor conflicts stimulated the passage of earnings statutes) *with* Siegel, *supra* note 13, at 1179 n.403 (arguing that "political agitation," in addition to commercial havoc, was a stimulus).

over her," and enumerated a list of grievances in which deprivation of suffrage and subordination in marriage figured prominently: "He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns."[52] Feminists criticized the common law for transforming economically productive women into economic dependents of their husbands, and demanded of legislatures the kind of reforms that would give women economic as well as political autonomy—including laws that would emancipate wives' household labor.

Feminists challenging the common law doctrine of marital service did not simply seek for wives rights in their "wages"—as historians have generally assumed and the Declaration of Sentiments itself seems to suggest. In *Home As Work*,[53] I describe a demand for joint property rights omitted in most accounts of the movement's reform agenda.[54] This demand for joint property rights was advanced at the earliest woman's rights conventions. For example, at an 1848 Rochester meeting held some weeks after the Seneca Falls convention and some months after passage of a New York statute that allowed wives to hold separate property in marriage, Elizabeth Cady Stanton criticized the doctrine of marital unity on the grounds that "she thought the gospel, rightly understood, pointed to a oneness of equality, not subordination, *and that property should be jointly held*."[55] While the common law gave a husband property rights in his wife's labor, early feminists argued that wives should own their own labor.[56] Yet to rectify the expropriation of wives' labor, feminists demanded for wives a *joint* property right in family assets. This joint property right was explicitly intended to secure for wives the value of their household labor. In 1851, a woman's rights convention resolved:

> That since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should, during life, have the same control over the joint earnings as her husband, and the right to dispose at her death of the same proportion of it as he.[57]

---

52. REPORT OF THE WOMAN'S RIGHTS CONVENTION, HELD AT SENECA FALLS, N.Y., July 19 & 20, 1848, at 6 (Rochester, John Dick 1848).

53. Siegel, *supra* note 13.

54. *See id.* at 1077 n.6.

55. PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTIONS, HELD AT SENECA FALLS & ROCHESTER, N.Y., JULY & AUGUST, 1848, 14 (Robert J. Johnston ed., 1870), *reprinted as* WOMAN'S RIGHTS CONVENTIONS: SENECA FALLS & ROCHESTER (Arno 1969) (emphasis added).

56. As Sarah Owen explained at that same Rochester convention, "[o]bserve the difference, when, after marriage, [a wife] assumes her right to dispose of, as she sees fit, the product of her own hard-earned toil, to which, by law she has no right or title except the right of dower." *Id.* at 9. At common law, a widow's "dower" was a life estate in one-third of the real property her husband held during the life of the marriage.

57. THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 15TH AND 16TH, 1851, 18 (New York, Fowlers and Wells eds., 1852). For a more

Feminist arguments for earnings reform focused on the labor wives performed in the household because, in the nineteenth century, married women performed most of their productive labor in the family setting: the economically valuable but uncompensated work of raising, feeding, and clothing a family, as well as income-earning activities such as industrial piecework, dairying, keeping boarders, and taking in laundry and sewing.[58]

As I recount in *Home As Work,* during the 1850s, feminists held a series of conventions and petition drives in the state of New York in which they sought suffrage and a range of reforms, including the enactment of a joint property regime.[59] In 1859, when a reform bill was on the verge of passage, the movement began to moderate its demands, seeking for wives the right to their *wages*. Feminists justified this demand on protectionist grounds, arguing that such reform would assist the poor wife whose drunken or profligate husband was by law entitled to appropriate her earnings and thus deprive his starving family of its only means of support.[60] Thus, several kinds of arguments for earnings reform were in the air in 1860 when New York adopted a reform statute providing that "the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property . . . ."[61] Susan B. Anthony was closely involved in negotiating and drafting this legislation,[62] and it is most likely due to her efforts that the statute did not explicitly exclude from its coverage the work wives performed for their families, as Maine's reform statute did. The Maine legislature had recently refused to enact an earnings law after "a certain member grew fearful that wives would bring in bills for their daily service;"[63] Maine then enacted an earnings statute providing that "[a]ny married woman may demand and receive the wages of her personal labor, *performed other than for her own family* . . . ."[64] New York's statute did not contain such exclusionary language, but feminist advocates understood that, whatever the scope of its earnings clauses,[65]

---

detailed account of the joint property claim, and the range of critical arguments supporting it, see Siegel, *supra* note 13, at 1112-35.

58. *See* Siegel, *supra* note 13, at 1086-91 (reviewing recent literature on the economic history of the family).

59. *See id.* at 1135-46 (recounting the feminist campaign in New York during the 1850s).

60. *See id.* at 1141-42 (describing shift in demand).

61. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157 ("An Act Concerning the Rights and Liabilities of Husband and Wife"); *see* BASCH, *supra* note 18, at 164, 188-99 (describing arguments made for earnings statute in New York).

62. *See* Siegel, *supra* note 13, at 1143-44 (describing how Susan B. Anthony supplied New York Senate sponsor with a modified Massachusetts bill).

63. 1 HISTORY OF WOMAN SUFFRAGE 632 (Elizabeth C. Stanton et al. eds., reprint ed. 1985) (1881) (Report of Lucy Stone, addressing the seventh annual Woman's Rights Convention).

64. Act of Apr. 17, 1857, ch. 59, 1857 Me. Acts 49 (emphasis added).

65. For commentary on the bill contemporaneous with its passage, see Siegel, *supra* note 13, at 1143 n.254 (quoting Ernestine Rose, a woman's rights advocate, and *The New York Times*).

the legislation did not recognize joint property rights either. They continued to agitate for enactment of a joint property law until diverted by the Civil War.[66]

This story was repeated in states across the country in the aftermath of the Civil War. While feminists in the postwar suffrage movement did not press the joint property claim with the tenacity they had in the antebellum period, they popularized joint property discourse in the pages of the nation's proliferating woman suffrage journals and lobbied legislatures around the nation for joint property rights, associated inheritance reforms, and separate property rights in earnings.[67] Many states enacted earnings statutes in this period, but none recognized joint property rights, and a good number explicitly excluded from coverage of the earnings statutes the work a wife performed for husband or family.[68]

Although the earnings statutes enacted in years immediately before and after the Civil War did not grant feminists all they sought, this body of legislation did differ significantly from the initial reform statutes giving wives the right to hold property in their own name. The earnings statutes gave a married woman property rights in her own labor as well as the capacity to act as a legal agent on her own behalf. The second wave of reform thus exceeded the logic of family protection.[69] In recognizing the wife as a legal and economic agent in her own right, the reform statutes implicated the structure of the marriage relation itself.

In 1880, a speaker before a convention of the American Social Science Association discussed the new marital status reform legislation. Professor Hitchcock voiced anxieties about imminent gender conflicts, presumably provoked by feminist agitation, as he summoned for his audience the possible consequences of the new legislation:

> If [a wife] chooses, she may employ her time with domestic cares; or, if she chooses, she may leave her babes for [her husband] to look after and

66. *See id.* at 1144-45 (discussing immediate pre-war period).

67. *Id.* at 1153-77.

68. *Id.* at 1179-83. State codes adopted in the 1860's and 1870's frequently included earnings provisions. *See* 2 BISHOP, *supra* note 26, at 490-91, 505, 512, 520, 524, 530, 536-37 (California, Illinois, Maine, Maryland, Massachusetts, Mississippi); *see also* Chused, *supra* note 18, at 1424 n.361 (discussing earnings statutes adopted in Massachusetts (1855); Kansas (1858) (territorial legislation); New York (1860); Alabama (1868) (free trader statute); Illinois (1869); Iowa (1870); Ohio (1871); Pennsylvania (1872); Delaware (1873); Kentucky (1873); Arkansas (1873); Indiana (1879)).

69. There were proponents of reform who rationalized the earnings statutes as extending to the working class benefits that the property acts had secured for the middle class—protecting wives against a dissolute or profligate husband and providing the family a measure of economic security against an industrious husband's creditors. For examples of such arguments, see Siegel, *supra* note 13, at 1176.

> nurse, and her meals for him to prepare with his own, while she engages in business on her separate account, and accumulates money . . . .[70]

If this dire circumstance had not yet materialized, it was a prospect properly contemplated in the wake of statutory reform:

> It may be said that this picture is overdrawn, because it is unlikely that any woman would so abuse the privileges which the law intends solely for her protection. Nevertheless, these are quite within the possible results of such legislation, and by them it is quite rightfully tested.
>
> It is obvious that the actual significance and tendency of these statutes is to be measured not so much by the immediate effect of this or that provision, or the existence of this or that evil under the old law which it is designed to prevent, as by the extent of its departure from that conception of marriage as a *status,* and of the relation to society and to each other of those who enter into it, upon which the old law was based.[71]

While legislatures may have intended no radical social transformation in enacting the various marital reform statutes, the transformative power of this body of law now stood in plain view. Professor Hitchcock's message was clear: application of the statutes without attention to their "possible results" would be a dereliction of judicial duty; courts were to approach common law reform with greater deliberation and foresight than the legislatures had heretofore demonstrated.

If the story of coverture's reform began in state legislatures across the country, by the latter half of the nineteenth century it had shifted in significant part to its courthouses. It was there that the legislative initiative—a hybrid of equitable and common law traditions reflecting a diverse body of social commitments—would be distilled into a legal order having practical force in everyday affairs. It fell to the courts to specify the ever-shifting relations of common law, equity, and statutes, and, as Professor Hitchcock warned, to define marital status in view of the continual adjustment of its incidents.

The high stakes raised by this phase of reform did not escape courts called upon to apply the new legislation. Nineteenth-century judges, steeped in the logic of contract, readily appreciated how the new earnings statutes might transform the social structure of marriage. By granting wives rights in earnings, the statutes seemed to abrogate a husband's common law rights in his wife's services. Not only did the statutes encroach upon a husband's rights in his wife's labor, but in conferring on wives general

---

70. Henry Hitchcock, *Modern Legislation Touching Marital Property Rights,* 13 J. SOC. SCI. 12, 34-35 (1881) (reproducing paper presented before the American Social Science Association Convention, Saratoga, Sept. 9, 1880).

71. *Id.*

contractual capacity, they raised a possibility not contemplated at law and only dimly glimpsed in equity: that a wife might contract with her husband regarding her services. *Ironically, by emancipating wives' labor in the form of a separate property right—rather than the joint property right in marital assets that feminists initially demanded—legislatures had statutorily created the possibility of interspousal market transactions for household labor.*

Judges recognized that the earnings statutes might refashion marriage in the image of the market, and interpreted the statutes so as to prevent this possibility from ever materializing. The observations of a judge interpreting New York's 1860 earnings statute are typical:

> If we reverse the judgment, we must hold unqualifiedly that every time when a married woman does any work for a person, other than her husband, her earnings are separate. If this be so, I do not see why she is not entitled to be paid by her husband when she does work for him—nurses him in sickness, or sews on his buttons in health. If we are to take the statute literally: 'The earnings of any married woman from her * * * labor and services shall be her sole and separate property,' why not her earnings in the work of the household? The section must be read as a whole . . . . That is . . . not necessarily all business carried on, or labor performed by [a married woman], is on her separate account.[72]

The same courts that understood contract as fundamental to the social order viewed the prospect of wives contracting for their labor as antithetical to the social order. This apparent contradiction was in fact no contradiction at all, for it reflected the deep structure of common law and liberal traditions from which the contractarian ethos flowed. After all, judges of this era endorsed freedom of contract to safeguard the "patrimony of the poor man"—"[t]he property which every man has in his own labor";[73] they intended freedom of contract to preserve "the ability of the laborer to support himself and his family."[74] The judges called upon to administer the earnings statutes saw the market and family as separate, gendered spheres[75] and sought to apply the earnings statutes in such a way as to make them so in law. Their vision had a certain coherence: just as liberty of contract ought to govern market exchange, the status obligations of support and service ought to structure family exchange.

---

72. Beau v. Kiah, 4 Hun 171, 174 (N.Y. Sup. Ct. 1875).

73. State v. Goodwill, 10 S.E. 285, 287 (W.Va. 1889) (declaring unconstitutional statute that regulated compensation of miners and prohibited payment by company scrip).

74. Lochner v. New York, 198 U.S. 45, 59 (1905).

75. *Cf.* Siegel, *supra* note 13, at 1091-94 (discussing nineteenth-century, separate-spheres ideology).

Courts charged with administering the statutes thus faced a complex interpretive task. Professor Hitchcock warned:

> Bench and bar alike are constantly embarrassed by the duty of construing and applying [the] new statutes, which in part abrogate and in part leave untouched long-established rules: statutes couched in terms, the full force of which the legislator evidently had not weighed, and raising new questions for which they afford no solution. Yet the courts, compelled to face these questions in the ceaseless conflict of human interests, must somehow solve them: if not by the express provisions of the statute, then in harmony with its probable intent, and also in harmony with other established rules of property or conduct,—to disturb or ignore which would be equally an abuse of judicial power and the sure occasion of future injustice.[76]

It fell to the courts in the late nineteenth century to decide how to square the reform statutes with a common law tradition, or, more precisely, how to define marital status in a changing legal and economic universe. Courts could neither preserve the status quo ante, nor steadily give ground: creativity was required when, with each passing decade, they faced new statutes and new transactions requiring their application. We need then to scrutinize this phase of coverture's reform from something of a different angle. We must move beyond familiar accounts of judicial "resistance"[77] and better define the nature of judicial response—to ascertain with greater precision the points of resistance and the lines of accommodation the record reflects. For, courts charged with administering the statutes did not simply "frustrate" reform; as they acceded to change, they defined its limits.

The remainder of this article explores judicial response to the earnings legislation from several perspectives. The discussion begins in New York State, a jurisdiction of national prominence in marital property reform. Here I trace changes in the law concerning wives' contractual capacity and earnings in order to reconstruct the interaction between the state's legislature and its courts as they collaborated in reforming the common law of marital status in the latter half of the nineteenth century. After scrutinizing the reform process in one state, I then survey earnings reform in common law jurisdictions across the country. My purpose is to show how courts progressively revised the law of marital status as they adjudicated wives' claims to earnings arising from contracts with third parties, as well as from interspousal contracts for labor performed in the family business. After retracing the complex path by which courts initially accepted earn-

76. *Cf.* Hitchcock, *supra* note 70, at 14.
77. *See supra* notes 28-29 and accompanying text.

ings reform, I then examine the points of resistance this path of accommodation reflects, concluding with an analysis of the multiple and often contradictory justifications judges offered for the bar they uniformly imposed on interspousal contracts regarding a wife's domestic labor.

## II. INTERPRETATION OF NEW YORK'S 1860 EARNINGS STATUTE

### A. REGULATING THE SCOPE AND PACE OF REFORM: LEGISLATIVE AND JUDICIAL COLLABORATION

The New York legislature acted to modify the law of marital status on numerous occasions during the latter half of the nineteenth century, addressing the question in 1848, 1849, 1860, 1862, 1884, 1887, 1892, 1896, and 1902. The first reform statute, enacted in 1848, enabled a married woman to receive and hold to her "sole and separate use" real and personal property, removing such property from the control of the husband and protecting it from liability for his debts;[78] amendments enacted in 1849 specified that wives holding property for their sole and separate use might convey and devise such property.[79] In 1860, the legislature declared that a wife might "perform any labor or services on her sole and separate account," and provided that "the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name."[80] In addition, the statute provided that wives might sue and be sued respecting their separate property, and conferred upon married women a cause of action for injury to person or character.[81] Amending legislation enacted in 1862 provided that a wife might engage in transactions involving real property without her husband's consent.[82] In 1884, the legislature conferred on wives general contractual capacity at law, but preserved legal and equitable precedent concerning contracts between husband and wife.[83] The statute was amended in 1892 to sanction contracts between husband and wife—except such contracts as might "alter[ ]" or "dissolve[ ]" the marriage relation, or relieve the husband from liability to support his wife.[84] General legislation codifying changes in domestic relations law was enacted in 1896.[85] Finally, in 1902, over 40 years after passage of the original earnings statute, the legislature announced a *presumption* that a

78. Act of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307.
79. Act of Apr. 11, 1849, ch. 375, 1849 N.Y. Laws 528.
80. Act of Mar. 20, 1860, ch. 9, § 2, 1860 N.Y. Laws 157.
81. *Id.* § 7.
82. Act of Apr. 10, 1862, ch. 172, § 1, 1862 N.Y. Laws 343, 344.
83. Act of May 28, 1884, ch. 381, 1884 N.Y. Laws 465.
84. Act of May 14, 1892, ch. 594, 1892 N.Y. Laws 113. Legislation enabling husband and wife to convey realty to each other without an intermediary was enacted in 1887. *See* Act of June 6, 1887, ch. 537, 1887 N.Y. Laws 667.
85. Act of Apr. 17, 1896, ch. 272, art. 3, 1896 N.Y. Laws 215.

married woman alone was entitled to recover "wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor, or services, or which was derived from any trade, business or occupation carried on by her" and a further presumption that she alone was entitled to recover where "the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed . . . ."[86]

As this record of legislative activity indicates, New York's first married women's property act initiated no abrupt change in the law of marital status, but instead inaugurated an incremental and halting modification of the common law rule. What this account of legislative activity obscures, however, is the important role that courts played in directing reform. An examination of litigation under the state's prominent 1860 earnings act reveals that the New York Court of Appeals selectively encouraged the legislature to accelerate and to delay the pace of marital status reform. In its decisions of the 1870s, the court invited the legislature to regularize wives' capacity to deal with third parties, but cautioned the legislature to respect a husband's property rights in his wife's labor. In both areas, the legislature displayed a remarkable receptivity to judicial guidance. The result was that these two aspects of coverture's reform took strikingly different paths in the decades after passage of the 1860 statute: judges and legislators granted a married woman the legal capacity to contract with third parties as an autonomous market actor, yet continued to protect a husband's property rights in products of his wife's labor.

1. Contractual Capacity

New York's 1860 earnings statute greatly enlarged the capacity of married women to enter into transactions respecting their separate property. For example, the 1860 statute provided that "[a] married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account,"[87] and "sue and be sued in all matters having relation to her property";[88] the statute also relieved a husband from liability on any "bargain or contract made by any married woman, in respect to her sole and separate property."[89] Yet the reform statute did not make wives autonomous legal agents. Rather than declaring that a wife possessed the same legal capacity as her husband or an unmarried woman, the statute granted a wife enumerated powers in "relation to her property" or "in

86. Act of Apr. 2, 1902, ch. 289, 1902 N.Y. Laws 844. The statute still allowed a husband to collect his wife's wages when he had expressly contracted with his wife's employer with his wife's *knowledge* or consent. *See infra* note 160 (quoting and discussing statutory provision).

87. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157.

88. *Id.* § 7.

89. *Id.* § 8.

respect to her . . . property." Such language invited courts to interpret the statute in accordance with equitable traditions that traced a wife's capacity to her property, not her person.[90]

Equity allowed a married woman to engage in transactions concerning her separate estate only if the trust creating the estate gave her the capacity to do so.[91] Even when a trust gave a married woman full capacity to manage its assets, equity recognized in wives something less than full capacity at law. The doctrine of charging enforced a wife's commitments as equitable liens on her estate rather than as personal liabilities;[92] further, the validity of a charge might depend on its relation to the estate, or even the existence of estate assets at the time of formation.[93] In practice, vagaries surrounding the equitable doctrine of charging rendered a wife's commitments unreliable at best.[94] During the 1870s, however, the Court of

90. This conceptual orientation can be traced to equitable jurisdiction: a married woman lacked capacity at law, and equity assumed jurisdiction over property held in trust for her, recognizing such capacity in the wife as redounded to the property's protection. *See supra* note 23 and accompanying text.

91. The terms of the trust determined a wife's dispositional capacity over her estate. Originally wives had only such capacity as the trust expressly conferred. But by the early nineteenth century, in New York at least, a wife had dispositional capacity except as expressly negatived by the trust instrument. *See* Jaques v. Methodist Episcopal Church, 17 Johns. 548, 563-65 (N.Y. 1820) (holding that wife can dispose of property in separate estate without consent of trustee unless specially restrained by the trust instrument); *cf. supra* note 23.

92. *See, e.g.*, Owen v. Cawley, 36 N.Y. 600, 602-03 (1867); Yale v. Dederer, 18 N.Y. 265, 275-76, 278-79 (1858).

93. The doctrine of charging recognized a wife as having legal capacity insofar as she acted for the "benefit" of her separate estate, or more generally in "relation" to that estate. *See* Stewart, *supra* note 48, at 369-70. A wife might be deemed to lack capacity if she committed estate assets to ends having no discernible relation to her estate; jurisdictions differed as to what constituted an "intent" to charge an estate. Even at a late date, the defense of "lack of consideration" was available to the wife in such circumstances, even if her promissory note was presented by a bona fide holder for value. *See* Linderman v. Farquharson, 5 N.E. 67, 68 (N.Y. 1886) (analyzing transaction that occurred prior to passage of 1884 statute granting married women contractual capacity at law) ("It is only where a married woman is carrying on a separate business, that notes given by her could, before the act of 1884, be treated as commercial paper."). For this reason, a wife's commitment might be determined infirm where she lacked an antecedent separate estate to be benefitted in the transaction. A mortgage note on property purchased certainly benefitted the separate estate thereby created but not one in existence at the time of contract formation. Courts construing the property acts ultimately solved this problem by characterizing the mortgaged property as the antecedent estate for purposes of the transaction. *See, e.g.*, Sidway v. Nichol, 34 S.W. 529, 530-31 (Ark. 1896); City Bldg. & Loan Ass'n v. Jones, 10 S.E. 1079, 1080 (S.C. 1890); *cf. infra* text accompanying notes 98-100 (discussing New York law).

94. *See, e.g.*, David Stewart, *Married Women Traders*, 33 AM. L. REG. 353, 362-63 (1885); *Contracts of Married Women*, 20 ALB. L.J. 244, 246 (1879) (explaining that in consequence of various theories of charging, "the grounds, on which any debt can be charged on a married woman's estate, are utterly unintelligible; and as a result no two courts, who have indulged in these fancies, can agree; and not only is the law different in all these States, that have attempted to follow these fancies, but in the same State these decisions vary constantly, as the judges or the court is changed") (quoting Radford v. Carwile, 13 W. Va. 572, 583

Appeals interpreted the earnings legislation in ways that broke with equitable precedents and moved in the direction of recognizing in wives full promissory capacity at law.

In *Frecking v. Rolland,*[95] for example, a wife signed a promissory note with her husband in order to obtain a loan which they used to initiate a business ultimately transferred to her separate ownership. If the wife lacked general contractual capacity, had no separate estate directly benefitted or expressly charged, and was not engaged in a separate business at the time of contract formation, was her note enforceable? The court concluded that it was. In addition to the clause authorizing a married woman to carry on a separate business, the 1860 act contained a provision exempting a husband from such contracts as a wife might assume "in or about" her separate business. Seizing upon it, the court reasoned, "the authority of a married woman to bind herself by executory contracts in relation to her separate business is recognized in the provision which exempts the husband from liability thereon."[96] But even this generous act of statutory interpretation begged the question: the "relation" of the wife's contract to her business appeared only at the point of performance, not formation. The court nonetheless proceeded to interpret the statute expansively:

> The power to carry on a separate trade or business includes the power to borrow money, and to purchase, upon credit, implements, fixtures and real or personal estate necessary or convenient for the purpose of *commencing* it, as well as the power to contract debts in its prosecution after it has been established.[97]

In *Cashman v. Henry,*[98] the Court of Appeals faced a similar question concerning a wife's liability on a mortgage. The lower courts had ruled the mortgage unenforceable, reasoning that because the wife lacked general contractual capacity, she could not be held to her commitment unless there existed an antecedent separate estate directly benefitted or expressly charged, or the liability was incurred in the prosecution of a separate trade or business. The Court of Appeals reversed. It held that a wife had general capacity to enter into an executory contract to pay for property because the legislature had added the word "purchase" to the amending statute of 1862; the term appeared in a statutory clause specifying the types of property about which wives might sue or form a contract without rendering

---

(1879)).

95. 53 N.Y. 423 (1873).

96. *Id.* at 425.

97. *Id.* (emphasis added). *See also* Adams v. Honness, 62 Barb. 326, 336 (N.Y. Sup. Ct. 1872) (finding wife's executory contract for services authorized by Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Law 157; ruling that statutory right in earnings "necessarily includes the right to make valid bargains for her labor or services before they are performed").

98. 75 N.Y. 103 (1878).

the husband liable.[99] The court justified its generous interpretation of statutory language by offering a strikingly liberal characterization of the statutory scheme:

> It will be observed that these statutes confer upon a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell or give it away .... She may engage in business, and incur the most dangerous, and even ruinous liabilities in its prosecution, and they will be enforced against her to the same extent as if she was unmarried. She is no longer regarded as under the tutilage of the court, but the new legislation assumes that she is capable of managing her own interests.
>
> ....
>
> The conclusion is that under the statutes as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase . . . may purchase property upon credit, and bind herself by an executory contract to pay the consideration money . . . and . . . her liability does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules, which determine the liability of persons *sui juris*, upon their contracts.[100]

Thus, in cases concerning a wife's capacity to assume contractual commitments, the New York Court of Appeals described the earnings legislation as wholly emancipating married women from the disabilities of coverture; it construed the statutes as bestowing full legal agency upon married women so that they might engage in business transactions as if unmarried.[101] Within six years the legislature enacted a statute that expressly repudiated the equitable doctrine of charging and that gave wives full capacity to contract with persons other than their husbands.[102] By translating wives' dealings with third parties from an equitable to a legal basis, the 1884 statute finally recognized wives as *sui juris*—having personal capacity

---

99. *Cashman,* 75 N.Y. at 114-15.

100. *Id.* at 113, 115.

101. *See, e.g.*, Bodine v. Killeen, 53 N.Y. 93, 97 (1873) (construing statutory clause enabling married women to carry on a separate business as bestowing upon wives "full legal capacity to transact the business, including, as incidents to it, the capacity to contract debts and incur obligations in any form, and by any means, by which others acting *sui juris* can assume responsibility").

102. The statute provides in relevant part:

> A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary.

Act of May 28, 1884, ch. 381, § 1, 1884 N.Y. Laws 465. It thereupon states: "This act shall not affect nor apply to any contract that shall be made between husband and wife." *Id.* § 2.

to contract with third parties—and so regularized their market dealings. But this legislative reform was anticipated by the Court of Appeals and fairly may be seen as perfecting its work.

2. Property Rights in Earnings

Just as the New York legislature was receptive to judicial guidance in matters concerning wives' capacity to enter contracts, it also heeded judicial counsel in matters concerning ownership of wives' earnings. To recall, the 1860 statute enabled a married woman to "carry on any trade or business, and perform any labor or services on her sole and separate account . . ." and declared that "the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property."[103] The earnings provision of the statute charted new territory—territory little traversed in prior years by the equitable and customary concept of a wife as sole trader[104] or by the 1848 married women's property act.[105] When the legislature granted the wife property rights in her "labor or services," it necessarily encroached upon a husband's common law right in his wife's services. Yet the legislature did not explain whether or how the 1860 statute abrogated, modified, or preserved a husband's traditional property rights in his wife's labor. Resolution of the question was de facto delegated to the courts.

The New York Court of Appeals confronted this question during the 1870s. Initially, the court explained in *Brooks v. Schwerin*[106] that the earnings clauses of the 1860 statute worked "a radical change of the common law": while the "services of the wife in the household in

103. Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157.

104. In this country, "sole trading" rules, rooted in equity, custom, and less frequently, statute, allowed married women to engage in commerce under specified conditions. Sole trading rules addressed a wife's promissory capacity, a husband's liability on her commitments, and those circumstances in which a wife might trade in her own right—namely, husband's absence, abandonment, and, in some jurisdictions, consent and notice/registration. The law concerning rights in profits was less developed, but it appears that title vested in a husband except in cases of abandonment. *See* SALMON, *supra* note 27, at 44-53. Of course, at equity, a husband might settle a business or its profits on his wife just as he might make a gift of any assets in trust. *See infra* note 127.

105. Under the 1848-49 legislation giving wives the right to hold separate property in marriage, *see supra* notes 78-79 and accompanying text, courts had recognized wives' rights in earnings only where their labor was applied to management of a separate business, intermingled, that is, with the capital assets of a separate estate. *See* Birkbeck v. Ackroyd, 74 N.Y. 356, 357-58 (1878) (noting that "the acts of 1848 and 1849 did not change the rule of the common law giving the husband the right to the services and earnings of the wife, in cases where she had no separate estate, and where her labor was not connected with the use of her separate property"); Rider v. Hulse, 33 Barb. 264, 270 (1860) (construing 1848-49 legislation) (allowing husband to recover from wife's legatee monies wife earned selling butter, poultry, and calves while husband was at sea, because "[t]he fruits of her own labor or the profits or income of any business in which she may have embarked do not fall within the meaning of the acts"), *aff'd*, 24 N.Y. 372 (1862).

106. 54 N.Y. 343 (1873).

the discharge of her domestic duties still belong to the husband . . . when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole*."[107] Yet, shortly thereafter, the court began to retreat from *Schwerin*'s third-party rule, eroding its scope severely.[108]

In 1878, the Court of Appeals offered a new interpretation of the 1860 earnings statute. *Birkbeck v. Ackroyd*[109] involved a husband's suit against a mill owner for wages; the plaintiff sought compensation for his own services, as well as those of his wife and minor children, and further, by assignment, those of his two adult sons and their wives. Although the case involved a claim for a wife's earnings from a third party for work performed outside the home, the court declared the husband the proper party to recover, without ever referring to the *Schwerin* case. Instead, the court observed that the 1860 earnings statute

> does not wholly abrogate the rule of the common law. [A wife] may still regard her interests and those of her husband as identical, and allow him to claim and appropriate the fruits of her labor. The bare fact that she performs labor for third persons, for which compensation is due, does not necessarily establish that she performed it, under the act of 1860, upon her separate account. The true construction of the statute is that she may elect to labor on her own account, and thereby entitle herself to her earnings, but in the absence of such an election or of circumstances showing that she intended to avail herself of the privilege and protection conferred by the statute, the husband's common law right to her earnings remains unaffected.[110]

Although the court claimed to derive the doctrine of election from statutory language,[111] it primarily justified its interpretation of the statute

---

107. *Id.* at 348.

108. In *Reynolds v. Robinson,* 64 N.Y. 589 (1876), the court allowed a husband to recover wages his wife earned on a contract she made with a boarder, over the defendant's objections that the earnings belonged to the wife. The *Reynolds* court distinguished *Schwerin,* describing it as a case where the wife's wages were "earned in labor outside of her household, and entirely disconnected from her household duties." *Id.* at 593. In this case, by contrast, the wife earned her wages from labor performed in the household. When a married woman kept boarders, the *Reynolds* court reasoned, a husband might "covenant and agree that his wife should receive pay for her services on her own account; but in the absence of some arrangement to that effect, the inference of law and fact would be that she was working for her husband in the discharge of her marital duties." *Id.*

109. 74 N.Y. 356 (1878).

110. *Id.* at 358.

111. *See, e.g., id.* at 358-59. The portion of the statute from which the court claimed to derive the election doctrine both supports and controverts the court's interpretation:

> A married woman *may* bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman, from her

on the grounds that it effectuated the legislature's purpose. The 1860 statute, the court reasoned, was enacted to remedy a "defect in prior laws": "in cases where the husband was unable or unwilling to support his family, or was idle or dissolute," the "hardship" of allowing a husband to control a wife's earnings "was apparent."[112] Thus, to effectuate the protective purposes of the statute, it was "not necessary . . . to hold that, irrespective of her intention, [a wife's] earnings, in all cases, belong to her and not to the husband . . . ."[113] Properly analyzed, the question turned on whether the wife intended to labor on her sole and separate account. As the court analyzed a wife's "intentions," however, it focused on her *husband's* conduct, thereby creating a series of presumptions about the ownership of a wife's earnings that comported with the court's understanding of the statute's purposes:

> So where the wife is living apart from her husband, or is compelled to labor for her own support, or the conduct or habits of the husband are such as to make it necessary for her protection that she should control the proceeds of her labor, the jury might well infer that her labor was performed on her separate account. But where the husband and wife are living together, and mutually engaged in providing for the support of themselves and their family,—each contributing by his or her labor to the promotion of the common purpose—and there is nothing to indicate an intention on the part of the wife to separate her earnings from those of her husband, her earnings, in that case, belong, we think, as at common law, to the husband, and he may maintain an action in his own right to recover them.[114]

Notwithstanding enactment of the 1860 earnings statute, a wife's wages still presumptively belonged, as at common law, to her husband.

*Birkbeck* appeared in 1878, just two months before *Cashman v. Henry,*[115] in which the Court of Appeals recognized a wife's capacity to assume a mortgage debt. Authored by the same judge, the two opinions interpreted the same statute: the earnings legislation of 1860-62. As described in *Cashman,* the legislation "confer[red] upon the married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified . . . . She is no longer regarded as under the tutilage of the court, but the new legisla-

---

trade, business, labor or services, *shall be* her sole and separate property, and may be used or invested by her in her own name.

Act of Mar. 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157 (emphasis added).

112. *Birkbeck*, 74 N.Y. at 358.

113. *Id.* at 359.

114. *Id.*

115. 75 N.Y. 103 (1878).

tion assumes that she is capable of managing her own interests."[116] As described in *Birkbeck*, however, the purposes of the reform statute differed markedly. Under the 1860 statute, a wife's earnings presumptively "belong[ed] . . . as at common law, to the husband," save when it was "necessary for [a wife's] protection that she should control the proceeds of her labor."[117] Evidently, the "broad and comprehensive powers" the earnings legislation conferred on wives to manage real and personal property did not extend to the management of their own labor.

Just as the New York legislature accepted the court's invitation, extended in *Cashman* and other cases of the 1870s, to enact legislation that would regularize wives' contractual capacity,[118] it also deferred to the court's concern that earnings reform proceed with greater caution. By the mid-1870s the Court of Appeals had significantly diminished the impact of the earnings clauses. Yet it was not until 1902 that the legislature intervened to modify the court's interpretation of the earnings statute.[119] The legislature's delay was not for lack of opportunity: in the interim, it reformed the law of marital status in 1884, 1887, 1892, and 1896.[120]

To appreciate the body of earnings law that the legislature preserved through its inaction, it is important to examine cases governing title to wives' earnings decided in the decades after enactment of the 1860 statute. This body of law bore significant resemblances to the common law regime prevailing before the statute's enactment. As I will show, courts implemented the 1860 reform statute in such a way as to protect exercise of a husband's traditional prerogative to appropriate his wife's earnings—and for over four decades, the New York legislature declined to intervene. In short, New York's legislature and courts collaborated in protecting a husband's rights to his wife's earnings for decades after passage of the 1860 statute.

### B. DETERMINING TITLE TO EARNINGS UNDER THE 1860 STATUTE: WIFE'S ELECTION VS. HUSBAND'S CONSENT

If one examines the adjudication of wives' earnings claims in the decades after passage of the 1860 statute, two features of the case law are immediately apparent. Husbands were allowed to claim their wives' earnings from third parties until well into the twentieth century, prevailing over defendants' objections that the wife was the proper party to recover.[121]

---

116. *Id.* at 113.

117. 74 N.Y. at 358.

118. *See supra* notes 101-02 and accompanying text.

119. *See infra* note 160 (quoting and discussing 1902 statute).

120. *See supra* notes 78-86 and accompanying text (describing sequence of marital status reform statutes enacted in New York).

121. *See, e.g.*, Johnson v. Tait, 160 N.Y.S. 1000 (Sup. Ct. 1916) (holding that under the relevant statute, a wife works for her husband when she renders services to a third party in her home).

The first case I have located in which such a defense succeeds appears in 1916.[122] The New York Court of Appeals repeatedly and expressly sanctioned this exercise of marital prerogative until at least the turn of the century.[123] Yet, by the 1880s, while husbands were prevailing in suits to recover their wives' earnings from third parties, wives seeking to recover their own earnings from third parties were relatively successful as well, prevailing more often than not over defense objections that the husband was the proper party to sue.[124] Though many wife-plaintiffs were nonsuited in the lower courts, most prevailed on appeal.[125]

Sustaining this state of affairs required an exceedingly flexible body of doctrine. Courts construing the state's earnings statute fashioned such a body of doctrine from an amalgam of common law, equitable, and statutory elements. Over time judges developed a pair of linked narratives that allowed either a husband or wife to recover a wife's earnings on a third-party contract. This body of case law recognized a wife's right to earnings in qualified terms, while continuing to protect a husband's traditional property rights in a wife's labor.

New York's earnings case law drew its major premise from the common law of marital status: a husband was obliged to support his wife, and she to serve him. From that same tradition courts borrowed doctrines of marital agency that enabled them to characterize a wife's contractual dealings as her husband's. Using these simple principles of property and agency, courts could recognize a husband as the proper party to recover on any contract for services into which his wife entered.[126]

To justify a wife's recovery in terms consistent with a husband's continuing common law right, courts drew on traditions of equity. The law of the

---

122. *See* Janz v. Schwender, 159 N.Y.S. 200 (Sup. Ct. 1916).

123. *See, e.g.*, Reynolds v. Robinson, 64 N.Y. 589 (1876) (finding that plaintiff husband can recover from testator value of services plaintiff's wife provided to testator when ill); Birkbeck v. Ackroyd, 74 N.Y. 356 (1878) (holding that plaintiff husband can recover from woolen mill the value of services provided to the mill by his wife); Porter v. Dunn, 30 N.E. 122 (N.Y. 1892) (finding that plaintiff husband can recover from boarder the value of nursing services the plaintiff's wife provided); Holcomb v. Harris, 59 N.E. 820 (N.Y. 1901) (finding that plaintiff husband can bring a cause of action against testator's estate to recover the value of services provided by plaintiff's wife).

124. *See, e.g.*, Sands v. Sparling, 31 N.Y.S. 251 (N.Y. Sup. Ct. 1894) (finding that a married woman living with her husband can recover board she furnished where husband told her that she could keep the pay); Lashaw v. Croissant, 34 N.Y.S. 667 (N.Y. Sup. Ct. 1895) (same).

125. *See, e.g.*, Stokes v. Pease, 29 N.Y.S. 430 (N.Y. Sup. Ct. 1894) (reversing referee's decision and finding that a married woman can bring a claim against testator's estate to recover the value of services she provided to testator); Carver v. Wagner, 64 N.Y.S. 747 (App. Div. 1900) (counterclaim) (reversing lower court and finding that defendant wife can bring counterclaim in an action against her for foreclosure for value of services she provided, where husband assented to the agreement); Stevens v. Cunningham, 74 N.E. 434 (N.Y. 1905) (reversing lower court and finding that plaintiff wife, not her husband, may recover the value of nursing services she had provided to a third party).

126. *See infra* notes 135-40 and accompanying text.

equitable separate estate allowed a husband to settle a business or other assets upon his wife; when properly formalized, courts of equity would protect such a gift as a qualified species of property.[127] Thus, even though a husband owned his wife's services he might, in accordance with equitable traditions, make a gift of them to her.[128]

To this amalgam of common law and equitable traditions courts added a gloss on the text of the earnings statutes. If, as courts construed the statutes, a wife was not entitled to all her earnings, but only those deriving from labor performed on her sole and separate account, some standard was required to discriminate between "emancipated" and "wifely" labor. Two variants of the statutory standard appeared. The first, announced by the Court of Appeals in the 1876 case of *Reynolds v. Robinson,*[129] was wholly continuous with equitable traditions: a wife was entitled to her earnings when her husband consented that she should have them.[130] Two years later in *Birkbeck v. Ackroyd,*[131] the court offered a definitive construction of the earnings legislation that contained an apparently contradictory standard: a wife was entitled to her earnings when she elected to labor on her sole and separate account.[132] The first account located the power to emancipate a wife in her husband; the second located this power in the wife herself. Though the election standard was seemingly more consistent with statutory language, which nowhere referred to a husband as having any role in a wife's emancipation,[133] New York's inferior and appellate courts would consistently adhere to the consent standard in the ensuing decades.[134]

---

127. At equity, a husband might settle a business or its profits on his wife, as he might make a gift of any assets in trust. *See* Stewart, *supra* note 94, at 358-60. In this circumstance, a wife's interest in the profits of her enterprise derived from her husband's consent, and generally could be attached by his creditors unless given for "valuable consideration." Joseph Story's account of sole trading is remarkably expansive, explicating the practice by way of general estate and settlement principles, and affording the wife an equivalent property interest. 2 JOSEPH STORY, EQUITY JURISPRUDENCE §§ 1885-87 (Jairus W. Perry ed., 1984) (1877). *But cf.* SALMON, *supra* note 27, at 44-53 (1986) (suggesting that law concerning profits of a sole trader was undeveloped in America, unlike that respecting capacity and liability).

128. *See* JOHN KELLY, A TREATISE ON THE LAW OF CONTRACTS OF MARRIED WOMEN 151-52 (Jersey City, F.D. Linn. ed., 1882) (explaining how a husband could make this transfer). For cases treating a wife's earnings as a gift under New York law as it stood just prior to the Act of 1860, see Freeman v. Orser, 5 Duer 478, 479-81 (N.Y. Sup. Ct. 1856); Rider v. Hulse, 33 Barb. 264, 269-70 (N.Y. Sup. Ct. 1860), *aff'd,* 24 N.Y. 372 (1862); Dygert v. Remerschnider, 32 N.Y. 629, 631-32, 638 (1865).

129. 64 N.Y. 589 (1876).

130. *Id.* at 593.

131. 74 N.Y. 356 (1878).

132. *Id.* at 358 (quoted *supra* note 110 and accompanying text).

133. *Cf. supra* note 105 and accompanying text.

134. *See infra* note 142 and accompanying text.

The consent standard was first unveiled by the Court of Appeals in the 1876 case of *Reynolds v. Robinson*,[135] in which a husband sought to recover from the estate of a boarder money due for his wife's services in nursing the decedent (his wife's adoptive father). The court emphatically rejected the arguments of the estate's executors that the plaintiff's wife was the proper party to sue:

> She was engaged in no business or service on her own account. She was in charge of his household, and, as part of her household duties, rendered the services to a person in her husband's house by contract with him. She was then working for her husband, and not for herself, or on her own separate account. Notwithstanding the act chapter 90 of the Laws of 1860, she could still work for her husband, she could devote all her time and service to him, and the circumstances of this case are such as to warrant the finding of the referee, that the services were rendered by him through her.[136]

To the defendant's objection that the decedent's contract was not with the plaintiff, but rather with his wife, whom the decedent had agreed to compensate in his will, the court countered that the plaintiff's "wife was clothed with authority to contract with the testator, and plaintiff's assent to the mode of compensation must be inferred."[137] No particular aspect of the transaction in question supported the court's inference that the plaintiff's wife had acted as her husband's agent and not in her own right; rather, the court based its inference on the character of the wife's labor, and the fact that the husband had exercised his customary prerogative to claim his wife's earnings. In the court's view, a wife's services in caring for a boarder amounted to the simple "discharge of her marital duties." The court announced a presumption to govern future litigation respecting such claims:

> [I]f the husband takes boarders into his house, or converts his house into a hospital for the sick, and his wife takes charge of his establishment, and thus aids him in carrying on his business, in the absence of special proof, all her services and earnings belong to her husband.[138]

The special proof the court required was a showing that the husband had "covenant[ed] and agree[d] that his wife should receive pay for her services on her own account."[139] Henceforth for a wife to recover her earn-

135. 64 N.Y. 589 (1876).
136. *Id.* at 593.
137. *Id.* at 594.
138. *Id.* at 593.
139. *Id.*

ings from a third party she would have to show that her husband had agreed to let her keep them.

The presumptions elaborated in *Reynolds* would govern in the New York courts for decades. *Reynolds'* inferences about marital agency allowed courts to attribute a wife's contractual dealings to her husband, enabling husbands to recover on their wives' contracts for service.[140] At the same time, *Reynolds'* consent rules provided clear grounds for determining when wives might recover their earnings from third parties under the statute. *Reynolds'* framework was sufficiently clear that by the 1890s courts had begun to recognize wives' claims with regularity—even though the Court of Appeals presided over no case in which it recognized a wife's right of recovery on a third-party contract until 1905.[141] In nearly all such cases, courts based a wife's right of recovery on the husband's consent that she might have her earnings.[142] Even when courts focused on a wife's election

---

140. *See, e.g., In re* Mallory's Estate, 35 N.Y.S. 155, 158-59 (Sup. Ct. 1895) ("Whatever services were rendered to the decedent by Mrs. Hoag were performed in the household of her husband . . . . It is entirely apparent that, whatever part Mrs. Hoag took in the negotiations for compensation, she was acting, not for herself, but for and subordinate to her husband."); *see also* Porter v. Dunn, 30 N.E. 122, 122 (N.Y. 1892) (finding that when she earned money keeping boarders, "the wife of the plaintiff was acting not for herself, but in the service of and subordinate to her husband").

141. *See* Stevens v. Cunningham, 74 N.E. 434 (N.Y. 1905) (discussed *infra* notes 161-65 and accompanying text).

142. The theory supporting a wife's right to recover earnings in these cases was succinctly expressed by the New York Supreme Court in Carver v. Wagner, 64 N.Y.S. 747 (App. Div. 1900):

> It is very obvious that these enactments do not destroy the common-law unity of the marital relation. The husband is still entitled to the services of his wife . . . . But these cases recognize a plain exception to the rule; and that is, if the wife renders services for another, with the assent of the husband, and with his acquiescence in payment to her therefor, the compensation belongs to her absolutely.

*Id.* at 750 (citations omitted) (holding for wife on counterclaim for services).

For cases following this rule or variants of it, see, e.g., Snow v. Cable, 26 N.Y. Sup. Ct. 280, 281 (1879); Matter of Kinmer & Gay, 14 N.Y. St. Rep. 618, 619 (Sup. Ct. 1888) ("It was competent for Seth Kinmer to make an arrangement with his wife by which she should have the money paid for board by Ferguson, and the profits resulting from the keeping of poultry."); Hook v. Kenyon, 9 N.Y.S. 40, 41-42 (N.Y. Sup. Ct. 1890) (granting wife and husband joint recovery on counterclaim for wife's services); Stokes v. Pease, 29 N.Y.S. 430, 431 (N.Y. Sup. Ct. 1894) (finding husband's knowledge of wife's contract for compensation evidence of his consent) ("Under these statutes, if a married woman, with the knowledge of her husband, renders services to a third person, pursuant to a contract for compensation, she may maintain an action to recover the price agreed or the value of the services rendered."); Sands v. Sparling, 31 N.Y.S. 251, 252 (N.Y. Sup. Ct. 1894) (finding wife entitled to earnings from boarder because husband agreed that she should have them); Lashaw v. Croissant, 34 N.Y.S. 667, 667, 669 (N.Y. Sup. Ct. 1895) ("The husband in effect agreed with the wife that he did not want anything for the services which she rendered to the testatrix . . . and in respect to them he emancipated his wife from all claim or interest . . . . [T]here was a complete and valid understanding between the plaintiff and her husband that all the services which she . . . should supply to the testatrix, should be for and upon her separate account, and, in effect, that she should become the owner of any and every indebtedness which should

as a basis for recovery under the statute, they elaborated their findings of fact respecting that election with reference to a husband's consent.[143]

For all practical purposes, then, it was a wife's agreement with her husband, and not her contract with a third party, that supported her right of recovery. A wife who filed suit on a contract for services could barely be characterized as exercising a right conferred by statute, nor could the earnings she claimed properly be characterized as her property. As the beneficiary of her husband's largesse she took her earnings as a gift, one which New York courts repeatedly indicated might be defeated by the superior claims of her husband's creditors.[144]

---

accrue against the testatrix."); Briggs v. Devoe, 89 A.D. 115, 117-18 (N.Y. App. Div. 1903); Matter of Dailey, 145 N.Y.S. 285, 290-91 (N.Y. Sup. Ct. 1904) (wife entitled to earnings because husband expressly agreed that the compensation was her property); Perry v. Blumenthal, 119 A.D. 663, 665 (N.Y. App. Div. 1907) (finding wife entitled to recover because her husband had authorized her to take boarders); Matter of Grogan, 82 Misc. 555, 564-65 (N.Y. Sup. Ct. 1913) (wife entitled to earnings because husband had "surrendered his claim"). *But cf.* Burley v. Barnhard, 9 N.Y. St. Rep. 587, 589-91 (1887) (finding that wife elected to claim her earnings, but also finding that wife's husband had told her she might keep them); Stamp v. Franklin, 12 N.Y.S. 391, 393-94 (N.Y. Sup. Ct. 1891) (holding that under the 1860 earnings statute a wife is entitled to keep earnings from third parties, but also emphasizing that the plaintiff's husband consented to his wife keeping compensation from third parties).

143. Courts examining the circumstances of a wife's election often focused on manifestations of a husband's consent. *See, e.g.*, Burley v. Barnhard, 9 N.Y.St.Rep. 587, 590-91 (Sup. Ct. 1887) (noting that evidence indicated husband had told wife she could "have" whatever she earned). In general, courts tended to treat the two rules as consistent. *See, e.g.*, Lashaw v. Croissant, 34 N.Y.S. 667 (N.Y. Sup. Ct. 1895):

> *Undoubtedly, in the absence of any agreement [between husband and wife], the meals delivered and services rendered would give rise to a cause of action in favor of the husband*, although the meals were delivered and the services rendered by the wife, upon the theory that all her services and earnings belong to her husband, and that he can maintain an action to recover therefore . . . . Where the husband and wife are living together, he may appropriate the fruits of her labor, and, *in the absence of circumstances showing her intention to avail herself of the privilege conferred by the statute concerning the rights and liberties of married women, his common-law right is unaffected.*

*Id.* at 669 (emphasis added) (citations omitted). The Court of Appeals illustrated how the two standards might be reconciled; it equated a wife's election with her husband's consent in Stevens v. Cunningham, 74 N.E. 434, 436 (N.Y. 1905) (quoted *infra* notes 161-64 and accompanying text).

144. *See* Matter of Kinmer & Gay, 14 N.Y. St. Rep. 618 (Sup. Ct. 1888):

> It is to be observed that the services in keeping [the] boarder were not for her husband, and the same may be said as to the keeping of poultry. If an appeal had been taken by a creditor, a different question would arise. It was distinctly held [by the Court of Appeals] in *Coleman v. Burr*, that as between themselves a husband might relinquish to his wife his right to her earnings, even in his own household, so that she could hold them to her separate use.

*Id.* at 619 (citing Coleman v. Burr, 93 N.Y. 17 (1883)); *see also* Carver v. Wagner, 64 N.Y.S. 747, 750 (Sup. Ct. 1900) ("The husband can forego his right to his wife's earnings, and, unless done in fraud of creditors, the property she acquires with his knowledge and assent . . . vests in her.")

### C. THE VISION OF FAMILY LIFE INFORMING EARNINGS CASE LAW

Several decades after the enactment of New York's 1860 earnings statute, courts had interpreted the legislation to allow a married woman to recover earnings from third parties in any circumstance in which her husband formally sanctioned the claim. Wives were allowed to claim their earnings, but they might do so only when their husbands permitted it. This interpretation of the 1860 statute was self-consciously designed to prevent wives from acting in terms adverse to their husbands' interests. In 1900, the New York Supreme Court frankly summarized the logic of the case law. The law precluded a wife's recovery in circumstances where "the wife is seeking to maintain her claim in antagonism to the husband, and in disregard of her wifely duties," but the law sanctioned her recovery in circumstances where "the husband, the party affected, renounces his paramount right to the money she has earned."[145]

The judges who crafted this body of law sought to enforce traditional principles of marital status, which, they insisted, the legislature had never formally repealed—it being "very obvious that these enactments do not destroy the common-law unity of the marital relation."[146] At the same time, judges interpreting the earnings statute sought to promote a particular vision of the family relation. Here, too, they saw themselves as effectuating legislative intent. As they saw it, the legislature had not intended to alter traditional family relations, but rather to assist wives in circumstances of familial breakdown: to alleviate the injustice of the common law rule in circumstances in which a husband was a spendthrift, a drunkard, a deserter, or otherwise derelict in the performance of his duties of support. This protectionist view of earnings reform—which found considerable, but not uncontroverted, support in the record[147]—was advanced by the Court of Appeals in the *Birkbeck* case in 1878 and expressly or implicitly adhered to by courts in the succeeding years.[148]

---

145. *Carver*, 64 N.Y.S. at 747. The court offered its observations in the course of distinguishing wives' third party contracts for services from contracts between husband and wife:

> And many of the cases . . . arose where an attempt was made to enforce the demand against [the husband] or his personal representatives upon an alleged agreement with him. That is a very different question from one where the services are rendered to a stranger with the assent of the husband, and upon a contract, made with his knowledge and approbation, that the compensation is to be paid to her . . . . The distinction is clear, and is well recognized by the authorities. In the one case the wife is seeking to maintain her claim in antagonism to the husband, and in disregard of her wifely duties. In the other case the husband, the party affected, renounces his paramount right to the money she has earned.

*Id.*

146. *Id.* at 750.

147. *See supra* notes 59-65 and accompanying text.

148. *See* Birkbeck v. Ackroyd, 74 N.Y. 356, 359 (1878) (quoted *supra* text accompanying note 112). For similar views, see Coleman v. Burr, 93 N.Y. 17, 28 (1883); Burley v. Barnhard,

In the world view organizing the cases, a husband supported the family; a wife was his dependent. She might enjoy her separate earnings as a gift, settled upon her as evidence of her husband's liberality. But the husband was the breadwinner for the family, and so long as he brought home an income, a wife had no claim in earnings she applied to family support. Such labor amounted to the discharge of her obligations as a dependent; it was "wifely," not personal. As the New York Supreme Court explained in 1901,

> in the case at bar the record discloses nothing but the single fact that the plaintiff did washing for third persons, and that those earnings went towards the family's support. *A different question might be presented were the husband permanently disabled and unable to contribute anything to the living expenses.* The proof here, however, only shows that the husband was temporarily incapacitated . . . but there is otherwise nothing to overcome 'the strength of the presumption of the husband's continued liability to support his wife, and of his performance of that duty, and of his consequent common-law right to her earnings.'[149]

Consistent with this view, when a husband was negligent in performing his duties of support, courts were correspondingly more receptive to wives' earnings claims, allowing recovery on a record that ordinarily would not support it. For example, in *Briggs v. Devoe*[150] a wife recovered her earnings from a third party, prevailing over her husband's competing claim; her husband was then permanently disabled and residing with his father. In these circumstances, the fact that the wife applied her earnings to family support was a factor militating in favor of recovery, not against it.[151] And, in *Pangburn v. Crowner*,[152] a wife the court characterized as "at the head of the household" was allowed to recover cows (purchased with her earnings) that her drunken and deserting husband had sold to a third party. Similarly, in *De Brauwere v. De Brauwere*,[153] the New York Court of Appeals allowed a wife to sue a husband who had abandoned her; in granting the

---

9 N.Y. St. Rep. 587, 589-90 (Sup. Ct. 1887) (paraphrasing *Birkbeck*); *see also* Blaechinska v. Howard Mission & Home, 29 N.E. 755, 755 (N.Y. 1892) ("When [a wife] works with her husband for another, and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him, and he is entitled to recover their value.") (citations omitted).

149. Klapper v. Metropolitan St. Ry. Co., 69 N.Y.S. 955, 956 (Sup. Ct. 1901) (emphasis added) (quoting Brown v. Railroad Co., 43 N.Y.S. 1094, 1098 (Sup. Ct. 1897)) (tort action).

150. 84 N.Y.S. 1063 (N.Y. App. Div. 1903).

151. In allowing the wife to recover her earnings, the court emphasized that the husband had initially consented to her keeping them. At the same time, the court gave significant weight to the family's atypical living arrangements, concluding that "[t]he evidence relating to the agreement between the plaintiff and her husband, together with the surrounding circumstances, is sufficient to sustain a finding in the plaintiff's favor." *Id.* at 1065.

152. 17 N.Y.S. 301 (Sup. Ct. 1892).

153. 96 N.E. 722 (N.Y. 1911).

wife's claim against her husband for the value of earnings she had applied to family support,[154] the court recognized for the first time a wife's direct action to enforce a husband's duty of support.[155] And in *In re Hamilton,*[156] a wife recovered payment from her husband's estate on a note he had given her for earnings she applied to family support during a period when he was reinvesting all his income in his construction business.[157]

Yet, evidence of a husband's consent or, in the alternative, of his dereliction of marital duty, were not the sole circumstances in which courts sanctioned wives' recovery on third-party contract claims. Judges responded to such claims differently as their view of a wife's marital obligations changed. Over time, judges began to see a wife's labor for third parties as distinct from her marital duties—sufficiently "separate" from her labor as wife that her husband's consent was not required as a predicate to recovery. In the 1892 case of *Cornelius v. Reiser,*[158] the New York Supreme Court was confronted with a wife's earnings claim for washing linen for the saloon at which her husband tended bar. The defendant saloon owner dealt only with the husband; while the saloon owner requested the husband to arrange for the laundry services, he never specifically requested the wife's assistance. Despite this, the court treated the wife as an independent economic agent, and, over the defendant's objections that the husband was the proper party to sue, allowed her to recover in quantum meruit:

> This was a contract between the defendant and the plaintiff, made through the husband, and not a contract of the plaintiff with the latter. *If the plaintiff had done this work for her husband, she would not be entitled to compensation from him for it; but there is a distinction between working for him and working with him for a third person,*—between helping her

154. *Id.* at 722. The monies plaintiff expended on family support included her earnings as a seamstress and janitress, as well as a small sum inherited from a relative.

155. At common law a wife had no means of enforcing a husband's obligation of support. However, the doctrine of necessaries allowed third parties who had supplied a wife credit for the purchase of necessaries to maintain a suit in equity for the recovery of monies advanced. In *De Brauwere*, the New York Court of Appeals expressly rejected the necessaries doctrine as a basis for the plaintiff's claim. *Id.* at 723. Instead, it reasoned that because the common law bar against intramarital suits had been removed by statute, a wife was now free to demand enforcement of her husband's obligations of support. *Id.*

156. 75 N.Y.S. 66 (N.Y. App. Div. 1902).

157. The plaintiff ran a boarding house where the couple lived. During this period, the husband gave his wife a note recording his debt to her in the amount of $1500 a year for "Home Keap [sic]." *Id.* at 67. So described, the note compensated the wife, not simply for room and board, but arguably for her services as well. The court, however, avoided scrutinizing the nature of the debt discharged. It enforced the note on the grounds that the husband was belatedly discharging his legal obligation to support his wife: "[W]here the husband has been supported by the wife, any competent proof tending to show that the husband recognized an obligation upon his part to reimburse the wife for her outlay will be supported and upheld as sufficient to create a valid indebtedness against his estate." *Id.*

158. 18 N.Y.S. 113 (C.P.N.Y. 1892).

> husband in his business, and helping in the business of a third person,—*and, where the work is done for a third person, the earnings belong to the wife.*[159]

Cases such as this did not augur an abrupt retreat from the consent requirement; courts continued to apply it with fair regularity. But it did signal an emerging reconceptualization of a wife's obligations of marital service. If a married woman's labor for a third party was distinct from her services as wife, she might recover her earnings in her own right without a husband's consent. Such a development would, moreover, extinguish a husband's legal claim on such earnings.

When in 1902 the legislature finally did enact a presumption that a wife's earnings from third parties were her own,[160] the Court of Appeals proceeded to incorporate this presumption into its analysis of a 1905 case that was nominally controlled by the statutes of 1860 and 1884. *Stevens v. Cunningham*[161] resembled for all practical purposes a boarder case. A wife tended her disabled landlady in an upstairs apartment for six years and sued to recover wages due from the estate. The lower courts ruled in favor of the estate, reasoning from established precedent that the husband alone was the proper party to recover. The Court of Appeals reversed, recognizing the wife's claim on the grounds that (in venturing across her apartment's threshold) the wife had taken up labor "distinct" from that required by marriage:

> It is obvious that the services rendered by the plaintiff were distinct from those duties which she owed to her husband in the marital relation. She was engaged in the prosecution of a separate calling, as a nurse and attendant, under either an express or implied contract precisely as if she had gone out and worked by the day in different houses throughout the

159. *Id.* at 114 (emphasis added).

160. The statute provided:

> A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right or action therefor, *unless she, or he, with her knowledge or consent, has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration.*

Act of Apr. 2, 1902, ch. 289, § 1, 1902 N.Y. Laws 844 (emphasis added). A contemporary commentator suggested that the purpose of the exception allowing a husband to claim his wife's earnings by express agreement entered into "with her knowledge or consent" was to protect a husband's customary prerogative to contract out his family's services in agriculture and the sweatshop industry. Helen Z.M. Rodgers, *Married Women's Earnings*, 64 ALB. L. REV. 384, 385 (1902).

161. 74 N.E. 434 (N.Y. 1905).

> town as a seamstress, a laundress, a nurse, or any other calling open to women.[162]

Although no material fact appeared to distinguish the labor at issue from the court's prior boarder cases,[163] the court nevertheless discerned an implicit act of election:

> [C]ounsel urged that no election was shown on the part of the plaintiff to engage in a separate business. We have here the situation where a wife for a period of six years or more was engaged openly in a separate occupation, without protest or interference from her husband; the record disclosing that he was entirely willing that she should recover for her services. This is a sufficient election on the part of the wife to embark in an outside undertaking whereby she may earn wages on her own account, no complaint being made that she was in any way neglecting her duties as a wife. It is common experience that wives go out to service in various domestic callings—the washerwoman, the seamstress, the nurse, and other callings .... The fact that a married woman enters upon such independent employment is a circumstance showing that she intended to avail herself of the privilege conferred by the enabling statutes.[164]

The wife's election was manifest in her husband's failure to protest her employment; his consent that she should recover in her own right; his disinclination to charge her with neglect of wifely duty; and, finally, in the wife's assumption of "independent" employment. If elements of husbandly consent predominate in this account of a wife's election, they obscure a crucial judicial concession in the case: that a wife's third-party employment is "independent," that is, "distinct" from the scope of her marital duties. Emergent, then, is a redefinition of a wife's common law obligation of marital service. Married women frequently seek third-party employment in "domestic" callings, and when this is consistent with discharge of their obligations as wives, they are entitled to claim such earnings in their own right.

The tortured path New York courts took in recognizing wives' rights to earnings from third parties is typical of the judicial response to the earnings legislation nationwide: in the effort to reconcile the reform statute with common law traditions of marriage, the conceptual repertoire employed, and the legal confusion engendered. As a commentator was to observe in 1935, "[t]he idea of the wife's ownership of inherited property came easier to a common-law viewpoint than did the idea that she could

---

162. *Id.* at 453-56.

163. In order to reconcile its decision with past precedent, the court distinguished prior boarder cases according to their legal characterization of wives' labor, rather than by their facts. *Id.* at 436-37.

164. *Id.* at 436.

under any conditions be the owner of her own labor."[165] Specifying those conditions was to be a long and arduous task. In that same year Vernier's survey of family law still cautioned: "One must go to the cases to determine the exact extent to which the husband's personal right to the wife's labor remains uninvaded."[166] Thus, the repertoire of doctrinal innovations appearing in the wake of reform—ranging from ad hoc presumptions to theories of election, consent, and relinquishment[167]—were the product of courts' self-conscious struggle to contain the more radical import of the statutes without wholly nullifying their terms. Simply put, how might courts recognize a wife's rights in her own labor without fundamentally reorganizing the marital relation?

## III. EVOLUTION OF THE DOCTRINE OF MARITAL SERVICE UNDER THE EARNINGS STATUTES

New York's statute granting wives rights in their labor contained no language excluding work a wife performed for husband or family.[168] Yet, as we have seen, the state's courts were confident that a husband was still entitled to the benefit of his wife's services; for decades courts protected a husband's common law prerogative to claim his wife's earnings, even when she worked for wages outside the household. In this respect, the New York record is typical: courts proceeded cautiously in recognizing wives' rights to earnings under the reform statutes, lest they unduly encroach upon a husband's continuing property rights in his wife's services. In each earnings statute decision, courts sought to distinguish between a married woman's "personal," "separate," or statutorily emancipated labor and her "wifely" or unemancipated labor, which remained a husband's by marital right. This interpretive task generated a new body of statutory common law governing wives' earnings.

For example, when an Iowa court interpreted a statute providing that a "wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right,"[169] it couched its decision with care: "We think that the terms, 'wages of her personal labor,' . . . refer to cases where the wife is employed to some extent in performing labor or services for others than the husband . . . but her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the married relation."[170] Of

165. Blanche Crozier, *Marital Support,* 15 B.U. L. REV. 28, 37 (1935).

166. 3 CHESTER VERNIER, AMERICAN FAMILY LAWS 195 (1935).

167. *See* M.J.Q., Annotation, *Consent of Husband to Rendition of Services by Wife as Prerequisite to Her Recovery Therefore,* 9 A.L.R. 1303 (1920); L.A.W., Annotation, *Right of Married Woman to Recover for Services Rendered Outside the Home,* 1917E L.R.A. 282, 294-98.

168. *Cf. supra* text accompanying notes 54-58.

169. IOWA CODE tit. 15, ch. 2, § 2211 (1873).

170. Mewhirter v. Hatten, 42 Iowa 288, 291 (1875) (construing statute governing recovery for tort actions).

course, by granting a wife rights in her "personal labor," the legislature had just *altered* the "duties and obligations which arise out of the married relation," but the court was confident that a wife's common law duties persisted, albeit in modified form. Its reasoning was simple. Construing the earnings statute to emancipate a wife's labor completely would transform marriage into a market relationship:

> We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common law and scriptural obligation and duty to be a "help-meet" to her husband. *If such a construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic service or assistance rendered by her as wife.* For her assistance in the care, nurture and training of his children, she could bring her action for compensation. *She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing.*[171]

It was to prevent this prospect from ever materializing that courts struggled in construing the earnings statutes. What courts had inaugurated was a search for principles that could characterize and divide a wife's labor—discriminating between labor subject to obligations of marital status and that respecting which wives had contractual capacity and a cognizable personal claim.

To appreciate how a wife's duty of marital service was gradually redefined in the decades following passage of the earnings legislation it is helpful to examine the adjudication of wives' earnings claims in two areas: on third-party contracts for labor performed in the home, and on contracts with the husband for labor performed in family business enterprise. By examining case law dealing with wives' work in these contexts—moving by character, location, and relation closer to the work of keeping a home and raising children—one is able to observe courts endeavoring to contain reform: to recognize wives as autonomous participants in the labor market while insulating the marriage relation from market exchange.

Analyzed from this perspective, the process of common law reform emerges as a wide-ranging revisionary endeavor. Over a seventy year period spanning the Civil War and New Deal eras, courts shifted from a general disposition against recognizing wives' rights in earnings on third-party contracts, to a disposition to recognize them; from a refusal to recognize wives' rights in earnings from third parties for work performed in the home or from their husbands for work in the family business, to a disposition, however tentative, to recognize them. Yet, throughout this period the courts never recanted the common law premises with which

171. *Id.* at 291-92 (emphasis added).

they began: the husband owned his wife's services, and the statutes could not be construed to deprive him of them. It is the content of a wife's common law duty of service that is undergoing transformation throughout the period.

It is of course possible to discount courts' vocal resistance to reform—ascribing it to ingrained, but moribund habits of common law thought—and characterize the cases under the earnings statutes as progressive in logic, moving, however erratically, toward recognizing wives as autonomous market actors. From this perspective, we are examining a story of wives' liberation from the hierarchical status regime of the common law—the triumph of contract over status relations. We would thus view courts' insistence that common law obligations of support and service remained unaltered by statute as something of an antiquarian protest, reiterated in an effort to deny the shrinking content of the service a wife owed her husband by virtue of marriage. Courts' continuing refusal to allow wives to contract with their husbands for the performance of household labor appears as a quaint relic of a regime of status otherwise abrogated by statute.

The earnings statute cases may be read in this fashion, but to do so, I believe, fundamentally mischaracterizes the nature of the legal transformations at issue. Closer examination of the case law reveals that courts did not abolish the doctrine of marital service, but instead reformulated this body of status law to conform with gender mores of the industrial era.

The earnings statutes redistributed from husband to wife title to at least some portion of a valuable "family asset": the value of a wife's labor. As courts set out to determine what portion of a wife's labor the statutes emancipated and what portion of a wife's labor remained a husband's by marital right, they drew upon gendered understandings of work specific to the industrial era. With the growth of the labor market during the industrial era, men's work was steadily separated from the household, and household labor increasingly appeared as a "wife's work."[172] This divergence in the social organization of men's and women's work supplied the conceptual distinctions that courts drew upon as they redistributed title to a wife's labor within the marriage relation. For as the gendered differentiation of market and household labor shaped courts' understanding of the duties of husband and wife in marriage, courts could begin to characterize a married woman's earnings from third parties as "personal" or "separate" market labor falling "outside" the scope of her marital or household duties. As the United States Supreme Court observed in 1901, the statutes "proceed upon the difference between the discharge of marital duties and independent labor."[173] Courts differed over time and across the country in

172. *See* Siegel, *supra* note 13, at 1091-94.

173. Texas & Pac. Ry. Co. v. Humble, 181 U.S. 57, 63 (1901) (construing Arkansas statute).

their estimation of what work was "independent" of a wife's "marital duties," but at no point did any court hold that a married woman might receive remuneration from her husband for the labor she performed in the household; this labor—a "wife's work"—remained a husband's by marital right.

Thus, the bar on interspousal contracts regarding wives' domestic labor is far from an antiquarian relic of a prior regime of status. Rather, it is the cornerstone of a new regime of status. Indeed, it is only with the articulation of a new regime of status—within which a husband still possesses property rights in a "wife's work"—that recognition of wives' claims under the earnings statutes proceeds. Ironically, it was the achievement of the earnings statutes to circumscribe anew the domain of contract and so give legal form to the relations of family and market in the industrial era.

The ensuing discussion explores judicial interpretation of earnings legislation in common law jurisdictions across the country, ranging across states and over time to examine courts' evolving response to earnings claims—arising from wives' third-party contracts for labor performed in the home, as well as from interspousal contracts for labor performed in the family business. The survey then concludes with an analysis of the multiple and often contradictory justifications courts offered for the prohibition they imposed on interspousal contracts concerning a wife's domestic labor.

### A. EARNINGS CLAIMS ON THIRD-PARTY CONTRACTS FOR WORK PERFORMED IN THE HOME

Earnings statute litigation is dominated by cases in which wives sought to recover payment from third parties for work performed in the household setting. Such labor, ranging from industrial piecework to washing, sewing, and care of boarders, constituted the primary form of married women's waged work until well into the twentieth century.[174] Yet courts

174. *See* Siegel, *supra* note 13, at 1086-91 (antebellum period); Stanley, *supra* note 32, at 489-91 (postbellum period); *see also* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 108-41 (1982); Elizabeth H. Pleck, *A Mother's Wages: Income Earning Among Married Italian and Black Women, 1896-1911, in* A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN 367 (Nancy F. Cott & Elizabeth H. Pleck eds., 1979). There is census data on married women's labor force participation for the decades before and after the turn of the century. *See, e.g.*, NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 129, 182-83 (1987); KESSLER-HARRIS, *supra*, at 122; JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM 133 (1982). But this data systematically undercounts waged work in the home. Siegel, *supra* note 13, at 1092 n.65; *see also* Christine E. Bose, *Devaluing Women's Work: The Undercount of Women's Employment in 1900, in* HIDDEN ASPECTS OF WOMEN'S WORK 95, 96 (Christine E. Bose et al. eds., 1987) (arguing that, after correcting for bias in the structure of 1900 census, wives' actual labor force participation is much closer to contemporary rates than is generally assumed); *cf.* COTT, *supra*, at 131 (arguing that wives' home-based employment began to

were extremely reticent to recognize wives' earnings claims for such work. The character and location of the household work wives performed for third parties marked it as a "wife's work."[175]

In 1900 the Supreme Court of Iowa rejected a married woman's attempt to recover earnings from a boarder, although, as we have just seen, over a quarter century earlier it purported to recognize a married woman's right to earnings from third parties:[176]

> There is no question but that during those years the plaintiff's *sole occupation was that of a housewife* in taking care of the home of her husband and family. *She had no other or separate occupation, and was not engaged in keeping boarders, or in washing, ironing, and mending, as a separate occupation*, nor did she furnish the supplies for the table at which defendant boarded. The law is undisputed that the husband is entitled to the services and earnings of his wife when she is not engaged in business on her own account.[177]

A wife's work keeping boarders did not appear to be labor for third parties because it was the labor "of a *housewife*," by definition performed for the benefit of her husband and family. Indeed, such work scarcely appeared to be labor at all. The husband, after all, had supplied the capital: "nor did she furnish the supplies for the table at which defendant boarded." Or, as the Iowa court held in another case, a wife could claim no property interest in realty purchased in part with funds from

> earnings of the wife in keeping boarders in the family, selling butter and milk, and the like .... [S]he had no separate property or business, and whatever she earned was in connection with her husband's property in the management of the family affairs.[178]

No matter how labor-intensive a wife's household enterprise, its capital base governed title to its proceeds.[179] A wife's labor in the home merged

---

decline in 1920s because increased regulation of home industry and restrictions on immigration reduced the urban population seeking boarding services).

175. *Cf.* Kleinert v. Hutchinson, 121 A. 742 (N.J. 1923) (wife contracts to provide housework and yard work for a neighbor; husband entitled to recover the value of wife's services performed within his own home *or* of a character similar to that which wife performed at home).

176. *See supra* text accompanying notes 170-71 (discussing Mewhirter v. Hatten, 42 Iowa 288 (1875)).

177. McClintic v. McClintic, 82 N.W. 1017, 1018 (Iowa 1900) (emphasis added) (action by widow to recover from deceased husband's brother for board, washing, ironing, and mending furnished him for years he resided in household). The court noted that "the compensation being primarily due to the husband, the law will not imply an agreement to pay the wife." *Id.* at 1019.

178. Hamill v. Henry, 28 N.W. 32, 33 (Iowa 1886) (post-separation property dispute).

179. *See, e.g.*, Porter v. Dunn, 30 N.E. 122, 122 (N.Y. 1892) ("Moneys which were

indissolubly with the property of her husband because it *was* the property of her husband. If her labor had value, it was not the wife's prerogative to claim the benefit of it.

And yet, just as courts over time reconceived the nature of a wife's contracts with third parties for labor performed outside the home, they found ways to recognize wives' contracts with third parties for labor performed within it. Once again, a husband's consent played a pivotal role. As a Michigan court reasoned:

> [N]o distinction can be drawn between the services of the wife performed in and about the house and those performed elsewhere, as a foundation for a claim to recovery for her own benefit. If the husband can consent to her giving her time and attention to the management of a millinery or dress-making establishment or to any other regular business, away from her home, and if this makes the business her own, there seems to be no conclusive reason why she [sic] may not consent to her making her services in the household available in the accumulation of independent means on her own behalf. *He relinquishes her [sic] right to her services in the one case no more than in the other, and perhaps in the last case the ordinary course of marital relations is least disturbed.*[180]

In the court's view, it is not sensible to distinguish between earnings claims arising from work a wife performed within and without the home—not because a wife's contracts were equally valid wherever the labor they concerned might be performed—but because the husband, as owner of his wife's services, might relinquish his rights in his wife's labor in the course of any contractual arrangement he saw fit.[181]

But reliance on the legitimating force of a husband's consent led courts into unexpected thickets and consequently down new paths. In 1886, a Minnesota court uneasily noted that the consent principle required limitation:

> While it may be true that a married woman will not . . . be entitled to moneys due from boarders or others, earned by her in and about the keeping and management of the family household, there can be no doubt that . . . she may become entitled to receive the same by virtue of a contract between herself and her husband. *We do not mean by this that*

---

expended in and about her attendance upon the testator were procured from the husband."); Stout v. Ellison, 15 Ill. App. 222, 226 (1884) (post-separation property dispute) ("Because the wife had canned and preserved the fruits . . . purchased by her husband, it did not follow that she thereby became the owner of the fruits in this canned and preserved condition.").

180. Mason v. Dunbar, 5 N.W. 432, 433 (Mich. 1880) (emphasis added).

181. *Id.* at 433 ("The husband had the right to give her for this purpose her services, or to refuse to give them at his option; and, if he made the gift, the legal right to deal with [the promisor] as a stranger . . . would follow.").

> *they may stipulate for a pecuniary compensation to be paid by one to the other for performing the duties that pertain to the relation, such as caring for and managing the family, and the household of the family, but confine the proposition to services rendered to others, and compensation from others for such services.*[182]

Seeking to contain the more far-reaching implications of the consent principle, the court arrived at a new distinction. A husband and wife might agree that the wife was to keep earnings from services she performed in the home, so long as the agreement concerned "services rendered to others" rather than "duties that pertain to the [marriage] relation, such as caring for . . . the household of the family." A decade later, this principle was codified in an Indiana boarder case:

> The statute does not relieve the wife from the performance of any of the duties owing to her husband or family, but it simply vests in her the ownership of the earnings resulting from her services to others. The services claimed to have been rendered by the appellee . . . were not such as were owing from her to either her husband or her family, and were not rendered for their comfort, welfare, or benefit. They were rendered to a stranger, to whom she owed no such duty.[183]

Because the court no longer views the wife's labor as "owing from her either to her husband or her family," it represents the wife as acting, not as her husband's agent, but in her own right. The transaction suddenly assumes the familiar form of a bilateral contract between wife and boarder, "a stranger, to whom she owed no . . . duty."[184]

### B. EARNINGS CLAIMS ON INTERSPOUSAL CONTRACTS FOR WORK PERFORMED IN THE FAMILY BUSINESS

When a wife contracted with a third party for work she performed in the home, that market relationship afforded courts a conceptual basis for characterizing wives' labor as falling "outside" the bounds of marital obligation. But when a wife contracted with her husband for work performed in the family business, ready grounds of demarcation vanished—

---

182. Riley v. Mitchell, 29 N.W. 588, 588 (Minn. 1886) (emphasis added); *see also* Wren v. Wren, 34 P. 775, 776 (Cal. 1893) ("[A] husband and a wife may agree between themselves, without any other consideration than their mutual consent, that money earned by the wife in performing any work or service which does not devolve upon her by reason of the marriage relation shall belong to her as her own.").

183. Arnold v. Rifner, 45 N.E. 618, 619 (Ind. 1896) (wife nursed decedent).

184. Theories of a husband's express or implied consent still continued to play a role in recognition of wives' third-party contracts for labor performed in the home until well after the turn of the century. *See* H.C. Sh., Note, *Right of Married Woman to Maintain Action for Board or, Lodging of, or Services Rendered to, a Third Person Living in the Home,* 46 L.R.A. (N.S.) 238, 238, 240-41 (1913).

even though the contract demonstrated that the husband had agreed that his wife should be paid for her work. A woman who worked with her husband worked for him. As a Missouri court explained in 1884, "where the work and business are carried on by husband and wife in co-operation, the labor of the husband being united with that of the wife, the business and its proceeds will be regarded as belonging to the husband."[185] It thus rejected the plaintiff's attempt to recover compensation for services rendered with her husband in working the defendant's farm even though she had continued to work for five months after her husband's death.

This logic initially dominated litigation of wives' claims to earnings arising from labor in family business enterprise. Judicial antipathy to the claim finds fulsome expression at the turn of the century in a triad of cases governed by New York law as it stood at three points in time: prior to passage of the 1860 earnings statute; after passage of the earnings statute and legislation recognizing wives' contractual capacity at law in all circumstances save in relation with their husbands; and finally, in the wake of legislation sanctioning interspousal contracts at law. Wives' claims to earnings from a family business enterprise were rejected, on discrete legal grounds, under all three regimes.

The New York Court of Appeals disposed of such a claim in *In re Callister's Estate,*[186] an 1897 case involving a transaction that began before passage of the state's 1860 earnings statute. In the 1850s, a woman contracted with a lawyer to serve as his clerk; the two married a year later, the woman continuing in his employ for years afterward. When the lawyer died intestate, the court refused to recognize the wife's wage claim against the estate, denouncing its erroneous premise: that, absent common law reform, a contractual relation for services could ever exist between husband and wife:

> *The contract made before marriage to perform services for compensation, and the contract made by marriage to perform services without compensation, could not both exist at the same time.* There was a pervading and irreconcilable conflict between them, and hence the presumption of the law is that the later contract so modified the earlier as to abrogate or supersede it .... [T]here can be no modified or conditional marriage contract, whereby the services of the wife are excepted from the usual effect of marriage. Necessarily all marriage contracts are alike in their legal operation, which cannot be changed by agreement, nor modified in any way except by legislation.[187]

185. Plummer v. Trost, 81 Mo. 425, 429 (1884); *cf.* Blaechinska v. Howard Mission & Home, 29 N.E. 755, 756 (N.Y. 1892) ("Such services as she does render him, whether within or without the strict line of her duty, belong to him.").

186. 47 N.E. 268 (N.Y. 1897).

187. *Id.* at 269 (emphasis added).

Marriage being, at common law, a "contract . . . to perform services without compensation," the husband's contract to compensate his wife for services was a nullity: "A man cannot be entitled to the services of his wife for nothing, by virtue of a uniform and unchangeable marriage contract, and at the same time be under obligation to pay her for those services, by virtue of a contract made before marriage."[188]

The *Callister* case provided a welcome opportunity to address earnings claims arising from work in the family business without dealing with the marriage contract as "modified . . . by legislation." Five years earlier the New York Court of Appeals had confronted a similar claim governed by the 1860 earnings statute; in this case the court had uneasily rested its decision on an amalgam of property and capacity concerns. To bolster its assertion that, despite passage of the earnings statute, a wage agreement between husband and wife was unenforceable, the court stressed that a married couple lacked general capacity to contract at law. Yet here the court encountered an obstacle that forced it to retreat from matters of capacity back to property. Under the earnings statute a wife was allowed to contract with her husband respecting her separate property. What then if, under the statute, a wife elected to labor on her own account and lay claim to a separate estate in her services? With rapid citation to state authority, the court responded that "the words 'sole and separate account,' as used in the statute, cannot mean simply an election on the part of the wife to work for her own benefit, regardless of whom the work is done for":[189]

> As a man cannot make a valid contract to pay his wife for extraordinary services rendered in his household or for working on his farm, how can he make a valid contract to pay her for helping him make clothes in his business as a custom tailor? What basis is there for any distinction?[190]

The court refused to recognize a wife's right to earnings on an interspousal contract for services in the family business because it might establish a precedent inviting claims on interspousal contracts for services in the family setting. Therefore, the plaintiff, who worked on a salaried basis as a seamstress in her husband's business, was unable to recover damages in tort for impaired earning capacity; the value of the labor remained her husband's by marital right.

In 1900 a federal court faced a wife's petition to recover wages due from her husband's business, then bankrupt. By this time the New York legislature had twice acted to sanction contracts between a married couple.[191]

---

188. *Id.* at 270.
189. Blaechinska v. Howard Mission & Home, 29 N.E. 755, 756 (N.Y. 1892).
190. *Id.* at 756.
191. *See* Act of May 14, 1892, ch. 594, 1892 N.Y. Laws 113; Act of Apr. 17, 1896, ch. 272,

Notwithstanding legislation recognizing interspousal contracts, the federal court insisted that wives were absolutely prohibited from contracting with their husbands for services, regardless of the character of the labor involved:

> The statute obviously intends to enable the wife to contract with the husband respecting the acquisition of property, but does it enable the wife to acquire property by agreeing to render him a service outside of her domestic duty? If so, it would enable her to acquire property by contracting with him respecting her domestic service. *There is a wide distinction between a power to acquire property by a contract with the husband and a power to create property, which shall be her own, by an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all.* In other words, a contract with the husband for the acquisition of property does not include a contract to convert her personal service to her husband into property.[192]

Facing legislation sanctioning interspousal contracts, the court might simply have ruled the contract invalid as without consideration. Instead, it excluded contracts for wives' services from the scope of the 1890s legislation. The court framed the question in terms of capacity rather than consideration because a wife's labor in her husband's business no longer appeared to be part of a wife's obligations of marital service. Yet if a wife's labor in her husband's business now appeared "outside of her domestic duty," the court reasoned, it still could not be the legitimate subject of an interspousal contract, for admitting the legitimacy of such contracts would open the door to interspousal contracts involving the wife's domestic labor. The court observed that during the time the wife worked in the business, "she in turn employed a servant to fulfill the domestic duties which otherwise the wife should have done or aided in doing"—dismissing as immaterial the wife's claim to have paid the servant's wages out of her own earnings.[193] The substitution proved that a wife's labor was unitary, the property of her husband wherever he might see fit to employ it. If a wife worked with her husband, she labored for him. An arrangement contemplating wages for a wife's labor in the family business was thus an impermissible "contract to convert her personal service to her husband into property"—of no validity as against the claims of third-party creditors.[194]

---

1896 N.Y. Laws 215.

192. *In re* Kaufmann, 104 F. 768, 769 (E.D.N.Y. 1900) (emphasis added).

193. *Id.* at 768.

194. *Id.* at 769. Cases such as this might be explained on the grounds that all family assets should be available to family creditors, but there are many New York cases that do not follow this principle. In 1890, for example, the Court of Appeals ruled that a husband's salary claim for management of a wife's separate business could be satisfied without prejudice to the wife's creditors. Third Nat'l Bank v. Guenther, 25 N.E. 986, 987-88 (N.Y.

Wives' claims for earnings in family business enterprise did, however, begin to find legitimacy in the courts—on grounds the federal court plainly foresaw. As in the boarder cases, the transformation hinged on a redefinition of wives' obligations of marital service. In 1895, an Iowa court allowed a married woman to recover earnings from her husband's business over the competing claims of her husband's creditors. The court reasoned that the wife's earnings claim arose from labor outside the scope of her marital duties:

> That it is the duty of the wife, as "helpmeet," to attend, without compensation, to all the ordinary household duties, and labor faithfully to advance her husband's interests, is true. Yet it certainly is not her duty, unless she desires to incur it, to undertake the boarding of a large number of prisoners who may for the time being come under the charge of her husband. These defendants had the undoubted right to contract with each other with reference to the board to be furnished the inmates of the jail, the same as if the marital relation did not exist.[195]

While a wife owed her husband "without compensation . . . the ordinary household duties," boarding prisoners did not seem to be one of them. The unconventional character of the wife's work no doubt predisposed the court to sanction interspousal contracts for services outside "the ordinary household duties." A like emphasis marks the decision of a Nebraska court recognizing a wife's right to earnings in her husband's business:

> The services for which compensation is asked are not those necessarily involved in household duties or the marriage relation. She is taken from the home under the contract and placed in an office, and required to

---

1890) (distinguishing cases in which husband's creditors claim rights in wife's earnings as without "application here, as it has not yet been held . . . that a husband owes any legal duty to his wife to render service for her, in her separate business, without compensation"). Further, in cases in which a husband managed his wife's separate business, New York courts denied his creditors rights in the proceeds of her business—at least if he drew no salary for his work. *See* Abbey v. Deyo, 44 N.Y. 343 (1871) (denying husband's creditors interest in property of wife's business, for which he was agent); Buckley v. Wells, 33 N.Y. 518 (1865) (denying husband's creditors interest in proceeds of wife's business, which he managed); *cf.* Kingman v. Frank, 33 Am. Law Reg. (N.S.) 468 (N.Y. Sup.Ct. 1885) (allowing husband's creditors to attach salary from wife's business). A husband's creditors were thus entitled to the value of a wife's waged or unwaged "services" to her husband but not the value of his "support" to her. This split treatment seems to reflect the courts' willingness to protect a wife's property rights in capital assets passively held but not in her own labor.

195. Carse v. Reticker, 63 N.W. 461, 462 (Iowa 1895) (finding that sheriff who subcontracted to wife the boarding of county prisoners had thereby relinquished rights in her services; therefore, transaction valid against husband's creditors seeking to attach land wife purchased with earnings).

> follow an extraordinary business, that of an assistant to a detective, far removed from the duties devolving upon the wife.[196]

Even as the court recognizes capacity in the wife to contract for her labor, it represents her, not as subject, but as object, "taken from the home under the contract and placed in an office, and required to follow an extraordinary business," so inexplicable is her appearance in the aspect of a detective. A set of role distinctions clearly enables these decisions but does not wholly control them. Both the Iowa and the Nebraska courts traced a wife's right to her earnings in the last instance to her husband's consent that she should have them, citing the contract of employment between husband and wife as evidence that the husband had relinquished his common law rights in her services.[197]

The relinquishment thesis was given persuasive expression by the Pennsylvania Supreme Court, in an opinion written the same year as the Iowa decision, and given controlling weight by the Nebraska court—as well as many other state courts in the years after 1895:

> If now he makes a contract directly with his wife that he, having occasion for extra and unusual service in the course of his business outside of his family relation and needs, will pay to his wife for the performance of such service the special wages which otherwise he would be obliged to pay strangers . . . so far as he is concerned, he has surrendered to his wife all claim to be the owner of her services, and therefore, of the compensation which he has agreed to pay her. His consent that she shall receive the compensation for the service certainly divests the case of the aspect that he, as owner of her services, and therefore of her earnings is entitled to both, against her will . . . .[198]

Having contracted with his wife for services to which he was entitled by marital right, the husband was deemed to have relinquished any property claim on his wife's earnings.[199]

---

196. *In re* Cormick's Estate, 160 N.W. 989, 989-90 (Neb. 1916).

197. *See Carse*, 63 N.W. at 462; *In re* Cormick's Estate, 160 N.W. at 990. Thus, absent an express contract for wages (indicating a husband's "relinquishment"), courts generally refused to imply one—reasoning not from the presumption of gratuitous service within the family relation, but rather from a husband's continuing common law rights. *See, e.g,* Standen v. Pennsylvania R.R. Co., 63 A. 467, 470 (Pa. 1906) (wife working in husband's greenhouse); Lewis v. Lewis, 245 S.W. 509 (Ky. 1922) (post-separation property dispute; wife tending store).

198. Nuding v. Urich, 32 A. 409, 410 (Pa. 1895) (bankruptcy) (holding that wife who worked as a cook in husband's restaurant could claim her wages).

199. *Accord* Roche v. Union Trust Co., 52 N.E. 612, 617 (Ind. App. 1899) ("By his agreement to pay her a compensation for extraordinary services rendered him in his business, he thereby relinquished to her her earnings thus acquired, and abandoned all claim thereto . . . .").

By 1908, the Supreme Court of Colorado did not even find it necessary to resort to the relinquishment thesis. It recognized a wife's right in earnings from work in her husband's business as flowing wholly from the character of the labor involved—as the Pennsylvania court had noted, labor that a "stranger" would otherwise perform:

> [T]he services performed by appellee for the husband were not domestic services as such but were performed away from the home; and if they had not been performed by appellee, it would have been necessary for the husband to have employed some one to perform the same.[200]

A married woman's labor in the family business no longer appeared to be part of her wifely duties. Labor outside a wife's "domestic services as such" was a fungible market commodity that a wife or any other person might supply.

By the early decades of the twentieth century, wives began to prevail on their claims for earnings in the family business, and the claim acquired a legitimacy lacking in the latter part of the nineteenth century.[201] Yet the improved status of the claim seems to have resulted from a changed conception of a wife's "normal" duties rather than any enhanced conception of a wife's economic autonomy. As one court put it, "[i]t does not appear that the services rendered by the wife in this case in any way interfered with her domestic duties or with the services to which her husband was legally entitled, and we do not see upon what theory consent on the part of the husband was required."[202] If judges began to recognize a

---

200. Tuttle v. Shutts, 96 P. 260, 261 (Colo. 1908) (post-separation property dispute; wife contracts to cook for husband's threshing outfit in exchange for stove). *But cf.* Copp v. Copp, 68 A. 458 (Me. 1907) (denying wife's claim against husband for wages earned cooking for husband's crew in logging camp); Mott v. Mott, 78 A. 900, 901 (Me. 1911) (denying wife's lien on husband's lumber for value of cooking services she provided to husband's crew in logging camp; "husband is immune from actions at law to enforce any contractual claim of the wife against him, at least during coverture").

201. *See, e.g., In re* Gutierrez, 33 F.2d 987 (S.D. Tex. 1929) (bankruptcy); *In re* Davidson, 233 F. 462 (M.D. Ala. 1916) (bankruptcy); Moore v. Crandall, 205 F. 689 (9th Cir. 1913) (bankruptcy); *In re* Cox, 199 F. 952 (D.N.M. 1912) (bankruptcy). *But see In re* Sussman, 44 F.2d 236 (E.D. Ill. 1930) (disallowing wife's claim on express contract in bankruptcy); *In re* Kaufmann, 104 F. 768 (E.D.N.Y. 1900) (same). *See generally* E.W.H., Annotation, *Services by One Spouse to Another as Consideration for Latter's Promise,* 73 A.L.R. 1518, 1520-23 (1931); G.J.C., Annotation, *Liability of Husband for Services Rendered by Wife in Carrying on His Business,* 23 A.L.R. 18 (1923).

202. Bechtol v. Ewing, 105 N.E. 72, 74 (Ohio 1913); *cf. In re* Davidson, 233 F. 462, 462-63 (M.D. Ala. 1916):

> Of course, there is no sound ethical reason why the wife may not perform, outside of her marital duties, services as clerk for the husband, and be paid therefor. Here she is not asking any recompense for the discharge of her duties as wife and housekeeper. But it may be observed that she made the home comfortable and attractive for her family; that she was always considerate of the sometimes neglected individual, the husband; and it is probable that, if Jesse had been altogether

wife's right to wages earned in her husband's business, their willingness to do so reflected an understanding of such labor as extraordinary, outside the normal scope of marital obligation, rather than any greater receptivity to the idea that a "wife's work" as such could be the subject of an interspousal contract.

### C. EARNINGS CLAIMS ARISING FROM INTERSPOUSAL CONTRACTS FOR DOMESTIC SERVICES

As we have seen, courts interpreting the earnings statutes stubbornly resisted the notion that wives might under any circumstance be the owners of their own labor. Over time an increasing number of courts proved accommodating, recognizing wives' rights in earnings from third parties, and, sometimes, from their husbands for labor in a family business; but courts did so without recanting the common law premises with which they began. A married woman's right to her earnings was thus recognized without disturbing the common law premise that a wife was obliged to serve her husband. It was the content of a wife's duty that was subject to gradual evolution.

Although courts differed across states and over time as to the types of earnings arrangements that could be recognized without threat to the regime of marital status, they were uniform in their conviction that the statutes, no matter how phrased, could not be construed to allow interspousal contracts regarding a wife's household labor. From the earliest point at which courts recognized a wife's right to earnings from third parties, judges vehemently distinguished such "personal" privileges from a wife's continuing obligation to serve her husband. Judges proclaimed this duty most emphatically when confronted with contracts stipulating that a husband was to pay his wife some form of compensation for raising children or performing household labor.

That the cases arose at all is surprising given the traditional common law bar to wives' initiating suit—one gradually modified in the post-Civil War period, but by statutes rarely construed to allow intramarital suits.[203] In fact the cases rarely involved direct conflict between husband and wife in

---

as industrious and competent a merchant or storekeeper as Dora was a housekeeper, he would never have failed in his business. Certain it is that Dora deserves commendation for her efforts to make the marriage venture with Jesse a success at home and down town at the store.

203. *See* Morton J. Stevenson, *Suits Between Husband and Wife,* 51 CENT. L.J. 284 (1900) (noting that common law bar on intramarital suits persists, although subject to some modification under marital property legislation). As late as 1943 a commentator observed: "Generally speaking, although married women may by statute hold property as if they were unmarried, these sweeping statutes do not permit suits in either torts or contracts within the family." Paul Sayre, *A Reconsideration of Husband's Duty to Support and a Wife's Duty to Render Services,* 29 VA. L. REV. 857, 870 (1943) (footnote omitted).

an ongoing relationship. Typically, interspousal contract claims were raised by wives against their husbands' estates on notes given in consideration of domestic labor[204] or such claims might be raised in the form of contract defenses against third-party creditors who sought to attach assets held by wives in consideration of their labor in caring for home and children.[205] When parties separated and then rejoined subject to contractual agreement, wives might sue for breach of commitments made in consideration of resumption of marital relations.[206] Or, wives might raise contract-based claims to marital property in the wake of separation or divorce.[207] Without exception, courts ruled interspousal contracts regarding wives' domestic labor unenforceable.[208] Contracts regarding a husband's duty of support were viewed with similar hostility.[209] The basic terms of a marriage con-

---

204. *See, e.g.,* Frame v. Frame, 36 S.W.2d 152 (Tex. 1931) (holding unenforceable an agreement to pay wife for her services as housekeeper and for work in managing family farm); Foxworthy v. Adams, 124 S.W. 381, 383 (Ky. 1910) (holding void checks left by testator to wife in consideration for nursing him through last illness, but holding enforceable check left to doctor in excess of amounts owed for medical services rendered); Perkinson v. Clarke, 116 N.W. 229, 231 (Wis. 1908) (holding unenforceable conveyance by husband to wife of land when there was no consideration to support the transaction other than the "care and attention bestowed by [the wife] upon her late husband"); Whitaker v. Whitaker, 52 N.Y. 368 (1873) (holding unenforceable note given in consideration of wife's labor in household and on family farm); *cf.* Grant v. Green, 41 Iowa 88 (1875) (state may not compensate wife for caring for mentally disturbed husband).

205. *See, e.g.,* Dempster Mill Mfg. Co. v. Bundy, 67 P. 816 (Kan. 1902) (wife performs housework and delivers mail for husband, while husband plants crops); Lee v. Savannah Guano Co., 27 S.E. 159 (Ga. 1896) (wife to relinquish servants and perform household duties in return for annual sum); Michigan Trust Co. v. Chapin, 64 N.W. 334 (Mich. 1895) (arrangement whereby husband was to pay wife annually for her services as a housekeeper); Coleman v. Burr, 93 N.Y. 17 (1883) (contract whereby wife is compensated for caring for husband's fully paralyzed mother for eight years).

206. *See, e.g.,* McKay v. McKay, 189 S.W. 520, 521 (Tex. 1916) (holding void agreement whereby wife agreed to resume marital relations and "keep and care for [her husband] through life, in sickness and old age" in return for conveyance of property by husband); *In re* Kesler's Estate, 22 A. 892 (Pa. 1891) (holding that wife's promise to resume marital relations with husband was inadequate as consideration for husband's promise to revoke prenuptial agreement); Miller v. Miller, 35 N.W. 464 (Iowa 1887), *aff'd on reh'g*, 42 N.W. 641 (Iowa 1889) (holding that wife's promise to return to husband and care for family was inadequate consideration for husband's promise to pay wife $200 per year); Copeland v. Boaz, 9 Tenn. 223 (1877) (finding that husband's execution of note to a trustee on wife's behalf to induce wife to return to him violated public policy).

207. *Cf.* Lewis v. Lewis, 245 S.W. 509 (Ky. 1922) (wife claimed land in divorce-related proceedings); Anderson v. Cercone, 180 P. 586 (Utah 1919) (same).

208. *See, e.g.,* 26 AM. JUR. *Husband and Wife* § 326 (contracts for performance or nonperformance of marital duties); *see also* G.J.C., Annotation, *Validity of Contract by Husband to Pay Wife for Services,* 73 A.L.R. 1518 (1931) (services by one spouse to other as consideration for latter's promise).

209. The husband was prevented from contracting to secure a variance in or release from his duty of support. A Wisconsin court explained in 1908:

> The law requires a husband to support, care for, and provide comforts for his wife in sickness, as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because

tract were fixed by law and the parties deemed powerless to alter them.[210]

In ruling interspousal contracts for domestic labor unenforceable, courts most frequently invoked the contract doctrine of consideration: "The promise to pay for services which the very existence of the relation made it her duty to perform, was without consideration."[211] By invoking the rule that a preexisting duty could not serve as valid consideration for a contract, courts hardly engaged in doctrinal innovation. Yet invocation of this rule masked some troubling questions. Courts invoked the preexisting duty rule

---

> the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations. . . which result from the marriage contract itself.

Ryan v. Dockery, 114 N.W. 820, 821 (Wis. 1908) (refusing to enforce antenuptial agreement in which husband promised to marry and care for blind woman in exchange for her promise to devise him a portion of her estate). An Illinois court noted:

> Marriage is a civil contract to which there are three parties—the husband, the wife and the state—and it is regarded as a status based upon public necessity and controlled by law for the benefit of society at large. One of the contractual obligations of the marriage contract is the duty of the husband to support the wife, and this contractual obligation cannot be abrogated without the consent of the third party—the state.

Van Koten v. Van Koten, 154 N.E. 146, 147 (Ill. 1926) (citation omitted); *see also* Garlock v. Garlock, 18 N.E.2d 521 (N.Y. 1939) (holding unenforceable a contract in which wife agreed to take annual sum in exchange for releasing husband from support obligations; husband's duty of support cannot be contractually altered); Vose v. Myott, 120 N.W. 58, 58-59 (Iowa 1909) (refusing to hold wife liable for deceased husband's boarding debts) ("Their obligations as husband and wife are not mutual or coextensive in this respect. The husband is still bound by his common-law obligation for the support of the wife and is entitled to the benefit of her domestic service."); Corcoran v. Corcoran, 21 N.E. 468 (Ind. 1889) (refusing to enforce contract in which husband conveyed house to wife in exchange for her promise to support him; conveyance to wife upheld as voluntary). *See generally* Hendrick Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 100-05 (1991).

Although courts viewed contracts altering a husband's support obligations with extreme antipathy, over time they began to recognize such contracts as an incident of judicially supervised separation agreements. For an overview, see E.W.H., Annotation, *Agreement Not in Contemplation of Divorce for Release of Wife's Right to Support as Contrary to Public Policy*, 50 A.L.R. 351 (1927); *see also infra* note 232 and accompanying text.

210. Thus, in 1880, a commentator at the American Social Science Association convention criticized Blackstone's characterization of marriage as a civil contract. According to Professor Hitchcock:

> [M]arriage,—that is, the relation or condition of husband and wife,—while it originates in a contract, is not itself a contract, but a *status*. This distinction is of the highest importance. It is characteristic of the contract of marriage, that when a man and a woman do by mutual and lawful agreement become husband and wife, they thereby enter into and create for themselves a civil and political *status* which the State controls, and the rights, duties and liabilities growing out of which the State, not the contracting parties, prescribes and regulates.

Hitchcock, *supra* note 70, at 16.

211. Michigan Trust Co. v. Chapin, 64 N.W. 334, 334 (Mich. 1895).

as if the obligations of marital service were fixed, when in fact they were in flux—undergoing incremental reformulation with each earnings statute decision. For example, in 1921 an Iowa court refused to enforce an antenuptial agreement that stipulated that a wife would be compensated for her labor with the preemptory remark, "[t]here is nothing in the petition to indicate that the work she was to do was other than the ordinary work of a housewife."[212] Notwithstanding passage of Iowa's earnings statute,[213] the court was certain that "the ordinary work of a housewife" could not serve as consideration for an interspousal agreement: "Such enactments do not deprive the husband of the wife's ordinary services as wife or permit her to demand or receive compensation therefor from him."[214] To support the proposition that a wife's common law obligations rendered her domestic labor invalid as contractual consideration, the Iowa court turned to a New York decision, examined above,[215] which rejected a widow's claim against her husband's estate for services she performed as her husband's law clerk. The *Callister* decision was handed down in 1897, and, as the Iowa court recognized, it rested on a proposition which in 1921 Iowa courts would no longer hold tenable: that wives were not entitled to compensation for labor in their husbands' business. However, the distinction was dismissed as inconsequential to the essential principle:

> [The services at issue in *Callister*] would doubtless be considered, at the present time, as outside her services as wife, but the discussion is applicable to a case where the services claimed for were such as inhered in the marriage contract.[216]

The notion of "services . . . inhere[nt] in the marriage contract" is belied by the very authority the court invokes in support of the proposition. It was this slippage in the obligations of marital service that the preexisting duty rule was deployed to mask.

Thus, repeated invocation of consideration doctrine concealed that courts were incrementally adjusting the ambit of common law reform as they interpreted the earnings statutes. In 1877 the New York Court of Appeals found it unthinkable that a wife's labor could be subdivided into compens-

---

212. Bohanan v. Maxwell, 181 N.W. 683, 685 (Iowa 1921).

213. *See supra* text accompanying note 169 (quoting Iowa earnings statute).

214. *Bohanan,* 181 N.W. at 686 ("In the instant case the marriage was consummated, but if it be thought . . . that the services to be performed after marriage were part of the consideration, then in that regard such services could not be performed except in the sense that it was plaintiff's duty to perform them without compensation.").

215. *See supra* text accompanying notes 186-88 (discussing *In re* Callister, 47 N.E. 268 (N.Y. 1897)).

216. *Bohanan,* 181 N.W. at 687.

able and noncompensable portions:

> If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household (which I do not perceive and cannot admit), the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services. In most cases she probably contributes more to the happiness of her family by the proper discharge of the delicate and responsible duties of her household, than by any outside labors, however arduous. It is clear that the law regards neither as any consideration for a promise founded thereon from the husband.[217]

Yet by the turn of the century this once inconceivable notion was subject to rapid codification. In many jurisdictions, wife's labor for third parties—at least if performed outside the home—supplied consideration for a contract. Her labor for her husband in the family's business—at least if performed subject to an express agreement—might constitute valid consideration for a contract. But, courts continued to insist, her labor as a housewife was a status obligation assumed by marriage, hence inadequate consideration to support a contract. The contract doctrine of consideration, it seems, codified the canon of domesticity.[218]

Yet for all the principled force consideration doctrine imparted to the opinions, judges seemed unwilling to rely upon it exclusively. Perhaps the more prescient among them recognized certain difficulties in the very

---

217. Whitaker v. Whitaker, 52 N.Y. 368, 371 (1873).

218. *See, e.g.,* Lewis v. Lewis, 245 S.W. 509 (Ky. 1922):

> At common law the husband and wife are under obligation to each other to perform certain duties. The husband to bring home the bacon, so to speak, and to furnish a home, while on the wife devolved the duty to keep said home in a habitable condition. Following this it has been held that an agreement by the husband to pay his wife for performing the ordinary household duties was not only without consideration, but against public policy.

*Id.* at 511. The commentaries are, at times, even more explicit, as in this annotation to Michigan Trust Co. v. Chapin, 64 N.W. 334 (Mich. 1895):

> Upon the husband rests the duty of providing for his wife and family and of meeting their obligations . . . . Possibly, as in the nature of compensation of these liabilities, he was entitled to the services of his wife and family, and such services and their proceeds were as much his as any class of property. In the division of labor between the husband and wife her services were ordinarily in the keeping of the house, in the caring for children, and in the preparation of food and clothing, and for the performance of these duties she certainly could not exact any payment from him, and any agreement on his part to compensate her for them is without consideration, and, consequently, nonenforceable . . . .

Annotation, *Agreements between Husband and Wife to Compensate Each Other's Services, or Relinquish Claims on the Other's Earnings or Profits,* 58 AM. ST. REP. 492, 493-94 (1898) (agreements between husband and wife to compensate for services).

project of defining a regime of status with contractarian tools. The very authority consideration doctrine imparted to opinions suggested a universality to the regime of contract that the opinions themselves sought to deny. Indeed, it was the fallacious assumption that the regime of contract was universal in scope that courts had contested since enactment of the earnings statutes. As the New York Court of Appeals complained:

> Prior to 1860 it was never heard of, as a mischief to be remedied by legislation, that a wife could not earn money on her own account from her husband; that she could not demand pay from him for services rendered in his household; that she could not contract with him for services to be rendered for him, and the statute of that year above referred to was not enacted to remedy such a mischief.[219]

So the court prefaced its holding that a husband's creditors might attach earnings accumulated by a wife over an eight year period under a contract with her husband to care for his incapacitated mother. Contractual arrangements of this variety were "mischief" bred of the erroneous assumption that wives' contractual capacity under the earnings statutes was unqualified in character. Consideration doctrine thus proved a treacherous doctrinal resource for containing the spread of such mischievous assumptions, as it tended to efface, rather than emphasize, the peculiar status of wives' contracts for labor.

The opinions invalidating interspousal contracts for domestic labor thus rarely rest on grounds of consideration alone. Often, with a subtle shift of emphasis, contractual equity, rather than adequacy of consideration, supplies grounds for invalidating such interspousal agreements:

> Notwithstanding the passage of the married woman's law of 1866, the wife still owes to the husband the performance of those common-law duties, and the rendering of those services which are appropriate to their surroundings and circumstances. If he labors in the field, in the workshop, or elsewhere, for her support, as is his legal duty, she cannot charge him for cooking his meals, making or mending his garments, sweeping the floors of his house, milking the cow, or for other services of a like kind. Their duties are correlative, the performance of hers being no less obligatory than the performance of his.[220]

Emphasizing the reciprocal nature of marital status obligations, the court suggests an equivalence of value in the duties of support and service imposed on husband and wife by the common law. The point then was not that a wife's performance of marital obligations constituted inadequate

219. Coleman v. Burr, 93 N.Y. 17, 25-26 (1883).
220. Lee v. Savannah Guano Co., 27 S.E. 159, 160 (Ga. 1896).

consideration for a contract, but rather that it would be unfair for a wife to demand payment for such labor, as she already received its value in the support provided by her husband.[221] The Supreme Court of North Carolina explicitly invoked the equivalence of value thesis in a 1919 opinion holding that wives rather than husbands should recover tort damages for injuries that impaired a married woman's capacity to earn wages from third parties:

> It was felt to be unjust and illogical that the husband should recover for labor which the wife had performed outside the household duties, and under a contract she had a legal right to make "as if single," and that when the wife had borne the physical and mental suffering . . . compensation therefor should go to her, and not to her husband, who had suffered nothing. *The discharge of household duties, unending and tiresome and without limitation of hours, the rearing of children, the loving companionship and attentions of a wife, are full compensation for her right to support by the husband.*[222]

By this reasoning, wives could not contract to be compensated for their labor in the home because—*by irrebuttable legal presumption*—they already received "full compensation" for such labor in the form of support by the husband.

But just as frequently as courts invoked the reciprocal obligations of support and service to demonstrate that wives were already "fully compensated" for their labor in the home, they resorted to another line of argument of somewhat contradictory implications. Instead of presenting the status obligations of marriage as just by virtue of their equivalence in value, courts defended marital obligation as socially beneficial because of its insularity from market exchange. In this view, the defining incident of a wife's labor was that it was uncompensated. As the New York Court of Appeals reasoned, there was an incommensurability between a "contract made before marriage to perform services for compensation, and the contract made by marriage to perform services without compensation,

---

221. The Iowa Supreme Court reasoned:

> When the wife performs labor or services for others for which wages accrue, such wages are her own separate property, but for labor performed and assistance rendered in the discharge of her domestic duties as a wife no wages, in the proper meaning of that term, attach or follow. *Both husband and wife have in their marriage vows bound themselves to the discharge of their respective duties toward each other, for which no wages as such are due. These duties being mutual, their discharge by the parties constitute the only compensation contemplated by law.*

Mewhirter v. Hatten, 42 Iowa 288, 292 (1875) (emphasis added).

222. Kirkpatrick v. Crutchfield, 100 S.E. 602, 607 (N.C. 1919) (emphasis added); *cf. supra* note 218 (commentator suggesting that husband's right to service of wife and family can be as "compensation" for his duty to support them).

[such that both] could not . . . exist at the same time"[223]—or, in the words of a federal district court, an impossibility in "an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all."[224] "This was simply the performance of her duty as a wife, for which she did not ask and could not have demanded compensation, and the services thus rendered cannot be considered a valuable consideration for the purchase of the lands."[225] In short, as an Iowa court reasoned in refusing to enforce an agreement for resumption of marital relations, which stipulated that the wife was to receive a monthly sum in consideration of her domestic labor:

> The marital obligations of husband and wife in the interest of homes, both happy and useful, have a higher and stronger inducement than mere money consideration, and they are generally of a character that the judgments or processes of the courts cannot materially aid . . . .[226]

The Supreme Judicial Court of Massachusetts elaborated on this theme in an 1888 opinion, in which it held an agreement for resumption of marital relations unenforceable. A wife left her husband and initiated divorce proceedings on discovering his infidelity. She was persuaded to drop the proceedings and return to her husband on the faith of an agreement redistributing property between the couple. The Massachusetts court ruled the agreement unenforceable, characterizing it as a simple contract for marital services. To the wife's argument that the contract was enforceable as resting on a valuable consideration—abandonment of a divorce proceeding that she had legal grounds to initiate—the court replied in an opinion that moves in punning circles around the contract claim, dissolving the domain of private consensual agreement into an arena of status defined by public concerns:

> The *consideration* of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband.

---

223. *In re* Callister, 47 N.E. 268, 269 (N.Y. 1897).

224. *In re* Kaufmann, 104 F. 768, 769 (E.D.N.Y. 1900).

225. Perkinson v. Clarke, 116 N.W. 229, 231 (Wis. 1908).

226. Miller v. Miller, 42 N.W. 641, 642 (Iowa 1889). In the same vein, a Kentucky court refused to honor a check left by a testator for his wife in consideration of her nursing him through his last illness while honoring a similar check to the doctor in attendance, in excess of amounts owed. It reasoned:

> It would be contrary to public policy to permit either [husband or wife] to make an enforceable contract with the other to perform such services as are ordinarily imposed upon them by the marital relations, and which should be the natural prompting of that love and affection which should always exist between husband and wife.

Foxworthy v. Adams, 124 S.W. 381, 383 (Ky. 1910).

> It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. Perhaps a husband can hire his wife to do anything for him which a servant can be hired to do, or can buy of her anything that is the subject of barter; but a servant cannot be hired to fulfill the marital relation, and the fellowship of the wife is not an article of trade between husband and wife. Like parental authority and filial obedience, conjugal consortium is without the range of pecuniary *considerations*. The law fixes and regulates it on public *considerations*, and will not allow the parties to discard and resume it for money.
>
> It is the same when the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right affecting only the parties to the marriage, but a right which is an incident of the status of marriage, and which affects children, the family, and society, and which must be exercised upon *considerations* arising from the nature of the right .... It is as much against public policy to restore interrupted conjugal relations for money, as it is to continue them without interruption for the same *consideration*. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public, when it is sold for money, and the law cannot recognize such a *consideration* for it .... The resumption of marital intercourse after a justifiable separation . . . only for money, shows connivance rather than condonation.[227]

By asserting the incommensurability of pecuniary and public considerations, the court shifts the ground of argument. No longer is the agreement unenforceable by reason of its failure to conform to the requirements of contract; rather it is the very imposition of contractual arrangements on the marriage relationship that defiles it. The logic of the consideration cases is upended. Intramarital relations are impermissible to the extent they assume the forms of contract: "The resumption of marital intercourse after a justifiable separation . . . only for money, shows connivance rather than condonation." Conformity with contractual norms becomes the grounds for invalidating such agreements rather than for enforcing them.

The distance separating the Massachusetts opinion from the premises of contract doctrine is suggested by a dissent from an indignant Oliver Wendell Holmes, who lectures the majority on its obfuscation of the consideration question. From the standpoint of contract rather than poetics, the wife's argument remains unrefuted:

> I do not understand it to be denied that this conduct on the wife's part was such a change of position, or detriment in the legal sense of that

227. Merrill v. Peaslee, 16 N.E. 271, 274-75 (Mass. 1888) (emphasis added).

> word, as to be a sufficient consideration for a promise, if not an illegal one . . . . The case is not like those where the wife was only doing what she was legally bound to do.[228]

And, Holmes continues, the court has not only violated principles of contract in its disposition of the case, but it has also violated principles of common sense. The court's romanticization of marriage denies its traditionally recognized economic logic:

> I cannot think that it is unlawful to make a lawful act, which the wife may do or not do as she chooses, the consideration of a promise, merely because, by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money.[229]

Holmes called the legal question correctly. By the turn of the century, with the incidence of divorce rising,[230] contracts for resumption of marital relations found increasing support in the courts, at least when based, as this one was, on forfeit of valid grounds for divorce.[231] But the majority called the consideration question correctly; recognition of such contracts was premised on "public" considerations, not on the technical adequacy of the so-called pecuniary consideration at issue. The majority's invective against those who would prostitute marriage with the forms of contract is a staple of the opinions construing the earnings statutes. Its assertion that "conjugal consortium is without the range of pecuniary considerations" assumes a thematic presence in opinions invalidating contracts for domestic labor: "The marital obligations of husband and wife . . . have a . . . stronger inducement than mere money consideration . . . ."[232] And the majority's insistence that intramarital contracts would disfigure the relation, reducing the wife to a condition of servitude—"a servant cannot be hired to fulfill the marital relation, and the fellowship of the wife is not an article of trade between husband and wife"—appears as a standard objection to interspousal contracts for domestic labor.[233]

---

228. *Id.* at 275.

229. *Id.* at 276.

230. *See, e.g.,* CARL DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 165-75 (1980).

231. *See* Darcey v. Darcey, 71 A. 595 (R.I. 1909); Adams v. Adams, 91 N.Y. 381, 384 (1883) ("[I]t would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other."); *see also supra* note 209.

232. Miller v. Miller, 42 N.W. 641, 642 (Iowa 1889).

233. Merrill v. Peaslee, 16 N.E. 271, 274 (Mass. 1888). In refusing to enforce the spousal agreement, the *Peaslee* opinion emphasized that the contract would degrade the wife into a prostitute, suggesting only indirectly that the contract raised concerns about treating the wife as a domestic servant. The court, however, addressed these concerns more directly in its

In claiming for the marital relation a spiritual character that distinguished it from "mere" market relations, and in seeking to protect the wife from her own misguided efforts to degrade herself into her husband's menial, the opinions typically assume a tenor of outraged solicitude for the wife's welfare. Interspousal contracts are unenforceable because they would transform the wife into a prostitute or servant. Yet it is important to note how such protests deflect attention from the common law tradition the opinions enforce—*a tradition in which the husband acquires a property right in his wife's services by the act of marriage itself.* For courts steeped in common law concepts of marriage, the notion that the marital relation might have an economic character could not have provoked such shock and consternation. Rather, what courts reacted to was the spectacle of a wife attempting to manipulate the economic structure of the relation in her own interest: that is, "show[ing] connivance rather than condonation,"[234] or yet more bluntly, "maintain[ing] her claim in antagonism to the husband."[235] This display of wifely autonomy—the more noxious for its subversive appropriation of the otherwise trustworthy forms of contract—seems at root the source of the outrage veiled, deflected, and displaced in the opinions.

Not infrequently the manifest text of the opinions is fractured by an eruption of their underlying concerns. A court's protest that a wife is surely something other than a "mere servant" strays into a fantasy about the implications of a contractually structured relation for her husband. The problem is not that the wife's services have been bought but rather that, if they are for hire, her compliance has been lost:

> [Admitting] that very radical changes have been made in the relation of husband and wife, still it seems to us . . . . that these changes *have not*

---

next sitting when it held that a woman who was induced by misrepresentation to enter a bigamous marriage could not sue her "husband's" estate for the value of sixteen years of domestic labor, either in tort or in contract, express or implied. As the court reasoned, there was no express contract for the wife's labor, "and the circumstances under which the work was performed, negatived any implication of an agreement or promise that it should be paid for." Cooper v. Cooper, 17 N.E. 892, 894 (Mass. 1888):

> [T]he fact that the plaintiff was led by mistake or deceit into assuming the relation of a wife, has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife excludes the inference that the society and assistance of a wife which she gave to her supposed husband were for hire. It shows that her intention in keeping his house was to act as a wife and mistress of a family, and not as a hired servant.

*Id.* at 894. For discussion of another implied contract claim arising out of a bigamous marriage, see *infra* text accompanying notes 268-69. *See generally* J.G.G., Annotation, *Right of Husband or Wife to Compensation for Services Rendered to the Other,* 15 L.R.A. 215, 216 (discussing implication of contracts for services in annulled or bigamous marriages).

234. *Peaslee,* 16 N.E. at 271.

235. Carver v. Wagner, 64 N.Y.S. 747, 750 (N.Y. App. Div. 1900).

> *transformed the wife into a hired servant, or established the law to be that the husband, when prostrated on a bed of sickness, will not be entitled to the tender care and watchfulness of his wife, unless he has the ability and expects to pay her wages therefor.* These duties are mutual and reciprocal and essential to the harmony of the marital relation. To abrogate these duties, or remove the mutual obligations to perform them, would be to dissolve that relation and establish that of master and servant.[236]

To allow a wife to contract for her services would be to acknowledge her ownership of them. More deeply, the notion of replacing a status relation structured by obligation with a contract relation structured by consent invited contemplation of the unthinkable: that wives might refuse to supply their services.[237] To recognize contractual relations between husband and wife was to supply legal form to relations of latent antagonism.[238] As the protest that contracts for domestic labor would institute master-servant relations between husband and wife rapidly evolves into a protest that, in a relation so structured, a wife might refuse to work, one senses, here and elsewhere, an implicit analogy of palpable force. Husband might face his wife in a struggle not unlike that of an employer facing strike-prone employees. If the analogy to class conflict does not breach the surface of the opinions, it unmistakably drives their rapidly multiplying arguments.

As courts cast about for irrefutable grounds on which to demonstrate that wives' contracts for domestic labor were unenforceable, they mobi-

---

236. Mewhirter v. Hatten, 42 Iowa 288, 292-93 (1875) (emphasis added) (quotation omitted).

237. Thus, in Lee v. Savannah Guano Co., 27 S.E. 159 (Ga. 1896), the Supreme Court of Georgia held unenforceable as against a husband's creditor a contract in which husband had agreed to pay his wife one hundred dollars annually "in consideration of her consent to dispense with servants, and her undertaking to perform with her own hands the ordinary household duties devolving upon a wife in her position." *Id.* at 159. The court invalidated the contract on the familiar grounds that it is a wife's legal duty to perform such services. Its recitation of the wife's legal duties was, however, unusually stern:

> The husband is not legally bound to support his wife in luxurious idleness. If she refuses to perform her obligations, she forfeits all right to demand of him a support. The courts uniformly protect the husband in the assertion of his lawful right to receive the benefit of his wife's services . . . . If a husband without means is willing to take upon himself all the burdens, or if, because of the possession of adequate means, he is able to relieve his wife from all forms of drudgery, it is, in the first instance, sometimes commendable, and, in the latter, always proper, for him to do so; but the wife cannot demand such an exemption as a matter of strict legal right.

*Id.* at 160. It is important to note that, in this case, the wife was *not* "refus[ing] to perform her obligations," or "demand[ing] . . . an exemption" from them, but instead was performing them—subject to a contract for payment.

238. *See, e.g.*, Miller v. Miller, 42 N.W. 641, 642 (Iowa 1889) ("What element could be introduced into a family that would tend more directly to breed discord than this contract?"); Coleman v. Burr, 93 N.Y. 17, 25 (1883) ("It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with the husband for the payment of services to be rendered for him in his home.")

lized a variety of arguments—as we have seen, of wildly contradictory implications. When arrayed in the course of a single opinion, as they frequently were, these arguments seem to point everywhere and nowhere, as if the court were suffering simultaneously from a surfeit and a shortage of grounds. In this respect, the remarks of the New York Court of Appeals in 1883 are not uncharacteristic of the body of opinions as a whole:

> It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts and establish them upon the disputed and conflicted testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts.[239]

As the court's protest mounts in indignation, the notion that "a wife could contract with her husband for payment of services" merges into a fantasy of extortion—"she could exact compensation for services"—and resolves into the specter of a wife suing her husband for pay. Then the suggestion is retracted. The problem is not the wife's defiance, but her degradation into "a menial and a servant." Yet, the court's underlying concern with the husband's welfare abruptly resurfaces in the suggestion that the master-servant relation would defile marriage, not by degrading the wife, but by depriving the husband of his wife's "loving and devoted ministrations." Once again the suggestion is retracted, and the image of marital conflict is submerged into one of marital collusion: the real problem with such relations is that they would facilitate frauds on creditors. With its seesawing acknowledgment and denial of marital conflict, the opinion's objections ultimately resolve into the figure of the wife who "could frequently absorb all her husband's property in the payment of her services." Is the court expressing concern about fraud perpetrated on third-party creditors or on the husband?

The rapidly multiplying justifications arrayed here suggests a court convinced beyond doubt of its decision but casting about in confusion for its grounds. We can penetrate the incoherence of the opinion to discern a latent text of some coherence; but as the court itself seems to recognize, the fears driving its decision do not constitute legal grounds for that decision. Thus, the rhetorical confusion that characterizes earnings stat-

239. Coleman v. Burr, 93 N.Y. 17, 25-26 (1883).

utes cases—within and across the opinions—may be read as symptomatic of a crisis. In these decisions we may observe courts, in the wake of common law reform, casting about for, but not quite finding, a legal discourse adequate to contain the statutes' more radical implications, one that possessed the coherence of the common law rule.

When Blackstone sought to explain why only a husband had a tort action for loss of conjugal consortium, he did so confidently. Reasoning inductively from observed practice he arrived at the principles that practice embodied:

> We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related . . . while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.[240]

Similarly he could proceed deductively from principle to practice:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover,* she performs every thing . . . . For this reason, a man cannot grant any thing to his wife, or enter into a covenant with her; for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself . . . .[241]

The ease with which Blackstone could adduce "reasons," synoptic principles to account for the structure of the common law, must have been envied by courts called upon to construe the earnings statutes. It was their task to mediate conflicts between the regimes of contract and status in the wake of common law reform, to draw boundaries anew so that each realm might once again possess the coherence Blackstone confidently assumed. Without such boundaries, each realm threatened the legitimacy of the other. Judges could not claim universality for the regime of contract while they were engaged in policing its boundaries; nor could they confidently invoke principles of marital status while recognizing in wives forms of legal agency unthinkable at common law. Courts struggling to reconcile conflicts between the realms of contract and status thus sought the restoration of status quo ante: the achievement of a legal order whose contradictory

240. 3 BLACKSTONE, *supra* note 1, at 142.
241. 1 BLACKSTONE, *supra* note 1, at 430 (citations omitted).

elements were naturalized so as to obviate the burdensome, if not embarrassing, task of justification in which they found themselves engaged.

Constructing this new legal order was necessary if courts were to settle, once and for all, a seemingly irrepressible question: Why shouldn't the labor wives performed for their families be treated like labor performed in any other context? This was the question presented by feminists who argued that wives should have property rights in their household labor[242]—and by litigants under the earnings statutes themselves. As the case law we are examining illustrates, ordinary Americans understood the earnings statutes to authorize experimentation with new economic arrangements in marriage.[243] With enactment of the statutes, there were married women across the nation who began to assert rights in marital property that they

---

242. *See supra* notes 53-68 and accompanying text (discussing feminist demands for joint property rights in marriage). For sources illustrating how nineteenth-century feminist arguments for joint property reform altered women's understanding of their household labor, see Siegel, *supra* note 13, at 1158-61 (discussing letters written by suffrage journal subscribers that protested the expropriation of wives' household labor and demanded joint property rights in marriage). For sources from the early twentieth century, see *id.* at 1209-10 n.549 (in the 1920s, feminists pursued different reform strategies, with some advocating interspousal contracts for domestic labor and others continuing to advocate joint property ownership in marriage); Vivian A. Zelizer, *The Social Meaning of Money: Special Monies*, 95 AM. J. SOC. 342, 362 (1989) (in the 1920s, social commentators criticize the practice of paying wives an "allowance" and advocate "a democratic 'joint control of the purse' "; a 1928 survey conducted by *Harper's* found that 54 of 200 respondents "had what the magazine described as the more 'feminist' financial arrangement: a joint bank account or common purse") (citations omitted).

243. *See, e.g., supra* Part III.C (discussing cases in which couples entered into contracts regarding a wife's household labor).

The impact of feminist joint property advocacy is evident in Anderson v. Cercone, 180 P. 586 (Utah 1919), a post-divorce dispute over marital property that a husband acknowledged was purchased with the couple's "joint earnings." The court testily observed that "[p]laintiff himself has brought some confusion into the case by unnecessarily alleging that plaintiff and defendant became the owners of the property through purchase by means of their joint earnings." *Id.* at 587. To dispel this "confusion," the court quoted what it saw as dispositive language in the trial transcript:

> Q. Now you alleged in your complaint that the earnings here were the joint earnings of you and your wife; that is, you each had an interest in the earnings?
> A. Well, I considered her had some interest in it because she was looking after the house and the children and helping me what she could do.

*Id.* To this the court responded:

> It requires neither argument nor comment to convince the understanding that such interest of the wife does not constitute a separate estate in her.... Property purchased from the joint earnings of husband and wife as above described belongs to the husband, subject only to such interest as the law gives her in the property of her husband.

*Id.* (citations omitted). The husband purchased the property with money he understood to be the couple's "joint earnings" but which the court concluded was his own. Thus, while title to the property was in the wife's name, the court held that the wife had an interest in the property only if the husband made her a gift. Because the parties never understood the transaction to be in the nature of a gift, the property was deemed to be the husband's.

claimed to have earned by virtue of their family labor—at times in terms adverse to their husbands' interests.[244] It is impossible to estimate from the record we have the typicality of these arrangements and claims or, for that matter, the altered social expectations they reflect. But the existence of this record demonstrates that reform did alter perceptions of wives' labor—and in ways that often exposed conflicts in the marriage relation.

To discipline social expectations unleashed by earnings reform and so defend marriage from transformation by contract,[245] courts needed to explain—in terms having the force of common sense—why the work wives performed for their families could not to be treated like any other form of labor. And so, as courts struggled to justify the marital duties of support and service, they slowly revitalized the common law, in effect, translating Blackstone to the legal and social idiom of the modern era. The judges who construed the earnings statutes surely viewed their task in more prosaic terms: their object was simply to recognize change while somehow containing it. But the strategies judges brought to bear on this task had contemporary rationality—in both their logic of accommodation and resistance. To define the obligations that "inhered" in marriage, judges drew upon the canon of domesticity, thereby infusing the ancient common law concepts of "support" and "service" with gender roles specific to late nineteenth-century America.[246] As judges drew upon their social experience to define the irreducible "essence" of the marriage relation, they differentiated family and market relations in law—creating two legal spheres that reflected and reinforced the gender status norms of the industrial era. This, then, is another perspective from which we might describe coverture's reform as "progressive."[247]

## IV. EARNINGS STATUTE LITIGATION: DEVELOPING A LAW OF STATUS FOR THE INDUSTRIAL ERA

The principles courts developed at the turn of the century to justify the prohibition on interspousal contracts for domestic labor still govern such

---

244. For a particularly compelling example of a wife's testimony to this effect, see Lewis v. Lewis, 245 S.W. 509, 510 (Ky. 1922), quoted *supra* text accompanying note 5.

245. *See supra* Part III.C. These concerns are succinctly expressed by one commentator describing developments in New York marital property law:

> *Baron,* lord and master, *femme covert!* Such words are now solecisms. They must be discarded. Husband, wife, may do for a while. But in time, the exact legal terms to express their exact legal status may have to be something like this, "marital contractor."

John B. Leavitt, *May A Husband Sue His Wife For Salary?*, 31 ALB. L.J. 64, 66 (1885).

246. For some particularly vivid examples, see *supra* note 218.

247. *Cf. supra* Part I.A (discussing the "status to contract" thesis that informs the historiography of marital status reform).

contracts today.[248] Consider, for example, *Borelli v. Brusseau*,[249] a case decided by a California court in 1993. A man who was hospitalized with heart problems and a stroke was advised by his doctors to enter a nursing

248. *See, e.g.*, Kuder v. Schroeder, 430 S.E.2d 271, 273 (N.C. Ct. App. 1993) ("Under the law of this State, there is a personal duty of each spouse to support the other, a duty arising from the marital relationship, and carrying with it the corollary right to support from the other spouse. So long as the coverture endures, this duty of support may not be abrogated or modified by agreement of the parties to a marriage.") (citation omitted); Watkins v. Watkins, 192 Cal.Rptr. 54, 56 (Cal Ct. App. 1983) (while " 'a married woman cannot contract with her husband with respect to domestic services which are incidental to [the] marital status,' " the same rule does not apply to unmarried cohabitants) (quoting Brooks v. Brooks, 48 Cal. App. 2d 347, 350 (1941)); Church v. Church, 630 P.2d 1243, 1250 (N.M. App. 1981) ("Under Virginia law . . . '[t]he husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household' ") (citation omitted); *In Re* Estate of Lord, 602 P.2d 1030, 1031 (N.M. 1979) ("a contract whereby one spouse agrees to pay the other spouse for his or her care, which is part of the other's duties as a spouse, is against public policy and is therefore void"); Department of Human Resources v. Williams, 202 S.E.2d 504, 507 (Ga. Ct. App. 1973) ("A husband is entitled to the *domestic* service of his wife, rendered in and about the household, in the *general* work of keeping and maintaining the home."); Matthews v. Matthews, 162 S.E.2d 697, 698 (N.C. 1968) ("It is well settled that a contract between husband and wife whereby one spouse agrees to perform specified obligations imposed by law as a part of the marital duties of the spouses to each other is without consideration, and is void as against public policy. Under the law, a husband has the right to the services of his wife as a wife, and this includes his right to her society and her performance of her household and domestic duties.") (citations omitted); Mays v. Wadel, 236 N.E.2d 180, 183 (Ind. 1968) ("It is the law of this State that between husband and wife, while they are living together as such in a common household, that there can be no express or implied contract for compensation or payment for any services or acts performed or rendered in and about the home by either of them in the common support of that household."); Cox v. Cox, 183 So. 2d 921, 923 (Miss. 1966) ("Consortium includes the performance by a wife of her household and domestic duties . . . without compensation therefore.") (quoting 26 AM.JUR. *Husband and Wife* § 9 (1940)); Youngberg v. Holstrom, 108 N.W.2d 498, 502 (Iowa 1961) ("It is well settled that a husband's agreement to pay for services within the scope of the marital relation is without consideration and contrary to public policy."); Martinez v. Martinez, 307 P.2d 1117, 1119 (N.M. 1957) ("As a wife, the plaintiff owed defendant the services she contracted to give in exchange for the deed."); Sprinkle v. Ponder, 64 S.E.2d 171, 175 (N.C. 1951) ("[I]t is fixed law that any . . . contract, attempting to make an ordinary marital duty the subject of commerce, is void as against public policy."); Tellez v. Tellez, 186 P.2d 390, 392 (N.M. 1947) ("A contract whereby the husband agrees to pay his wife for his care, which is a part of her duties as a wife, is without consideration, against public policy, and void."); Oates v. Oates, 33 S.E.2d 457, 460 (W.Va. 1945) ("[A]n agreement between husband and wife by which the wife agrees to perform the domestic duties imposed by the marital relation for a consideration is contrary to public policy and void . . . . The marital duties of husband and wife cannot be made the subject of barter and trade, and either spouse performing such duties for compensation, either received or expected, is placed in the category of a servant."); Ritchie v. White, 35 S.E.2d 414, 415 (N.C. 1945) (noting that there is nothing in the state's married women's property act "to indicate a purpose on the part of the General Assembly to reduce the institution of marriage, or the obligations of family life, to a commercial basis"); Brooks v. Brooks, 48 Cal. App. 2d 347 (1941) ("a married woman cannot contract with her husband with respect to domestic services which are incidental to her marital status"); Luther v. National Bank of Commerce, 98 P.2d 667, 672 (Wash. 1940) ("since the marriage relation obligated the wife to care for her husband and make a home for him, an agreement to pay for such services is without consideration"); *In re* Estate of Sonnicksen, 23 Cal. App. 2d 475, 479 (1937) ("the necessary legal effect of the marriage contract was to terminate the

home. The man instead asked his wife to nurse him at home for the duration of his illness and promised to leave her certain properties if she did; the wife provided her husband the nursing care he sought, but he died without devising her the properties. When the wife sought specific enforcement of the agreement, the court refused her request, announcing that it would "adhere to the longstanding rule that a spouse is not entitled to compensation for support."[250] An indignant dissent quoted at length from several of the cases relied upon by the majority to expose their "ethos and mores": "Statements in two of these cases to the effect that a husband has an entitlement to his wife's 'services' . . . smack of the common law doctrine of coverture which treated a wife as scarcely more than an appendage to her husband."[251] But the majority insisted that there were good reasons to adhere to the rule, notwithstanding its historical origins:

> We agree with the dissent that no rule of law becomes sacrosanct by virtue of its duration, but we are not persuaded that the well-established rule that governs this case deserves to be discarded. If the rule denying compensation for support originated from considerations peculiar to women, this has no bearing on the rule's gender-neutral application today.[252]

*Borelli* offers the same mix of contractarian and anticontractarian justifications for its refusal to enforce the couple's agreement that courts offered at the turn of the century. The majority first argues that there is no consideration to support the agreement other than labor that the wife owed her husband by reason of marriage: "Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case."[253] The court then asserts that recognizing interspousal contracts of this sort

---

obligations of the parties under [the] written agreement" because "one of the implied terms of the contract of marriage was that [the wife] would perform without compensation the [domestic] services covered by [the] written agreement"). *See generally* 41 AM. JUR.2D *Husband and Wife* §§ 320-22 (1968 & 1994 supp.); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 301-03 (2d ed. 1988); LENORE J. WEITZMAN, THE MARRIAGE CONTRACT 60-75, 338-41 (1981); Banks McDowell, *Contracts in the Family*, 45 B.U. L. REV. 43, 44-54 (1965); Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161 (1974); Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 241 (1982).

249. 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993).

250. *Id.* at 20.

251. *Id.* at 21 (Poche, J., dissenting) (citation omitted).

252. *Id.* at 20.

253. *Id.*

would violate public policy:

> While we do not believe that marriages would be fostered by a rule that encouraged sickbed bargaining, the question is not whether such negotiations may be . . . unseemly. The issue is whether such negotiations are antithetical to the institution of marriage as the Legislature has defined it. We believe that they are.
>
> The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.[254]

*Borelli*'s reasoning is, no doubt, persuasive to many. There are many who share with the *Borelli* majority an animus to market relations in the family, who "do not believe that marriages would be fostered by a rule that encouraged sickbed bargaining," and who believe that "even if few things are left that cannot command a price, marital support remains one of them." But should those who agree with the majority's reasoning be concerned with the dissent's charge that *Borelli* rests on "the common law doctrine of coverture which treated a wife as scarcely more than an appendage to her husband?"[255] Or can they be satisfied with the majority's assurance that the legal origin of the rule applied in *Borelli* has "no bearing on the rule's gender-neutral application today?"[256] The very longevity of the doctrine of marital service suggests that the dissent's concerns are more weighty than the majority grants. I now consider how statutory reform of the doctrine of marital service infused an ancient common law rule with gender mores of the industrial era so that it can be justified in terms that are not only socially acceptable but highly persuasive for many today.

### A. CONTRACTARIAN AND ANTICONTRACTARIAN RATIONALES FOR THE PROHIBITION ON INTERSPOUSAL CONTRACTS

Since passage of the earnings statutes, courts have justified their refusal to enforce interspousal contracts for domestic services on two grounds. Courts deemed such agreements unenforceable on grounds of contract:

254. *Id.*
255. *Id.* at 21 (Poche, J., dissenting).
256. *Id.* at 20.

under the preexisting duty rule, the agreements lacked consideration.[257] But courts also deemed the agreements unenforceable on grounds of "public policy": analyzing interspousal agreements as if they were merely market transactions would desecrate the marriage relation.[258] For purposes of brevity, I henceforth refer to the first rationale as "contractarian" and the second as "anticontractarian."[259]

There is an important distinction between these two rationales. The contractarian justification treats the interspousal agreement as a transaction concerning *property rights in the wife's labor*: either the wife owns her labor, or the husband does, in which case there is no consideration to support the agreement. By contrast, the anticontractarian justification insists *a wife's labor is not property that husband and wife can barter over like a fungible market commodity*.

For centuries judges enforcing the common law talked about a husband having property rights in his wife's labor, but, as the *Borelli* dissent points out, this kind of talk is hardly persuasive today.[260] For this reason, the *Borelli* majority invokes the contractarian or consideration-based argument in passing,[261] but it defends its holding on anticontractarian grounds, arguing that it is *inappropriate* to analyze interspousal relations in the discourse of property and contract. While "[t]he dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length," the majority insists, this is not so: "even if few things are left that cannot command a price, marital support remains one of them." *Borelli*'s reliance on the anticontractarian rationale for nonenforcement of the interspousal agreement marks it as a modern expression of coverture doctrine.

When Blackstone explained the common law of coverture, he was entirely comfortable talking about property-in-persons. A wife could not recover consortium damages from third parties who injured her husband, Blackstone explained, because "the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior. . . ."[262] Until the beginning of the twentieth century, American courts discussed marital status law in the language of

257. *See supra* notes 211-18 and accompanying text.

258. *See supra* notes 223-39 and accompanying text.

259. While the consideration argument applies basic contract principles, the public policy argument is actually anticontractarian in ethos: the public policy argument belongs to an area of a contract doctrine concerned with explaining why certain transactions are not appropriately analyzed in accordance with normal contract principles.

260. *See supra* text accompanying note 251.

261. *See supra* text accompanying note 253.

262. 3 BLACKSTONE, *supra* note 1, at 142 (passage quoted in full *supra* text accompanying note 240).

property-in-persons:

> It was held by this court that *at common law the husband was entitled to the person and labor of his wife and the benefits of her industry and economy.*
>
> . . . .
>
> It was not the intention of the legislation to deprive the husband of his common-law right to the earnings and services of his wife, rendered as wife, by her in and about either their domestic matters or his business affairs. For such services, she has no legal recourse against him or his estate.[263]

But by the beginning of the twentieth century, the language of property-in-persons was already antiquated, suspect—if not in total disrepute—by reason of its ties to the institution of slavery. While the common law explained many status relations of the household (husband/wife, master/servant, parent/child) in the language of property-in-persons, explaining this body of law in the same terms became extremely awkward once the nation repudiated the institution of slavery.[264] Indeed, during the nineteenth century, feminists frequently compared the institutions of marriage and slavery in their arguments for reform of the doctrine of marital service,[265] and the comparison proved quite effective in the campaign for earnings reform. As courts sought to reconcile the resulting earnings statutes with the common law of marital status, they continued to draw upon the traditional status discourse of the common law, but they also

---

263. Standen v. Pennsylvania R.R. Co., 63 A. 467, 470 (Pa. 1906) (citations omitted) (emphasis added); *see also In re* Callister, 47 N.E. 268, 269 (N.Y. 1897) (holding that married women's property acts "have not by express provision, nor have they by implication, deprived the husband of his common-law right to avail himself of a profit or benefit from [his wife's] services"); Lee v. Savannah Guano Co., 27 S.E. 159, 160 (Ga. 1896) ("The courts uniformly protect the husband in the assertion of his lawful right to receive the benefit of his wife's services.").

264. For example, during the Civil War, Democrats in Congress who opposed passage of the Thirteenth Amendment were delighted to point out commonalities in the legal relations composing the institutions of slavery and the household:

> The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves.

CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. Chilton White); *cf.* STEINFELD, *supra* note 43, at 59 (1991) (comparing common law governing marriage and master/servant relations, each of which was "entered by means of a status contract"). *See generally* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 454-59 (1989) (analyzing discussions of family, slavery, and employment relations in congressional debates over Thirteenth Amendment).

265. *See* Siegel, *supra* note 13, at 1098-1102.

began to explain the doctrine of marital service in a different and more modern idiom—the rhetoric of separate spheres.

Since the beginning of the industrial era when men's work was reorganized and progressively separated from the household setting, Americans have described family and market in the language of separate spheres. Nineteenth-century authorities celebrated the market as a male sphere of competitive self-seeking, while celebrating the home as a female sphere that could offer spiritual relief from the vicissitudes of market struggle.[266] It became commonplace to describe "home" as a place where man

> *seeks a refuge from the vexations and embarrassments of business*, an enchanting repose from exertion, a relaxation from care by the interchange of affection: where some of his finest sympathies, tastes, and moral and religious feelings are formed and nourished;—*where is the treasury of pure disinterested love, such as is seldom found in the busy walks of a selfish and calculating world.*[267]

In this now-familiar typology, men and women work in gender-dichotomous spheres, each of which is governed by its own ethic. In the market work is performed for material gain, while in the household work is performed out of a "disinterested" sense of love and duty. Exchange in the market is thus paradigmatically "interested," while exchange in the household is paradigmatically "altruistic."

The distinction between family and market ethics was fiercely enforced: if women attempted to apply market ethics to labor in the family sphere, they appeared unnaturally selfish or degraded by the market transaction itself. Consider, for example, the reasoning of the New York Supreme Court in the 1858 case of *Cropsey v. Sweeney*.[268] A woman sued the estate of a man with whom she had lived for twenty-two years and borne twelve children in the mistaken belief she was married. When the plaintiff discovered that the man she thought was her husband had another wife living at the time he married her, she realized she had no claim to dower and sued the decedent's estate seeking recompense for her labor during the twenty-two years of their "marriage." The court rejected her implied contract claim on the following grounds:

> Her own (no doubt truthful) story of her long, devoted, faithful love, and services, as a *wife* and *mother*, will not permit us to say that she is legally entitled to receive pay for those services *as a servant*.

---

266. *Id.* at 1092-94 (discussing nineteenth-century "cult of domesticity").

267. NANCY COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 64 (1977) (quoting Charles Burroughs, *An Address on Female Education, Delivered in Portsmouth, N.H., Oct. 26, 1827,* at 18-19 (Portsmouth 1827) (emphasis added)).

268. 27 Barb. 310 (N.Y. App. Div. 1858).

> True, the law will not presume that work or labor performed *as a servant or laborer*, was voluntary, and performed without any view to compensation; but the law cannot presume that the domestic and household work and services of a wife for a husband are performed with a view to pay as a servant or laborer.
>
> The law would do an injustice to the plaintiff herself, by implying a promise to pay for these services; and respect for the plaintiff herself, as well as for the law compels us to infer and hold, that these services were performed not as a servant, with a view to pay, but from higher and holier motives; and that therefore her complaint does not constitute any cause of action.[269]

Whatever claim the wife thought she had in the sizable estate the couple had accumulated by the time of her "husband's" death, the court assures her that the law would do her "an injustice" to indulge her request to share in its assets. "[R]espect for the plaintiff herself" requires the court to hold "that these services were performed not as a servant, with a view to pay, but from higher and holier motives. . . ."

While the court speaks with a certain smugness, its argument has social resonance, even today. We still believe that work performed in the family is performed for love, even as we sometimes concede that it is also performed with a view to gain. We habitually repress this social understanding, however, because to admit it somehow degrades the work family members perform for each other—especially when they perform that work "as a *wife* and *mother*."[270]

It is this conception of the family sphere that courts drew upon as they struggled to explain why wives could not contract with their husbands for the performance of household services: to quote an 1883 opinion of the New York Court of Appeals we have already examined, "[t]o allow such

---

269. *Id.* at 314-15. For a similar case, see Cooper v. Cooper, 17 N.E. 892 (Mass. 1888) (discussed *supra* note 233). Over time, most courts repudiated this analysis and allowed recovery in implied contract by women who were fraudulently induced to marry. *See In re* Fox's Estate, 190 N.W. 90, 91 (Wis. 1922). For an overview of the law in this area, see Jane M. Draper, Annotation, *Establishment of "Family" Relationship to Raise Presumption That Services Were Rendered Gratuitously, As Between Persons Living in Same Household But Not Related By Blood or Affinity*, 92 A.L.R. 3D 726 §§ 4-5 (1979).

270. In this volume, Joan Williams describes this gender dynamic as "commodification anxiety." Williams proposes a joint property regime that would compensate wives for their household labor. She observes that the joint property claim provokes "commodification anxiety" because it rejects the distiction between "men's 'naturally commodified' work in the market and women's 'naturally uncommodified' work in the household" and so violates "the traditional boundary between the altruistic and sharing behavior in the family and the self-seeking behavior in the market." Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 83 GEO. L.J. 2227, 2280 (1994) (footnote omitted). *See generally id.* at 2279-82 (analyzing "the way commodification anxiety polices traditional gendered allocations and maintains the traditional dichtomy between the market and the family").

contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations . . . ."[271] In 1889, the Iowa Supreme Court refused to enforce an interspousal contract for a wife's domestic services on the grounds that "[t]he marital obligations of husband and wife in the interests of homes, both happy and useful, have a higher and stronger inducement than mere money consideration . . . ."[272] And, in 1910, the Kentucky Supreme Court explained:

> It would be contrary to public policy to permit either [husband or wife] to make an enforceable contract with the other to perform such services as are ordinarily imposed upon them by the marital relation, and which should be the natural prompting of that love and affection which should always exist between husband and wife.[273]

The anticontractarian justification for refusing to enforce interspousal agreements in domestic labor is manifestly at odds with the contractarian justification for nonenforcement. While the anticontractarian justification insists that transactions in the family and the market are governed by two discrete ethics, the contractarian justification assumes that market concepts of consideration are of universal applicability in determining the enforceability of promises. The anticontractarian argument insists that wives should give husbands the benefits of their labor "freely"—that is, out of love or duty and not for gain; by contrast, the contractarian argument refuses to enforce the husband's promise to pay on the grounds that he already owns his wife's labor, hence will gain nothing from the transaction. The anticontractarian rationale deems the interspousal agreement unenforceable because paying a wife for her labor will degrade her into a mere servant,[274] whereas the contractarian rationale finds no consideration to

---

271. Coleman v. Burr, 93 N.Y. 17, 25-26 (1883) (passage quoted in full *supra* text accompanying note 239).

272. Miller v. Miller, 42 N.W. 641, 642 (Iowa 1889).

273. Foxworthy v. Adams, 124 S.W. 381, 383 (Ky. 1910).

274. *See, e.g.*, Oates v. Oates, 33 S.E.2d 457, 460 (W.Va. 1945) ("The marital duties of husband and wife cannot be made the subject of barter and trade, and either spouse performing such duties for compensation, either received or expected, is placed in the category of a servant."); Coleman v. Burr, 93 N.Y. 17, 25-26 (1883) ("To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations."); Mewhirter v. Hatten, 42 Iowa 288, 292-93 (1875) ("[Admitting] that very radical changes have been made in the relation of husband and wife . . . [i]t seems to us . . . that these changes have not transformed the wife into a hired servant, or established the law to be that the husband, when prostrated on a bed of sickness, will not be entitled to the tender care and watchfulness of his wife, unless he has the ability and expects to pay her wages therefor."); *see also supra* notes 227-33 and accompanying text (discussing Merrill v. Peaslee, 16 N.E. 271 (Mass. 1888)).

support the interspousal agreement because the husband already owns his wife's "services."

Yet, despite flagrant contradictions between the contractarian and anti-contractarian rationales, courts invoke the two justifications for refusing to enforce interspousal agreements as if they were entirely compatible. Courts can invoke both types of justifications without sense of contradiction because the justifications are historically related: two expressions of one body of marital status law as it developed over several centuries. Indeed, in some cases, courts explain the common law of marital service in an idiom drawn from both traditions of justification. In 1900, a federal court described a wife's employment contract in her husband's business as "an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all."[275] Similarly, in 1948, the Supreme Court of Tennessee explained "that all services performed by the wife in the home and which arise out of the marital relationship must be considered as gratuitous," and then cautioned:

> While certain common-law duties and obligations of the husband and wife are still in force, such as the duty of the husband to support his wife and the obligation of the latter *to render freely all services, such as, under the common law, were presumptively rendered out of love and affection*, he cannot claim the fruits of her labor, rendered a business enterprise in which he may have an interest, as being entirely personal and gratuitous. To so hold would defeat the right of the wife to her earnings contrary to [statute].
>
> The learned Court of Appeals seems to have made no distinction between services which have always been presumed personal and gratuitous, because they arise out of the marital relation, and services which pertain to business and commerce.[276]

Status relations that were once expressed in a discourse of property-in-persons are now expressed in a more modern idiom: a wife's duty of marital service is "to render freely all services, such as, under the common law, were presumptively rendered out of love and affection . . . ." In short, the discourse of marital status has evolved so that family relations originally expressed in the language of property can now be expressed in the language of affect. This transformation in the idiom of marital status is

---

275. *In re* Kaufmann, 104 F. 768, 769 (E.D.N.Y. 1900) (passage quoted in full *supra* text accompanying note 192).

276. Hull v. Hull Bros. Labor Co., 208 S.W.2d 338, 341 (Tenn. 1948) (emphasis added) (" 'It is said that the reason underlying the rule is that family life abounds in acts of reciprocal kindness which tend to promote the comfort and convenience of the family, and that the introduction of commercial considerations into the relations of persons so closely bound together would expel this spirit of mutual beneficence and to that extent mar the family unity.' ") (quoting Key v. Harris, 92 S.W. 235, 237 (Tenn. 1905)).

suggested by the court's statement that the wife works for her husband "freely"—a description of the relationship attentive to questions of love *and* money.

### B. MARKET AND FAMILY AS SPHERES OF INTERESTED AND ALTRUISTIC EXCHANGE

It is now conventional for courts to describe a wife's duty of marital service as labor that is "presumed gratuitous."[277] The presumption of gratuity divides social life into two spheres, a market sphere of interested exchange and a family sphere of altruistic exchange:

> It is elementary that ordinarily where one person performs services for another which are known to and accepted by him, the law implies a promise to pay .... Where, however, it is shown that the claimant and the person served are members of the same family and the services are such as are usually performed by one member of the family for another, a presumption ordinarily arises that the services are gratuitous .... The presumption of gratuity arises only where the family relation is shown.[278]

As we have seen, the roots of this presumption lie in a status discourse that gave the head of a household property rights in the "services" of its members (that is, wife, children, servants).[279] Various justifications offered

---

277. *See, e.g., supra* note 276 and accompanying text; Kuder v. Schroeder, 430 S.E.2d 271, 276 (N.C. Ct. App. 1993) (Greene, J., dissenting) ("Arguably ... plaintiff's contribution to defendant's educational accomplishments is outside the scope of her marital duty of support, and therefore is not presumed gratuitous."); Jennings v. Conn, 243 P.2d 1080, 1081 (Ore. 1952) ("One of the manifold duties imposed on a wife by the marital relationship is that she shall assist her husband, and that services rendered in such assistance are presumed to be gratuitous."); *see also supra* notes 275-76 and accompanying text; *cf.* Cox v. Cox, 183 So. 2d 921, 923 (Miss. 1966) (holding that by marriage a wife "impliedly agrees" to perform household services "without compensation").

278. *In re* Talty's Estate, 5 N.W. 2d 584, 586 (Iowa 1942).

At different times and in different contexts, the presumption that labor performed in the family relation is gratuitous has been treated as both a conclusory and a rebuttable presumption; however, even when rebuttable, the presumption enforces social relations and does not merely interpret them. For example, in most states a husband is no longer entitled to the labor of his wife in the family business. But unless there is an express contract proven, a wife working in the family business will be conclusively presumed to give her husband the value of her labor "freely." *See, e.g.* Andrews v. English, 199 P.2d 202, 204 (Okla. 1948):

> There is generally no implied obligation on the part of the husband to pay his wife for services even though they are rendered outside of ordinary household duties. Between strangers there arises a rebuttable presumption that work is done with the expectation of payment, but between husband and wife the presumption is that the work is performed gratuitously and no payment is expected, which presumption may be rebutted by providing an express, valid promise to pay.

279. *See supra* Part IV.A; *see also* STEINFELD, *supra* note 43, at 55-56 (discussing various status relations of the household regulated by the common law).

for the presumption suggest its legal origins;[280] yet the presumption is often discussed as if it were derived from the social experience of family life and not imposed upon it.[281] By this point it should be clear, of course, that the doctrine of marital service played an important role in constructing the social universe that the presumption of gratuity codifies. The law has shaped the very expectations and understandings of family life that it claims to reflect.

There are many ways that the doctrine of marital service shapes the social experience of family life. We can begin by examining the operation of marital status law in a typical interspousal contract case. Suppose a wife secures from her husband some promised benefit in exchange for the performance of household labor; she performs her part of the bargain, but he does not give her the benefit promised. No court of law will assist the wife in enforcing the bargain; instead the court would declare her labor was "presumed gratuitous," "rendered freely," or given out of "the natural prompting of that love and affection which should always exist between husband and wife." Or, perhaps, as in the *Borelli* case,[282] the court might observe that "even if few things are left that cannot command a price,

---

280. *See, e.g.*, 66 AM. JUR. 2D *Restitution and Contracts* § 31 (1973):

> One of the reasons for the rule that where parties are members of the same family their services are presumed to be gratuitous is that one rendering service to the other receives reciprocal services in return .... Another reason underlying the presumption of a gratuity is that family life abounds in acts of reciprocal kindness which tend to promote the comfort and convenience of the family, and that the introduction of commercial considerations into the relations of persons so closely bound together would expel this spirit of mutual beneficence and to that extent mar the family unity.
> (citations omitted).

281. *See, e.g.*, York v. Place, 544 P.2d 572, 573-74 (Or. 1975) (applying presumption of gratuitousness in marriage to case of cohabitants):

> We start with the principle, well grounded in human nature, that where one renders services for another, payment is expected. This is modified, however, by a principle, equally well grounded on human experience, that payment is not expected where there is a close relationship such as that existing between spouses and between parent and child.
>
> ....
>
> The basis of this principle is that in the normal course of human affairs persons living together in a close relationship perform services for each other without expectation of payment. Payment in the usual sense is not expected because the parties mutually care for each other's needs. Also because services are performed out of a feeling of affection or a sense of obligation, not for payment.
>
> A legal marriage creates a legal obligation of support. The principle we are considering, however, is grounded upon human experience and not a legal obligation.

282. Borelli v. Brusseau, 16 Cal Rptr. 2d 16 (Cal. Ct. App. 1993). *Borelli* is discussed *supra* in text accompanying notes 249-56.

marital support remains one of them."[283] These, of course, are prescriptive, not descriptive, statements. When a prescriptive statement of this sort appears as part of a judicial opinion, it actually has constructive force—that is, it allocates title to the property in dispute so as to construct marriage as a relation of "altruistic" exchange. Of course, this usage of "altruistic" seems to do violence to its ordinary meaning, but this is in fact how the language of altruism functions in marital status law: *Courts invoke the discourse of altruism in order to impute to women a decision to give a husband title to marital property in which the wife is in fact claiming an interest.* This is one way the law of marital status constructs the family relations it claims to find.

But the law of marital status also shapes family relations that never make their way into court. Indeed, the body of law we are examining is self-consciously designed to keep marital disputes out of court. In the 1889 case of *Miller v. Miller,*[284] the Iowa Supreme Court explained the public policy that the prohibition on interspousal contracts serves:

> The marital obligation of husband and wife in the interest of homes, both happy and useful, have a higher and stronger inducement than mere money consideration, and they are generally of a character that the judgments or processes of the courts cannot materially aid . . . . It is to be kept in mind that public policy is not against the payment of money, if it is done voluntarily; but the evil which the law anticipates arises from the enforcement of such a contract, which, if legal, should of course be enforceable.[285]

As the *Miller* court makes clear, when judges refused to enforce interspousal contracts for domestic services, they did not intend to prohibit exchange in the household. *To the contrary, they insisted that household exchange proceed on a different social basis than market exchange.* In the market, the realm of interested exchange, the state would enforce promissory bargains. But in the home, as the *Miller* court explained, exchange would be "voluntary."[286] The state would neither formalize nor enforce interspousal agreements. The bar on interspousal contracts for household labor thus delimits and defines both market and family relations. By disabling wives who might bargain with their husbands over the terms of

283. *Id.* at 20.

284. 42 N.W. 641 (Iowa 1889).

285. *Id.* at 642.

286. In this context, "voluntary" means gratuitously—lacking the element of consideration that would justify treating the transaction as an exchange relationship enforceable by contract. For a similar usage, see Cropsey v. Sweeney, 27 Barb. 310, 314-15 (N.Y. Sup. Ct. 1858) ("the law will not presume that work or labor performed *as a servant or laborer,* was voluntary") (passage quoted in full *supra* text accompanying note 269).

their labor, this body of status law constructs marriage as a regime of "altruistic" exchange.

This, then, is another way the bar on interspousal contracts for domestic labor shapes the world we inhabit, although we rarely notice it. Today, few married women seek enforcement of household labor agreements as the plaintiff in *Borelli* did, but the relative infrequency of such contract claims demonstrates the prescriptive force of the legal rule—not its inconsequentiality. Married couples may collaborate, bargain, and bicker over household affairs, but any agreements they arrive at are paradigmatically "private"—not formalized at law or subject to judicial oversight. Spouses do not look to the courts to interpret or enforce such agreements, and if they did, no aid would be forthcoming: to my knowledge, no American court has ever enforced such an agreement.[287] Since passage of the earnings statutes, courts have denied married women recourse to state authority otherwise structuring contract and market exchange—disabling those who attempted to bargain with their husbands respecting the terms of their labor, and discouraging any others who might be so inclined.

Considered from this vantage point, the prohibition on interspousal contracts for household labor has immense distributive consequences for women. Imagine a marital relationship organized in accordance with the gender norms prevailing throughout most of the nineteenth and twentieth centuries. When a husband entered the market, he could contract to exchange his labor for wages or other remuneration with which he might purchase a livelihood for his family. But if his wife labored at home in accordance with prevailing gender norms,[288] she could not strike such a bargain with her husband. She could provide her husband household labor in exchange for material goods, but this exchange relationship lacked the legal incidents of a contract. Under these circumstances, when a married woman performed household labor for her husband, she might acquire access to wealth (e.g., her husband's market wages), but title to such wealth would remain in her husband's name. Because title to the wealth a wife "earned" remained in her husband's name, married women might (and often did) find themselves economically disempowered during the life of the marriage and impoverished at divorce.

The socio-economic position of women in marriage is most often understood to result from the gendered division of labor in the industrial era, but, as this article demonstrates, it is also a product of the law of marital status in the industrial era. That gendered structures in the relations of production and distribution reinforce each other in this way is no accident. The legislators and judges who reformed coverture law during the industrial era self-consciously struggled to preserve the "essence" of the mar-

287. *See supra* note 248 and accompanying text.
288. *See supra* text accompanying notes 58 & 174.

riage relation, and in this era they understood the "essence" of marriage in the discourse of spheres. Because legislatures and courts reformed the common law of marital service with attention to the emergent distinction between market and household labor, they revised the marital status doctrines of the common law in such a way as to reflect and reinforce the gender mores of the industrial era. Reformers of the common law thus succeeded in preserving the "essence" of the marriage relation. To an eerie degree the body of law that emerged from reform reproduced the status relations the common law once formally enforced. After the earnings statutes emancipated married women, the vast majority of wives remained economic dependents of their husbands, and, notwithstanding earnings reform, husbands continued to hold title to the value of a "wife's work."

## CONCLUSION

It was to preserve marriage in recognizable form through transformations in its legal and economic structure that courts struggled in construing the statutes that granted wives rights in their labor. We inherit today the legacy of this struggle, oblivious to its very existence as the courts who waged it hoped we might be. To the extent the story of the earnings statutes is no part of our historical or legal consciousness, to the extent that women's labor in the home remains invisible as labor and compensation for it is, if not unthinkable, then something of a crank claim—the work of the courts we have examined is perfected. We live in a world in which unwaged labor in the home stands as an anomaly: lacking explanation but not requiring one either. In this world it takes an act of critical scrutiny to discern that market relations have been systematically delimited—and that labor vital to their support is, with equal systematicity, expropriated from women on an ongoing basis.

Ultimately, then, this study illustrates how a movement for egalitarian law reform can work to modernize and so naturalize an antiquated body of status law. As the history of the earnings statutes illustrates, when a society undertakes to disestablish caste relations, it may instead translate them from an antiquated and therefore socially dissonant discourse to a contemporary and socially acceptable discourse. In this way, reforms that begin the work of dismantling a caste regime can instead revitalize it. Legislation that begins to disestablish a caste regime may thus subordinate its beneficiaries—perhaps not to the extent that openly caste-enforcing legislation might—but by means that will escape the moral scrutiny that openly caste-enforcing legislation invites.

The long history of the doctrine of marital service suggests that caste regimes do not survive by their rigidity, but instead through their malleabil-

ity and adaptability. The law of marital status was able to survive premature news of its death in part because status discourse has this chameleon-like quality. In short, status talk is not always detectible as status talk. Frequently, it may disguise itself—even by masquerading in the language of love.