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Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860–1920

Matthew J. Lindsay

Between the Gilded Age and the Progressive Era, American state legislatures enacted a series of new laws that delineated a class of citizens who were deemed ineligible to participate in the institution of marriage. Scholars have characterized this development as evidence that lawmakers had lost faith in a laissez-faire approach to nuptial governance, and thus transformed marriage into an object of public regulation. This essay argues that behind the ostensible nuptial privatism of the mid-nineteenth century lay a self-conscious policy of judicial governance. Judges invoked the language of nuptial privacy and the common law of contract strategically to advance their vision of moral and economic discipline. The new marital prohibitions thus represented, the essay argues, not the expansion of the state's police power into the previously private realm of domestic relations, but rather a critical transformation in how nuptial reformers and lawmakers understood the relationship between marriage and the well-being of the polity.

Fueled by growing concerns about pauperism, the racial character of the urban proletariat, and the collapse of the economically independent single-male-breadwinner household, the changing form of nuptial governance signaled a thoroughgoing intellectual and strategic reorientation from an understanding of marriage as forming economically and morally viable households—the fundamental units of society—to an understanding of marriage as a largely procreative institution, as the literal source of the citizenry. This reconceptualization of marriage underwrote a strategy of nuptial governance that mobilized marriage as a strategy in the state's regulation of social reproduction.

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In the 1882 edition of his landmark *Treatise on the Law of Husband and Wife*, James Schouler authoritatively summarized the dominant wisdom of postbellum Americans writing about marriage. He postulated that the institution of marriage was vital to the well-being of society because it served three indispensable functions. First, marriage created the family unit, which provided for the material "maintenance of offspring" and women, and thus protected the public against dependents. Second, Schouler advised, marriage "necessarily [afforded] a discipline to both sexes" by permitting "sexual indulgence . . . under healthy restraints." Finally, he wrote, marriage provided for the "proper nurture" of children, "and for the education in turn of the whole human race." Because the institution represented the bedrock of society, his generation believed, it ought to be the "policy of every government . . . to encourage matrimony" (Schouler 1882, 14, 15, 16). This vision of marriage was dramatically reshaped, in public and academic discourse and in the law, between the postbellum period and the First World War. Whereas in the Victorian Era the American judiciary—then the principle custodians of marriage—considered virtually all unions to be inherently beneficial to society, Progressive Era reformers, social scientists, and policymakers across the political and ideological spectrum believed that many marriages threatened the health of the polity.

Between the last decade of the nineteenth century and the 1920s, American state legislatures passed a momentous series of new laws that dramatically circumscribed who was eligible to participate in the institution of marriage. The Connecticut legislature led the way in 1895, prohibiting "feeble-minded, imbecilic, and epileptic men and women under 45 years of age" from marrying. Similar legislation was then adopted throughout the nation (Vernier 1931, 191–95). By 1929, 29 states barred "imbeciles," "idiots," "lunatics," the "feeble-minded," and those of "unsound mind" from marriage (Grossberg 1985, 150). Affliction with venereal disease likewise frequently rendered one ineligible for marriage. By 1929, 19 states made venereal disease a bar to marriage, and 10 of those required a health certificate from a physician to obtain a marriage license (Vernier 1931, 200–202). Nineteenth-century courts had recognized some types of mental and physical incompetence as grounds for prohibiting or annulling marriages. The Progressive Era legislation, however, signaled not only a massive statutory expansion in the number and scope of nuptial restrictions, but also a distinct shift in emphasis toward prohibiting the transmission of what reformers, social scientists, and policymakers regarded as hereditary deficiencies.

Historians and legal scholars have generally characterized this explosion of legislation, as well as the accompanying multitude of nuptial solemnization and licensing requirements, as an expansion of state police power in the interest of public policy. In the context of the economic destabilization of the family under the industrial wage system, the rising divorce rate,

falling birth rate, and the loosening of traditional gender roles within the family, historians argue, policymakers lost faith in privatist, laissez-faire approaches to the formation of marriage. Around the turn of the century, fears of the transmission of hereditary defects to future generations likewise became powerful enough to undermine what one scholar has characterized as the "social confidence in nuptial privatism that had been a pillar of liberal marriage law and the aversion to state intervention" (Grossberg 1985, 150). These social and biological fears, historians contend, fueled the state's expansion of its regulatory purview, drawing the legal inception of marriage out of its refuge in the private domain of the common law of contract and transforming it into a full public status. As the regulatory state expanded its authority into the traditional patriarchal household, scholars maintain, individuals within the family developed distinct legal identities, and thus bore a more "immediate" relationship to the state (Grossberg 1985, 24–27).¹

These interpretations of the transformation of American marriage law at the turn of the century overlook the continuous presence of the regulatory state in the formation of marriages between the period of supposed nuptial privatism in the early- and mid-nineteenth century and the dramatic new marital prohibitions imposed by legislatures in the Progressive Era. Throughout the nineteenth century, this essay argues, the formation of marriages was the subject of deliberate, public policy-conscious legislative and, especially, judicial construction. The question, then, is not "why did the state become involved in regulating the legal inception of marriages toward the end of the nineteenth century?"; rather, it is "why did reformers and policymakers believe that the *mode* of the state's regulation of marriage required reconstruction?" By examining not only discrete legal developments, but also a cluster of larger scientific, philanthropic, racial, and gender discourses in which the transformation of the law was embedded, this

1. See also Mintz 1989; Keller 1977; Mintz and Kellogg 1988. Peter Bardaglio similarly argues that during Reconstruction, southern courts looked to an "increasingly accepted view of marriage as a legal status, rather than simply a contract, to uphold the power of each state to determine marital capacity" in order to reinforce the racial and sexual boundaries between whites and former slaves (Bardaglio 1995, 183). A relative paucity of scholarship examines the regulation of the *formation* of marriages. However, a sizable body of scholarship analyzes attempts to reform the common law marriage status, through married women's property and earnings legislation, and through women's assertion of their constitutional rights and celebration of contract models of individual autonomy. On property and earnings reform see Basch 1982; Chused 1992a, 1992b; Lebsack 1992; Siegel 1994a, 1994b; Stanley 1988. On the use of rights discourse see DuBois 1987; Clark 1990. Much of this work is oriented around the question of the extent to which married women's property and earnings reforms relieved wives from the legal and economic disabilities they suffered under the common law doctrine of marital unity. Reva Siegel, among others, has rejected the traditional "status to contract" interpretation of family law history by arguing convincingly that rather than overturning the common law of marital status, nineteenth-century courts interpreted the property and earnings statutes in a manner that modernized the values of coverture in accordance with the gender mores of the industrial era. In so doing, she argues, the courts naturalized through the gendered division of marital labor one of the most essential aspects of marital status law—the husband's right to claim the value of his wife's services. See Siegel 1994b.

essay argues that it was not the state's willingness to regulate the marriage contract that changed, but rather legislators' and judges' conceptions of the potential relationship between marriage and the well-being of the polity.

The successful late-nineteenth- and early-twentieth-century campaign to formalize the procedures through which marriages were created and to tighten restrictions on exactly who was eligible for marriage represented in large part the state's response to the challenges that the industrial reorganization of labor and the household posed to the ideal of the economically independent, single-male-breadwinner family.² An emerging body of scientific and popular thought about the hereditary transmission of mental and physiological "deficiencies" furnished marriage reformers, legislators, journalists, and judges with a language and set of concepts that enabled them to avoid directly confronting the contradiction between the highly valued ideal of a republic of self-sufficient family units headed by economically independent men on the one hand, and the social consequences of capitalist economic development on the other. In turn, reformers and policymakers transformed marriage into a largely procreative institution—the hereditary wellspring of the national population. As nuptial reformers, public health advocates, and lawmakers defined what constituted hereditary "fitness," moreover, their class and ethnic fears explicitly shaped their judgment of precisely who was incapable of parenting an advancing civilization.³ With its inherent viability as a foundational social institution in doubt, the marriage relation was thus reformulated in legislatures, courts, and public discussion to serve society largely as a strategy of selective breeding—not as

2. This perceived breakdown of the traditional regulatory functions of poor and working-class households contributed to what Michel Foucault has characterized as the conceptual emergence of the "domain of population." Population, he writes, involves "a range of intrinsic, aggregate effects, phenomena that are irreducible to those of the family," and encompasses a host of economic, moral, and medical concerns. The family takes on a transformed role as an important source of "individualizing knowledge" about, and as a privileged instrument in the governance of, the population—the new primary object of government and police power. (1991, 1979). The ominous elements of the urban population, chief among which was the economic and moral threat posed by an ever-expanding army of paupers, would thus be managed through a strategy of governance that wielded the family as one of its principle mechanisms of control. As a mediator between the state and the population, the family was central to the efforts of reformers to deflect potential challenges to the prevailing economic order (Donzelot 1997). On the post-Revolutionary construction of male republican freedom and independence, see Wood 1991; Kerber 1980; Bloch 1987. On the importance of household relations of feminized dependency to the nineteenth-century reconstruction of male "independence," see Stanley 1996; Blackmar 1989; McCurry 1995. On the ideological significance of abolitionist thought and slave emancipation to the construction of the "freedom" and personal "independence" of male wage earners, see Davis 1975; Walters 1978; Montgomery 1981; Stanley 1988, 1992.

3. On the emergence of eugenics in the late-nineteenth and early-twentieth centuries, see Kevles 1985; Degler 1991; Haller 1963; Willrich 1998. For an intriguing analysis of the relation between discourses of political economy and the process of racialization in the context of post-emancipation Jamaica, see Holt 1992.

the *end* of public policy in and of itself, but as an *instrument* of the state in its governance of the citizenry.

By focusing on the *formation* of marriages rather than the internal structure of the marriage status, as other scholars have, this essay offers a new perspective on the judicial use of contract in nineteenth-century marriage law. Contract doctrine was certainly, as scholars have demonstrated, a potential, though largely unrealized, “antidote” to the common law of coverture—that is, a source of opposition to husbands’ historical status-based property right in the value of their wives’ labor.⁴ The invocation of contract in decisions determining the validity of disputed marriages was also, I argue, a strategy that judges used to effectuate what they believed to be the public benefits of the marriage status. In this sense, then, the strategic application of contract doctrine worked to underwrite a significant aspect of the marriage status: female economic dependency. By examining the logic and motives of often successful campaigns to regulate the formation of marriages through new legislation, this essay explores the social and regulatory meaning of marriage in an age when confidence in the intrinsic moral and economic viability of the household was eroding among many reformers and policymakers.

The essay is organized into three sections. The first demonstrates that long before the regulatory boom of the Progressive Era, judges considered the marriage relation to be an appropriate object of public policy and customarily invoked the language of private contract to serve what they perceived to be distinctly public ends. The second section argues that during the 1870s and 1880s the judicial construction of legislation regulating the creation of marriages marks the beginning of the shift in the public-policy conception of marriage—from a relation that should be aggressively promoted to a privilege that should be conscientiously guarded. The third section discusses the construction of the hereditarily “fit” citizen after the turn of the century. It examines the legal, academic, public, and scientific discourses that aggressively defined the ideal of American citizenship in accordance with eugenically inspired notions of race and class. It then demonstrates how that ideal was codified by state legislatures in a new series of nuptial prohibitions, and how the new regulations were received in American courts.

4. See note 2.

THE PUBLIC POLICY OF CONTRACT: JUDICIAL REGULATION OF MARRIAGE IN THE MID-NINETEENTH CENTURY

Long before the Progressive Era expansion of nuptial regulations, American judges and legal-treatise writers consistently and unequivocally defined the marriage relation as a public status that was of vital interest to society and, as such, an appropriate object of state regulation. Postbellum jurists took great pains to distinguish the "mature" marriage relation—the relation that existed once a valid marriage had been formed—from the civil contract through which one entered that relation. Joel Bishop, one the most widely cited treatise writers of the nineteenth century, characterized the "contract of marriage" as simply a "gateway to the marriage status" (Bishop 1864, 145). Though two parties must enter into marriage through a civil contract, wrote a Kentucky court, "it is nevertheless *sui generis*, and, unlike ordinary or commercial contracts, is *publici juris*; because it establishes fundamental and most important domestic relations" (*Macguire v. Macguire* 1838, 183).⁵ As "the very basis of the whole fabric of civilized society," argued a Scottish judge whom Bishop cited approvingly, marriage "should not be left to the discretion or caprice of the contracting parties, but should be regulated in many important particulars by the laws of every civilized country" (Bishop 1864, 7).⁶

Although the specters of "racial amalgamation," Mormon polygamy, and incest represented significant enough threats to the social order for postbellum legislatures and courts to restrict nuptial eligibility, the prevailing judicial policy was to aggressively promote the creation of new marriages.⁷ Because the marriage relation was of such vital importance to the well-being and stability of society, Bishop wrote, "the presumption both of law and fact

5. Case quoted in Bishop 1864, 7.

6. See also Schouler 1882, 19–20; Stewart 1887, 5–6.

7. Postbellum legislatures and courts did indeed exercise their regulatory power by imposing and enforcing laws prohibiting bigamy, consanguineous unions, and most significantly, miscegenation. During and immediately following the Civil War, 10 states passed new laws prohibiting and punishing interracial marriages, thus joining the 14 states with similar laws already on the books (Cott 1995; Bardaglio 1995). Such unions were usually declared void *ab initio* by statute, as opposed to merely voidable. ("A marriage is termed void when it is good for no legal purpose" [Bishop 1864, 89], "but a voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity" [Schouler 1882, 22]). Even when a statute contained no express clause of nullity, courts interpreted it to render marriages in violation of the ban absolutely void (Schouler 1882, 27). Similar statutes declaring bigamous marriages null and void were held constitutional by the U. S. Supreme Court (Cott 1995, 116–17). Consanguineous unions were likewise rendered void *ab initio* through legislation in many states, though the common law held them merely voidable (Bishop 1864, 104, 270). Though marriage was "considered in law a civil contract," declared the Arkansas Supreme Court, it "has been regulated by legislative enactments by defining the character and relation of the parties who may marry, so as to prevent a conflict of duties and to preserve the purity of families" (*Jones v. Jones* 1872, 21; and see *Francois v. State* 1880; *State v. Kennedy* 1877; *State v. Ross* 1877; *State v. Gibson* 1871).

should be carried to the very verge to uphold a marriage." Courts aggressively applied the "well-recognized maxim, *Semper praesumitur pro matrimonio*"—always presume marriage (Bishop 1864; 11). Because the very stability of the state rested on the marriage relation, Bishop later wrote, "*prima facie* . . . each particular marriage is beneficial to the public" (Bishop 1891, 16). A Mississippi court expounded on Bishop's conception of the importance of marriage to the public interest: "The superstructure of society rests upon marriage and the family as its foundation. The social relations and the rights of property spring out of it, and attach to it, such as dower, administration, distribution and inheritance. All controversies therefore, growing out of marriage, assume the dignity of *quasi* public questions." The law, the court insisted, strongly presumed the validity of a disputed marriage, and placed a very heavy burden of proof on the party challenging its legality (*Wilkie v. Collins* 1873, 510–11).⁸ By validating informal, common law unions, by refusing to void marriages formed in violation of statutory requirements, and by drastically limiting the conditions under which marriage could be annulled, mid- and late-nineteenth-century courts advanced a vision of the marriage relation as an intrinsically desirable end of public policy. By consistently presuming and preserving the validity of disputed unions or, in some instances, by dissolving them, American courts in effect legitimized and provided for children, saved women from unchastity and men from licentiousness, and guarded the state against the burden of financial dependents.

One of the primary policy aims of nineteenth-century courts was to prevent sexual promiscuity by legally ensuring the satisfaction of sexual desires within marriage. "The natural indulgence of natural desire," Bishop suggested, and the "prevention of adulterous intercourse," were among the greatest public ends of matrimony (*Deane v. Aveling* 1845, 299).⁹ Judges thus invariably held impotence to be grounds for annulment. "If a party is permanently unfit for sexual intercourse," one jurist wrote, "he or she is not competent to marry." Moreover, he continued, "the defect must be one of copulation, not of reproduction, for barrenness in no way invalidates a marriage" (*Stewart* 1887, 53, 55). A New York court found, for example, that the "possession of organs necessary to conception cannot, as a matter of law, be held essential to capacity to enter into the marriage state . . . so long as there is no impediment to the indulgence of the passions incident to this state" (*Wendel v. Wendel* 1898, 72). The capacity to sexually indulge one's spouse, and decidedly not the capacity for procreation, this court declared, lay at the essence of marriage. To deny a petition for annulment because of impotence would place the innocent party in a state of "constant tempta-

8. See also *Hull v. Rawls* 1854; *Cole v. Langley* 1859; *Askew v. Dupree* 1860; *Philadelphia v. Williamson* 1873; *Teter v. Teter* 1884; *Cartwright et. al. v. McGown* 1887.

9. Case quoted in Bishop 1864, 276.

tion," generating "the probable consequence of other [extramarital] connections" (*Deane v. Aveling* 1845, 299).

In order to stave off the adulterous promiscuity that would result from such unfortunate unions, courts voided truly "unconsummated" marriages upon petition by constructing them as broken contracts. In an 1870 suit for divorce, a Maryland court determined upon surgical examination that due to "a very imperfect development of the sexual organs," a woman was capable of "only incipient and imperfect coition." The court concluded that "it is well settled that if by reason of malformation or organic defect at the time of marriage, there cannot be natural and perfect coition, *vera copula*, between the parties," and if the condition is "permanent and incurable," the case "comes within the legal definition of impotence and is cause for nullity of marriage" (*J. G. v H. G.* 1870, 401).¹⁰ Again, mere infertility was not considered fraud. The capacity to accommodate sexual indulgence, not the capacity to procreate, was held to lie at the essence of the marriage contract. The courts conceived of marriage as a vitally important public institution that functioned as a bulwark against promiscuity, and they frequently mobilized the "neutral" doctrine of contract in order to help the relation serve its purpose.¹¹

In their desire to control promiscuity, however, postbellum courts usually strove to create rather than to dissolve marriages. Judges frequently legitimated potentially illicit sexual relations by conferring the status of marriage on the couple. American courts consistently applied the rule that a marriage contract may be entered into *per verba de futuro cum copula*. An Illinois court explained the rule as it was frequently understood and applied: "Where the parties competent to contract agreed to marry at some future time," Judge Shope declared, "if they have *copula*, which is lawful only in the married state," that act "will be presumed to have been allowed on the faith of the marriage promise, and that the parties, at the time of such *copula*, accepted each other as man and wife." The court presumed that in the context of an agreement to marry sometime in the future, sexual intercourse constituted present consent to enter into a contract of marriage. By committing an act that was unlawful outside marriage, the court reasoned, the couple "will be presumed . . . to have changed their future promise to marry, to one of present marriage" (*Cartwright v. McGown* 1887, 399). Through

10. See also *Devanbaugh v. Devanbaugh* 1836; *Meyer v. Meyer* 1875. "A contract of marriage," Bishop wrote, "implies that the parties are capable of consummating it." Accordingly, under common law the impotent party who, aware of his or her incapacity, nevertheless contracts marriage, "commits a gross fraud and grievous injury." Even if the contracting party is ignorant of his or her deficiency, Bishop wrote, the marriage would nevertheless be held voidable because "there is equally a violation of the contract" (1864, 272-73).

11. In her discussion of two late-nineteenth-century U.S. Supreme Court cases, Nancy Cott (1995) has similarly concluded that the Court characterized marriage as a contract when the validity of a common law marriage was in question.

the application of this rule, the court in effect conferred marriage, and thus morality, on a potentially illicit act.¹²

In the nineteenth century the idea of contract represented both a fundamental legal doctrine and a potent economic and cultural metaphor for relations of mutual obligation and exchange. Exactly when judges invoked the common law of contract, however, as well as what its application in a particular case meant in practice were left largely to the discretion of the courts. In this respect, then, contract functioned as a kind of doctrinal template that enabled courts to organize a couple's "matrimonial" behavior—including cohabitation as well as sexual and economic exchange—into a narrative of private consent to marry. Bishop confirmed the moral and social value of presuming such consent in cases of *per verba de futuro cum copula*. Not to apply the doctrine, he charged, would be to inflict "the disgrace of concubine" on a virtuous woman, and to allow "some slip in the form of marriage . . . [to make] her a sort of select strumpet." "All intercourse between the sexes in its nature matrimonial should be such in fact," he wrote, and "the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, and presses into its service all things which can help it in each particular case to sustain the marriage, and repel the conclusion of unlawful commerce" (Bishop 1864, 16–17, 394).¹³ American courts curbed illicit sexual relations, in short, by applying a rule of present consent that rendered such relations matrimonial.

During much of the nineteenth century, the moral and economic dimensions of marriage and the home existed ideologically as two sides of the same coin. When courts legitimated disputed marriages they were both acting in consonance with and underwriting the prevailing middle-class gender ideology that explicitly linked married women's moral virtue to their economic dependency. The ideology of separate spheres arose concurrent with, and was functionally linked to, market expansion, the rise of wage labor, and the movement of men's labor outside of the home. Historians have convincingly argued that the image of the home as a domestic sanctuary, or refuge, protected from the competitive and hostile world of economic exchange and characterized by the selfless moral virtue of a housewife and mother, helped to legitimate market relations by locating social morality in the domestic sphere. It was precisely the economic dependency of women, their ostensibly "disinterested" separation from the world of commerce and

12. See also *Port v. Port* 1873; *Richard v. Brehm* 1873. Because the law presumes innocence in cases where the facts are "equally susceptible to two constructions," Bishop wrote, by connecting the "consent *de futuro* with [an equivocal copula], and making of the two a present consent, the copula becomes moral and legal, which would otherwise be immoral and illegal." Instead of concluding that a couple had violated "decency and morality and law," he continued, the law presumes present consent to marriage when a man and a woman "yield . . . themselves" to what is "lawful only in . . . [the marriage] relation" (Bishop 1864, 212, 216).

13. Emphasis added. See also *Askew v. Dupree* 1860, 189, 190.

politics, moreover, that insured the affectionate, morally regenerative quality of the home (Cott 1977; Ryan 1981; Stanley 1996; Bloch 1987).¹⁴ For judges and other middle-class and elite Americans, therefore, the ideology of separate spheres represented a model not only of gender roles, but of social and economic organization more generally. This model lay at the center of a historically longstanding worldview that envisioned an American population that was economically and morally contained within and disciplined by independent, male-headed household units. It was this worldview that animated courts' aggressive creation of legal, legitimate families.

In practice, guarding the virtue of women was frequently inextricable from preserving support for widows and insuring the legitimacy of and rights of inheritance for children. Courts were especially determined to ensure that economic dependents were provided for. In cases involving inheritance rights, the presumption of marriage was aggressively invoked. An Indiana court explicitly acknowledged this form of judicial activism in an 1884 case to determine the validity of an informal marriage, in order to settle the estate of a deceased man. "The presumption in favor of marriage and the legitimacy of children," the court ruled, "is one of the strongest known to the law, and in favor of a child asserting its legitimacy this applies with particular force." In such cases the burden of proof was laid heavily on the party challenging the validity of a marriage. A child who "is asserting his mother's innocence over evil, and maintaining his right to property acquired by his father," the court declared, is "in a position to insist upon a full and broad application of the rule that 'the law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy'" (*Teter v. Teter* 1884, 138).¹⁵ If the ideology of separate spheres held that a woman's

14. The concept of "separate spheres," it should be noted, operated principally as an ideology, rather than an accurate characterization of most nineteenth-century households. Most women were, in fact, infinitely more involved in some form of domestic production or commerce than the image of spheres suggests. See Boydston 1990; Kerber 1988.

15. Emphasis added. See also *Cartwright v. McGown* 1887, 396, in which the court stated that every "reasonable and fair presumption will be indulged for the purpose of upholding a marriage, and establishing the legitimacy of the offspring"; *Hull v. Rawls* 1854; *Henderson v. Cargill et al.* 1856; *Cole v. Langley* 1859. It is important to note that such judicial interpretations were understood by the courts to serve the needs not only of the parties involved, but the larger public end of protecting and strengthening the American state. An 1873 case to determine whether alimony and child support were owed forcefully demonstrates judges' conception of the national policy scope of the decisions validating disputed marriages. In *Philadelphia v. Williamson* the defendant had participated in a Catholic marriage ceremony in Ireland 16 years earlier, with the woman who was suing him for support. After immigrating to the United States and having seven children together, the defendant claimed that he and the plaintiff had never been lawfully married because a 1746 English law forbade the intermarriage of a Papist and a Protestant, which he claimed to have always been.

The court declared that in a case in which it is argued "that the children of these parties are bastards, and their mother nothing more than a concubine," the burden is on the defendant to "very clearly establish" that to enforce the English law would "not be to destroy that policy of our own government . . . [and] carry havoc and ruin into many a virtuous house-

economic dependency was necessary to ensure her moral virtue, in the practical logic of many nineteenth-century judges the presumption of virtue became a necessary legal prerequisite for her economic protection.

An 1868 Pennsylvania inheritance case, *De Amarelli's Estate*, powerfully illustrates the way in which American courts strategically invoked both contract doctrine and the rule of favoring the presumption of innocence and legality. In *De Amarelli's Estate*, Catherine Vincent, who claimed to be the widow of Vincent De Amarelli, argued that she and the deceased had been secretly married for several years before his death, during which time she had given birth to their three children. Because De Amarelli was a highly regarded professor at the University of Pennsylvania, while Vincent was originally a servant at the boardinghouse where De Amarelli lived, she maintained, the couple lived apart in order to protect her husband's social and professional standing. De Amarelli supported her at a boardinghouse for several years, where he visited her for periods of several hours between one and three times a week. When they were together, witnesses agreed, the couple conducted themselves as though they were married, though De Amarelli assumed a false name. De Amarelli never revealed to his friends or colleagues that he was married, and referred to Vincent in his will by name, rather than as his wife.

Throughout the decision Judge Agnew aggressively guarded Catherine Vincent's moral virtue. The court reiterated several times that "there is not a spark of evidence against her purity, and not a breath of suspicion had sullied her reputation previous to her reputed marriage." In response to the charge that her relation with De Amarelli began illicitly, and in justification of the fact that Vincent herself did not attempt to account for the origin of their relation in her testimony, Agnew took it upon himself to construct a scenario explaining how the couple had secretly entered into the marriage status as a precondition of sexual intercourse. He speculated that "lust may have fired [De Amarelli's] purpose at first, but [under] the well-known influence of her religion, and the guards it throws around Cath-

hold." The defendant failed to make his case. Because "marriage is universally regarded as the foundation stone of all the social relations," without which "the social fabric falls into ruins," the court declared, "a law which would bastardize issue . . . could not be tolerated in the United States." "We shall not be told," the court continued indignantly, "that a husband and father" may enter this country with his wife and children, and then "deliberately turn them all out upon the cold charity of the world." To recognize the English law would "tend to debase public morals, and introduce a test utterly at war with a fundamental principle of American government." The court pronounced with patriotic fervor that if "this nation, in the strength of its manhood, is to be respected," it must "emphatically declare that upon the subject of marriage, and especially its destruction, it will determine every case by its own enlightened principles of morals and of public policy." The court concluded the decision rather personally. "It gives me great judicial satisfaction," Judge Ludlow scathingly wrote, "to make this faithless husband and father, who did not hesitate in fact to brand his own offspring in an open court of justice as a bastard, to understand that justice is administered" in the United States (*Philadelphia v. Williamson* 1873, 177, 178, 179).

olic females of her rank, . . . his desires finally drove him into a proposal of marriage consummated privately." With great generosity of imagination, the court in effect cloaked a potentially illicit intercourse in the language of nuptial privacy. When De Amarelli's "approaches were first made," Agnew reasoned, "they were not probably in the presence of witnesses, and when he concluded to marry, it is not likely his design would be published." The very privacy of the relation, in short, permitted the court to imagine the possibility of present consent, which enabled it to confer marriage. By treating marriage as a private contract, requiring no publicity, formal solemnization, or documentation for its validity, the court constructed a scenario that, in spite of "whatever doubts may be suggested . . . ought not and cannot convert an acknowledged wife into a mistress, and innocent offspring into bastards" (*De Amarelli's Estate* 1868, 288, 293).

Ultimately, the determination of whether Catherine Vincent was a wife or a "concubine" had dramatic economic implications. The court's decision to confer virtue on her was necessarily a determination that she was a widow, entitled to an inheritance as such, and that her children were legitimate and thus De Amarelli's legal heirs. To declare the relation meretricious, in short, would have been to deny Vincent and her three children a source of *private* economic support. Judge Agnew's interpretation of De Amarelli's will powerfully suggests his understanding of the marriage relation as one of female and filial economic dependency. In an 1860 codicil to his will, De Amarelli gave Vincent \$500; but three years later, "after the birth of his second child," recalled the court, "and as years had cemented their union, which in the beginning might have been the result of unconquerable desire," he raised the endowment to \$3,000. "Surely this looks rather like the gift of growing affection for a wife," the court reasoned, "than the improbable lavish of one upon his mistress, after appetite and desire quenched." In this case, Judge Agnew's conception of the proper economic dynamic of the marriage relation, as opposed to a mere sexual exchange, moved him to confer marriage on a relation that he understood to be serving the function of matrimony. The judicial policy goal of providing for widows and children was in this sense self-enabling: Judge Agnew interpreted a relation he perceived to be serving the personal and social functions of marriage as evidence of an *actual* marriage; this determination, in turn, ensured that the relation would continue to function in the service of desired policy ends. This interpretation is supported, moreover, by the court's incessant reiteration of its unwillingness to "pronounce [Vincent] a mistress and her children bastards" (*De Amarelli's Estate* 1868, 295, 296).

The decision succinctly encapsulated how the court appealed to the doctrine of contract to advance its vision of appropriate sexual morality and economic provision:

Mystery may surround its origin; suspicion may linger in its circumstances, and slight doubt disturb its clearness, but the policy of the State demands that this relation should not be slightly discredited and the issue bastardized. This is necessary in this country, where marriage is a civil contract, and often unattended by ceremony, or performed by a single officiating witness: (1868, 297)

It was the very privacy of the relationship in question, therefore, that enabled the court to construct a narrative of mutual consent to marry.¹⁶ Moreover, it was through the language of private contract that judges often executed their most aggressive, self-conscious policy interventions. Judicial decisions in cases involving the disputed validity of marriages demonstrate that nineteenth-century courts' reliance on the common law of contract did not necessarily translate into a *laissez-faire* approach to society. Rather, the language of the decisions reveals a judiciary that explicitly understood itself to be drawing strategically on contract doctrine to make and execute public policy it believed served the interests of the society and state.¹⁷

FROM FAMILY TO POPULATION: NUPTIAL SOLEMNIZATION AND THE CHANGING INSTRUMENTALITY OF THE MARRIAGE RELATION

By the Gilded Age, the vision of society that had animated the judicial practice of creating families through the strategic invocation of contract doctrine was growing increasingly untenable. As widespread poverty and dependence on public and private charity soared in the 1870s, and as the increasing visibility of women in the wage labor force shook the material and ideological foundation of marriage, the "protective" aspects of marriage seemed to contemporaries to be eroding among wage earners (Stanley 1988).¹⁸

16. The concept of "marital privacy" was wielded instrumentally by nineteenth-century judges in other contexts as well. Reva Siegel has demonstrated that in the context of Victorian ideals of domesticity and nonhierarchical, companionate marriage, nineteenth-century courts invoked the discourse of "affective privacy," and employed tropes of domestic "interiority" to preserve in substance, though not in form, the older common law prerogative of husbands to "correct" their wives physically. See Siegel 1996.

17. On the common law as an important source of self-conscious nineteenth-century policymaking, see Novak 1996; Horwitz 1977; Forbath 1991; Hattam 1993. The legal realists also contributed valuable insights into the non-neutral social and economic consequences of the ostensibly formal, neutral principles of contract. See, for example, Cohen 1935.

18. On the menace of pauperism in the Gilded Age, see Stanley 1992; Katz, 1986; Boyer 1978; Trachtenberg 1982. In fact, women's labor inside and outside the home had been crucial to not only household economies but the nation's industrial expansion more generally, since the birth of the Republic. It was the increasing "visibility" of this labor, often in the form of wage work performed outside the home, that struck postbellum observers as new. See Boydston 1990; Stansell 1986; Kessler-Harris 1982.

In the face of cyclical and chronic unemployment and intense fears of mass pauperism, charity and nuptial reformers as well as policymakers lost confidence in the capacity of many poor and working-class families to function as a shield against dependence on private or public aid. As growing numbers of impoverished families entered poorhouses together, professional charity organizers increasingly determined that the only way to disrupt the transmission of dependence from one generation to the next was to remove children from the homes and influence of their pauper parents.¹⁹ It was in this context that in the last three decades of the nineteenth century an alternative and competing conception of exactly *how* nuptial unions served the public good increasingly posed a legal and political challenge to the common law vision of marriage as *prima facie* beneficial to society. Beginning in the 1870s an aggressive marriage reform campaign, championed most publicly by Frank Gaylord Cook, a Boston attorney and reformer, and Samuel Dike, the ubiquitous and outspoken corresponding secretary for the National Divorce Reform League (later the National League for the Protection of the Family), waged war on the common law doctrine of private nuptial contract (Grossberg 1985, 83–95).

Charity and nuptial reformers located the problem of mass dependency by and large not in the poor pay and chronic unemployment of the industrial wage system, but instead in the moral and biological nature of those who were allegedly failing the test of household independence. Though many reformers continued to draw distinctions between the “worthy” and “unworthy” poor, those dependent on public or private charity were increasingly labeled with the pejorative title of “pauper.” “Pauperism” was constructed not as an economic problem, but as a moral and behavioral epidemic. It was a profoundly personal failing that threatened to infect the polity with the repudiation of, even flagrant contempt for, the ideal of male and household independence, and for the laws of political economy. As a mass phenomenon, moreover, pauperism raised the specter of a potentially dangerous urban population, mixing promiscuously, that was economically and politically disinvested from, and even hostile to, the goal of social stability.²⁰ This intellectual and strategic reorientation of urban reform, and

19. In the words of William Pryor Letchworth, a renowned children's advocate, “rescuing the child” from its alms-receiving parents was the “surest way of correcting the great evil of hereditary pauperism now growing rapidly in our state” (cited in Katz 1986, 107).

20. For a provocative analysis of the construction of “pauperism” in relation to discourses of political economy and the liberal state, and its consequences for strategies of philanthropy, see Giovanna Procacci 1991. Historians of urban reform have demonstrated that between the 1840s and the Gilded Age, reformers fundamentally reconceptualized both the nature of the objects of their efforts—the urban population—and the goal of reform work itself. In her study of women's benevolent work in the nineteenth century Lori Ginzberg depicts the transformation in particularly stark terms. She argues that whereas the prevailing antebellum “ideology of benevolence” had aimed at working to redeem society through the moral conversion of fallen individuals, the postwar generation of increasingly professional, scientifically oriented charity experts “evinced a far more pessimistic and insulated perspec-

particularly the changing place of the family within many reformers' vision of social stability, spurred family advocates to urge a transformed role for the state in the regulation of marriage.

Opponents of the common law of nuptial privatism such as Cook and Dike demanded, and the majority of state legislatures delivered, laws aimed at protecting the public interest in the status of marriage. These statutes required licensing and registration of all marriages, as well as formal wedding ceremonies performed by sanctioned officers of the state and attended by witnesses. Such requirements, their advocates argued, would help put an end to the dependency, moral laxity, and legal disorder that informal marriages were alleged to promote. The surge of legislative regulation signaled the beginning of a dramatic transformation in what nuptial reformers and policymakers believed to be the social consequences of many marriages. It marked the decline of the conception of marriage as an intrinsically valuable institution, and the emergence of a more selective vision of exactly *which* marriages would serve the interests of the public. Moreover, by locating the causes of society's crisis of pauperism in families themselves, rather than in the nature of industrial wage relations, reformers and policymakers who were invested in the idea of the nation's continued economic growth could maintain that the remedy for dependency lay not in state regulation of the economy but rather in the moral and behavioral reconstruction of one of the most conspicuous and disturbing symbols of social disintegration—the faltering family.

In 1888 Frank Cook wrote a series of four highly influential articles that appeared in the *Atlantic Monthly*. He argued that “of all of the institutions of society, marriage is the most fundamental, the most far reaching, and most vital. It preceded society; it made society possible; it binds society together.” Because marriage was “the source and mainstay of society,” Cook continued, “the state—the legal representative of society— . . . [is] most deeply concerned in its legal inception” (1888a, 680). At first glance this homage to the public importance of marriage appears to characterize the social function of the nuptial bond elaborated by text writers such as Schouler and Bishop, and by courts in decisions such as *De Amarelli's Estate*. A closer look, however, reveals a telling hint of a shift in emphasis from a conception of marriage as forming a discreet, stabilizing *unit* of society, to an understanding of marriage as the literal *source* of society. The legal program around which Cook and other reformers mobilized, and their emphatic assertion of the rights of the social body in opposition to the private rights of individuals, mark the beginning of a broad and lasting transformation in the

tive about human nature and the limits of reform.” “Human nature,” she writes, “according to the once benevolent middle class, had not been amenable to salvation; with the help of the state it could perhaps be restrained.” Urban reform was thus reoriented away from the inculcation of moral virtue and toward more class-conscious social control (Ginzberg 1990, 200, 211). See also Fredrickson 1965; Katz 1986.

legal and political understanding of exactly how marriages served the public good.

Nuptial reformers railed against what they understood to be the absence of state regulation of marriage in the United States, bemoaning the "rampant individualism" of the common law doctrine. "In the ownership of an acre of land," Cook wrote, invoking a popular analogy, "a man is fully protected by the law, . . . but in the lifelong, all-important relation of marriage, property, happiness, honor itself, are often left, by the inefficiency of the law, to depend solely upon oral and circumstantial evidence" (1888a, 668). Even the supposedly quintessentially "private" realm of property transactions, Cook suggested, enjoyed greater legal controls than the free-for-all of the American marriage market. The common law of marriage, he believed, sanctified "the rights of the individual at the expense of the rights of society." The body of common law decisions that I have argued represent a deliberate judicial policy to reinforce what postbellum courts conceived of as the most significant public functions of marriage, Cook understood to be blatant negligence toward an institution that was vital to the welfare of society. Whereas most nineteenth-century jurists valued the language of nuptial privatism as a way to promote marriages in the interest of the public, Cook instead saw in common law marriage a "minimum of civil regulation," and an expression of "the law of nature as it exists among savage tribes, and . . . in the Middle Ages, the darkest period of modern times" (1888b, 527, 528, 531).

The fact that marriage reformers advocated their position in terms of an opposition between familiar, time-honored legal categories—that is, between the rights of the individual and the welfare of the public—should not obscure the historical specificity of their underlying concerns. Their campaign to supplant the "laxity, multiplicity, and confusion" in the American celebration of marriage with state-directed "strictness, unity, and definiteness" (Cook 1888c, 261) represented an anxious reaction to a host of broad social transformations that reformers believed posed an imminent threat to both "integrity of the family" and the well-being of the nation (1888b, 530). The language of the movement suggests that the late-nineteenth-century campaign for mandatory nuptial solemnization represents, above all, an effort to assert a new form of regulatory control over a national population that reformers judged to be in ethnic, moral, economic, and gender turmoil.

Advocates of mandatory nuptial solemnization characterized their program of legal reform as a new system of regulations to meet the needs of a rapidly changing society. American marriage laws, argued Samuel Dike, "in their variety, conflicting terms, and often loose restrictions, are the heritage of a union of independent colonies and States, and a lack of a system and care in legislation." In light of the "development of the West," however, Dike continued, "the growth of our manufactures, [and] the frequent remov-

als of residence," it was becoming clear that contemporary marriage laws "were made for a society that has so greatly changed that they are now felt to be a misfit to the social needs of a great nation" (1890, 399). That "great nation," Dike suggested, could continue to enjoy the progress of economic growth without the costs of social dislocation by simply modernizing its marriage laws. The nation's celebrated "growth in manufactures" did not have to be an enemy of household independence. Rather, the family could be made to "work" again by reforming the rules governing its inception.

Though he welcomed certain aspects of this forward march of modern industry, Cook saw in the consequences of industrial development an unnerving departure from an ideal and irrecoverable national past. In the early years of the republic, he rhapsodized,

when population was small, scattered, and agricultural, when society was simple, frugal, and conservative, respect for law and conformity to civil regulations were almost universal. Moreover, as settlers of the same faith and race usually dwelt together, there was unanimity of sentiment in the protection of the common interest and the maintenance of social order.

In this well-ordered environment of religious and ethnic homogeneity, Cook suggested, regulations governing the solemnization of marriage were universally observed. Though a noncoercive, largely voluntary system of nuptial laws may have adequately served such a stable, localistic society, Cook suggested, it was wholly inadequate for the "great, rapidly growing nation" of the late-nineteenth century. In the United States of the 1880s, he wrote,

there exists the widest diversity of race, religion, and sentiments. Population is congregating in cities. Labor . . . is crowding into factories and tenements. In the shops, in the factories, in merely every occupation, at great odds and under particular temptations, women compete with men in the selfish, exacting struggle for preferment, for daily bread. Industrial struggle and discontent and social evils are rife in the community.

Though Cook clearly recognized that at least some of the social evils he worried about found their origins in the industrial economy, his proposed solution was nevertheless oriented around buttressing the family through the legal reform of marriage. Rather than "fortifying our social institutions and strengthening the foundations of the social order," he continued, American "courts are forsaking, not protecting, are tearing down, not building up, the very basis of the whole fabric of civilized society" (1888b, 530).

As this portrait suggests, the apparent moral and economic chaos of the industrial laboring class—particularly the ethnic heterogeneity of the population and the participation of women in the “industrial struggle”—led Cook to reevaluate the wisdom of indiscriminately encouraging marriage through nuptial “privatism.” With its utter “insecurity,” and its threat of “clandestine marriages and secret unions,” Cook argued, the common law doctrine of the private marriage contract introduced into American society much of the “license . . . of the Middle Ages.” In great civilizations of the past, he instructed, marriage was a thing of great publicity, and thus subject to the better judgment of the bride’s parents and of the community. But in the modern United States, he declared, a man “may go by stealth at night” into the house of a girl’s father, “and carry her off without the knowledge or consent of her parents.” The couple may then, by simple consent, Cook worried, “become . . . husband and wife . . . in law” (1888b, 530, 521, 527). In the “simple,” “conservative,” and most important, homogeneous America of the past, Cook believed, nuptial privatism worked because the population virtually policed itself. But in the modern industrial metropolis, where a certain degree of surveillance and social control was required to maintain order, the common law of marriage only encouraged the degradation of an already morally precarious population.

The population toward which nuptial reformers urged the regulatory attention of the state, these passages suggest, was understood increasingly in terms of its foreignness and ethnicity. The “population congested in . . . [major American] cities,” Cook declared, “is largely, in some mainly, foreign born; and the swelling tide of immigration bears to us, unfortunately, . . . the social evils that fester and threaten in Europe” (1888b, 531). Dike likewise urged that greater public attention be given to the foreign “source” of “our dangers.” A “thorough study” by experts of the “foreign element in our own country would,” he wrote,

show the need for more official and private watchfulness of the domestic morals of this class, and that a careful supervision of our immigrants would affect our domestic morals most favorably. The uncertain marital relations of some immigrants from countries where illicit unions take the place of lawful marriage, . . . and where illegitimate births are . . . [frequent, and where] unchastity must exist among a very large proportion, . . . makes . . . legislation very desirable. (National Divorce Reform League 1887, 6)

Reformers such as Cook and Dike understood the menace to American society that solemnization laws were intended to combat to be largely an external one. At least in this dimension of the “marriage problem,” they suggested, it was less the degradation of the traditional “American” marriage

relation than the massive injection of foreigners into the national population that demanded aggressive legislative regulation.

As reformers turned their focus more to the condition of the American population, social problems were increasingly enunciated as political problems of national scope. The influx of Europe's human refuse into American cities, Cook warned, represented an "imminent danger to the state through . . . political corruption." He likewise attributed "the recent anarchist disturbances" to the domination of American cities by immigrants (1888b, 531). Others emphasized the economic costs of a deteriorating national population. Foreshadowing the rise of eugenics in the coming decade, Dike reported in 1888 that the "most potent single cause[s] of crime" were "Bad Homes and Heredity" (National Divorce Reform League 1889, 12). The national regulation of marriage, of course, spoke directly to both these problems. By defining the source of society's problems as largely an ethnocultural and biological siege on the American population, these critics of common law marriage signaled the early stages of a transformation from an understanding of marriage as the creation of viable households—the fundamental *units* of society—to a conception of marriage as the *source* of population. Most important, perhaps, ethnicity became for many reformers a language with which to talk about—or rather, to avoid talking about—labor militancy, class conflict, and structural poverty. By characterizing the social disorder and pauperism in American cities as a problem of an under-regulated immigrant population, reformers mobilized an effective trope with which to lay blame on the poor themselves. Thus they could avoid confronting the inherent contradiction between the social consequences of an industrial capitalism and the ideal of self-sufficient, single-male-breadwinner households.

Because nuptial reformers constructed the crisis of the family as a consequence of the under-policed morals of an ethnically marked class of foreign origin rather than of the untouchable realm of labor relations, they were prepared to advocate a transformed and more explicit regulatory role for the state. For marriage activists this role took the form of widely adopted mandatory nuptial solemnization laws. Reformers and lawmakers recognized in the common law doctrine of private nuptial contract only a socially injurious dearth of concern for the public good. In retrospect it appears that the public policy functions of judicially constructed nuptial privatism were, in the minds of many late-nineteenth-century Americans, insufficient to the task of governing the modern population. At the time, however, reformers and policymakers articulated the new regulations as a policy of upholding the interest of society over the rights of individuals. One advocate of solemnization requirements explained in justification of the recent nuptial legislation that marriage was "of greater moment to the state than to the parties

themselves. [Marriage is] the parent, not the child of society, . . . [which may] be molded by the State" (Weightman 1883, 184).

The judicial reception of the late-nineteenth-century solemnization laws starkly illustrates two competing conceptions of the social function of marriage. The legal debate took shape around the question of whether to construe the new statutes as mandatory—and thus to render void *ab initio* all unions that failed to conform—or as merely directory, in which case the common law rule would continue to prevail over the legislative reforms. Though most courts continued to favor the common law doctrine of simple consent, a substantial minority endorsed the new regulations, and in doing so articulated their belief in the need to protect the interests of society and state in terms characteristic of the nuptial reformers. Moreover, the judicial language in the decisions reveals a more fundamental contest between competing visions of exactly how, and by whom, the marriage relation would be mobilized in law as a strategy of public governance.

A majority of late-nineteenth-century jurists called on to determine the validity of marriages formed in violation of state solemnization requirements agreed with Thomas Cooley's declaration that marriage was a "common right" that could be entered into by simple "present agreement," even "if all ceremony be dispensed with," and regardless of the "restrictive regulations" of "local statutes" (*Hutchins v. Kimmell* 1875, 127). In 1877 the U.S. Supreme Court explicitly endorsed Cooley's construction of the statutory regulations. "Such formal provisions may be construed as merely directory," Justice Strong argued, "instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent." Behind this invocation of the common law of contract lay the same public policy considerations pursued by courts through the language of nuptial privatism. Justice Strong explained that "the statutes are held merely directory" not simply because marriage is considered "a thing of common right, [but] because it is the policy of the state to encourage it, and because . . . any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of the law" (*Meister v. Moore* 1877, 79, 81).²¹

21. See also *State v. Walker* 1887; *Peck v. Peck* 1880; *Cartwright v. McGown* 1887; *State v. Bittick* 1890; *Campbell's Admin. and Heirs v. Gullatt* 1869; *Port v. Port* (1873). When it refused to void the second marriage of a divorced man who had been legally forbidden from remarrying, a Mississippi court similarly elevated the "happiness and security of society" above the "prerequisite formalities of a statute." The man who illegally contracted a second marriage, the court emphatically declared, may be criminally punished, but with him the punishment must stop. "To extend the punishment to the second wife, . . . innocent of any thought even of violating any law, and extend the punishment further to the helpless and unsinning offspring of the second union, would . . . not only be cruel and unjust, but would be, moreover, a departure from the humane spirit of the law, which regards every marriage with favor and seeks to uphold the validity of every marriage contract. . . . The innocent second wife, and unoffending offspring are not to be branded, one as having lived in concubinage and the others as having been born bastards" (*Crawford v. State* 1895, 178–79). A frequently cited English case makes the power of judicial construction regarding feminine virtue even more

The court's decision was firmly rooted in the prevailing postbellum judicial practice of securing female sexual virtue and filial legitimacy through the expansive, enabling rule of present consent; a practice based on an "older" and, by the late nineteenth century, waning conception of the marriage relation as an intrinsically beneficial end of public policy.

A substantial minority of late-nineteenth-century courts, however, rejected the Supreme Court's interpretation, and instead constructed the solemnization statutes as mandatory. In doing so they voided the marriages of couples who failed to comply with the new laws, and articulated an emphatic repudiation of nuptial "privatism" and of the dominant postbellum public policy conception of the marriage relation as *prima facie* beneficial to society. "While the married state is a most commendable one," declared a Washington State court, "and ought to be encouraged in all legitimate ways," dispensing with the statutory requirements would "set a premium on illicit intercourse." When "cohabitation and reputation without any agreement constitute marriage," Judge Scott reasoned, fornication must necessarily precede matrimony (*In re McLaughlin's Estate* 1892, 588, 590, 589).²² The common law of nuptial contract, traditionally wielded by courts as a shield *against* promiscuity, is here instead charged with *encouraging* sexual immorality. This interpretation reflects the emergent understanding of the legal inception of marriage as a strategy with which to govern an increasingly morally suspect urban population.

The court argued that rejecting the validity of marriages formed through informal contracts and forcing couples to adhere to publicly prescribed procedures of marriage would impress on them the solemnity of their action as well as its importance to the public. By so doing it would also prevent the great social menace of divorce. The common law of marriage promoted divorce, the judge argued, because "a contract this lightly made might as easily" be dissolved. "It is contrary to public policy and public morals," the court continued, "and revolting to the senses of enlightened society that parties could place themselves in such a condition that they might mutually repudiate." By rendering void *ab initio* the unions of people who failed to comply with the solemnization requirements, the court sought to reconstruct the very way in which the American public conceived of the

explicitly: To construe solemnization requirements as mandatory, ruled the court, would be to determine that a "woman, however innocent and virtuous, who, failing only to comply with mere *forms of the statute*, celebrates a marriage sanctioned by natural and divine law . . . is a mistress." To void such a marriage, the court declared, would be to "turn adrift the wretched female who has been deluded into the snares of a villain, or has ignorantly supposed that she was ascending the hymeneal bed which the construction of the law harshly converts into the couch of the prostitute." See *Caterall v. Sweetman* 1845 (cited in J. 1888, 11).

22. Nuptial privatism, he warned, also threatened female sexual purity by undermining the ability of parents to control their daughters. If "common law marriages are to be recognized . . . as by a simple agreement," the court wrote, "a man, though forty years a senior, and a girl of the age of twelve years, can enter into this relationship regardless of the will of the parents" (*In re McLaughlin's Estate* 1892, 589).

marriage relation. "By adhering to the statutory provisions," Judge Scott instructed, "parties are led to regard the contract as a sacred one, as one not lightly entered into, and are *forcibly impressed* with the idea that they are forming a relationship in which society has an interest, and to which the state is a party" (*In re McLaughlin's Estate* 1892, 590).²³ By performing a publicly prescribed ritual of matrimony, the court suggested, people participated in and became subject to an act of state governance. Through the regulation of marriage, the population would "feel" the power of the state and thus come to understand the great public consequence of their actions. The characterization of the personal lives of individuals as integrally related and vital to the operation and well-being of the state was an important step in the larger legal, political, and theoretical transformation of the population into a national citizenry.

Above all, the judicial language in *In re McLaughlin's Estate* signals the beginning of a fundamental shift from the family to the population as the primary end of governance. "There is a growing belief, the court observed, "that the welfare of society demands . . . that an institution like marriage,"

which is so closely and thoroughly related to the state should be the most *carefully guarded*, and that improvident and improper marriages should be prevented. All wise and *healthful* regulations in this direction prohibiting such marriages as far as practicable would tend to the prevention of pauperism and crime, and the transmission of hereditary diseases and defects, and it may not be regarded as too chimerical to say that in the future laws may be passed looking to this end. (*In re McLaughlin's Estate* 1892, 590, 591)²⁴

The court located the source of society's most burdensome ills—economic dependency, crime, and disease—in the unhealthful biological condition of the population, a consequence of improvident unions. It is clear from the court's emphasis on the prevention of socially harmful traits, moreover, that for at least some jurists nuptial regulation represented the possibility of not only prescribing the form that the celebration of marriage would take, but also of completely *proscribing* some unions. The public policy of marriage, the court reasoned, should serve the production of a "healthy" citizenry. The decision suggested that marriage should not be blindly promoted, as the advocates of the common law doctrine seemed to believe, but conscientiously "guarded." For nuptial reformers and jurists like Judge Scott, the creation of new marriages was no longer an intrinsically desirable *end* of public

23. Emphasis added.

24. See also *Beverlin v. Beverlin* 1887, 737, another minority decision, in which the court found that although West Virginia's solemnization requirements did not expressly nullify unions that were formed in violation of the law, "our statute has wholly superseded the common law and in effect, if not in express terms, renders invalid all attempted marriages contracted in this State which have not been solemnized in substantial compliance with its provisions."

policy; rather, the selective prohibition of certain unions was emerging as an instrument that legislatures and courts wielded in their governance of the population. The court's prediction regarding future legislation, moreover, was exactly right. For in the two decades following the decision in *In re McLaughlin's Estate*, the nation would see a dramatic proliferation of state laws prohibiting the marriages of many citizens on the basis of biological and hereditary fitness.

THE RISE OF EUGENIC MARRIAGE: THE HEREDITARILY FIT CITIZENRY IN THE PROGRESSIVE ERA

By the turn of the century, the legal contest had swung decidedly in favor of the reformers, social scientists, and legislators who regarded only a select class of unions to be socially advantageous. As marriage came to be conceived of less as an inherently valuable social institution, it became understood increasingly in terms of its procreative function. This transformation was heavily informed by the rise of hereditarian conceptions of individual behavior and capacity. As social reformers, journalists, social scientists, and policymakers began to imagine a population of biologically endowed individuals, social fitness became dependent on collective individual fitness. The "cell is for the body what the individual is for society," wrote one eugenicist in *The Arena* in 1890, "and the body politic dies a natural death through the inability of the individual member to sustain himself [T]he new generations fail in the work of progress because the renewal of individuals is left to the unfit, and the civilization dies" (Stanley 1890, 95). The marriage relation, in turn, was increasingly characterized as the biological source of the citizenry. This brand of hereditary determinism underwrote a strategy of nuptial governance that focused less on environmental reform and material provision, and more on regulating the reproduction of the population. As the wellspring of social heredity, marriage was increasingly constructed and mobilized not as the principle *end* of public policy, but as a selective *instrument* through which the American state governed the population. By the Progressive era, in short, marriage served the "public good" as a strategy of governance in the reproduction of hereditarily fit citizens.

This vision of marriage rested on the idea that the urban population was made up of hereditarily endowed atoms that were becoming increasingly individuated relative to their respective family units. Samuel Dike wrote in 1890 that in the United States, where "individualism and its legal and social ideas are more fully developed" than anywhere else, "the Family has given place to the Individual" (1890, 403). Many contemporary observers agreed that the modern family had been radically destabilized and super-

seded by the individual as the most fundamental unit of American society. This rapid trend toward individualism was inextricable from the decline of the "patriarchal régime" (Calhoun 1919, 174). The family, observed Columbia University professor of education Willystine Goodsell, had ceased to function as an economic, legal, and religious unity under the state-backed authority of the husband and father. Rather, he wrote, "the modern household not infrequently presents the phenomenon of a group of clashing wills, an association of highly individualized persons, each asserting his rights." Though this development brought significant gains to humanity by undermining the familial "autocrat," Goodsell continued, "it would seem that in some instances [the family of the twentieth century] has paid for the independence of its members the costly price of its very existence" (1915, 56, 57). What represented the economic and moral bedrock of the state in the postbellum era had become, for some, more a voluntary association of self-interested individuals.²⁵

Other critics, however, saw in the alleged dissolution of the family an exciting new opportunity for the construction of a more national citizenry and for the strengthening of the state by expanding its role in the governance of that citizenry. Despite the current "disorganizing tendencies toward free individualism," one optimistic writer noted, "the reduction of family functions has not been solely anarchistic but has been due in large measure to the transfer of prerogatives to more inclusive social institutions"—most notably schools, child protection societies, orphan asylums, churches, and the growing body of child labor laws (Calhoun 1919, 173). Sociologist George Elliott Howard remarked of this transfer of authority that "little by

25. Social scientists and other critics sometimes represented this condition as an inevitable result of a historical trend in the West toward the democratization of society and the expansion of individual rights, initiated in the Renaissance, elaborated during the Enlightenment, and embedded in the founding principles of the American state. Others blamed a relaxation of moral standards, or the growing presence of women in the labor force, college, and the professions. A few explicitly attributed the crisis of the family to the ravaging effects of the urban industrial economy (Goodsell 1915, 328–41; Calhoun 1919, 156; *The Present Disintegration of the American Home* 1911, 296–98). One of the most influential scholars of the family in the Progressive Era, the University of Chicago sociologist George Elliott Howard, wrote that the historical development

most threatening to the solidarity of the family is believed to be the individualistic tendencies arising in existing urban and economic life. With the rise of corporate and associated industry comes a weakening of the intimacy of home ties. Through the division of labor the 'family hearth-stone' is fast becoming a mere temporary meeting-place of individual wage-earners. . . . The tenement and the 'sweating system' are destructive of the home. Neither the lodging-house, the 'flat,' nor the 'apartment' affords an ideal environment for domestic joys. . . . To the children of the slum the street is a perilous nursery. For them squalor, disease, and sordid vice have supplanted the traditional blessings of the family sanctuary. The cramped, artificial, and transient associations of the boarding house are a wretched substitute for the privacy of the separate household (1904, 227–28).

Under such conditions, the postbellum legal ideal of the physically private, geographically stable, and economically self-sufficient family that functioned as society's most foundational public and private institution appeared increasingly unrealistic.

little . . . the original 'coercive' powers of the family under the patriarchal régime have been 'extracted' and appropriated by society" (1904, 226). For Howard this process held great promise. When "the tie that binds [the family's] members together ceas[es] to be juridical," he wrote in *McClure's Magazine*, it becomes more "spiritual." When the despotic, coercive element of the family is stripped away by more far-reaching social institutions, and when "the corporate unity of the patriarchal family has been broken up or even completely destroyed," there emerges "a loftier ideal of the marital union and a juster view of the relative shares of the sexes in the world's work." By dismantling the traditional patriarchal family unit, moreover, it was possible for a truly national citizenry and an empowered regulatory state to take shape. It is "at the expense of the old solidarity of the family," Howard enthusiastically declared, that "the new solidarity of the state is being won" (1909, 238).

For many influential advocates of eugenics, the health of that national citizenry rested squarely on its aggregate hereditary endowment.²⁶ Karl Pearson, one of the leading British popularizers of eugenics, wrote in *Popular Science Monthly* that "permanence and dominance in the world passes to and from nations even with their rise and fall in mental and bodily fitness" (1907, 389). "Disease and health," Pearson wrote, "vigor and impotence, intelligence and stupidity, sanity and insanity . . .—all the things which make for strength or weakness of character—must be . . . dissected under the statistical microscope, if we are to realize why nations rise and fall, if we are to know whether our own folk is progressing or regressing." The nation's folk, all agreed, were in dangerous decline. "The growth of human sympathy—" he continued, "and is not this one of the chief factors in national fitness?—has been so rapid during the century that it has cried Halt! to almost every form of racial purification." Only the scientific application of

26. A broad cross-section of scientists, reformers, academics, and the literate public embraced the discourse of eugenics in the 1900s and 1910s. Broadly conceived, the term *eugenics* refers to the "science" of improving the biological condition of the human race through selective breeding. First elaborated in England in the late nineteenth century, eugenics was popularized in the United States in the 1890s and 1900s. Eugenacists warned that the modern tendency toward social reform, charity, and sympathy for society's unfortunate—society's willingness "to keep the helpless and diseased alive"—had arrested the process of natural selection, and thus inhibited the progress of the "race." "Environmental" reform, they argued, contributed to the deterioration of the "national stock" because it failed to alter the "germ plasm" of the population. In other words, nature always prevailed over nurture. The "less fit members of the race in a civilized and artificial society," wrote one sociologist, "are enabled to survive in the struggle and to pass on their defects to coming generations" (Batten 1908, 236, 237). Virtually every undesirable personal and social trait was believed to be hereditary, including criminality, pauperism, sexual immorality, insanity, and, perhaps most menacing of all, "feeble-mindedness"—a general condition of substandard intelligence to which most of the preceding afflictions were frequently attributed. The heredity of the population, sometimes to the virtual exclusion of all other factors, dictated the ascent or decline of society (Kevles 1985, 3–56, 70–84; Degler 1991; Haller 1963).

the principles of eugenics, and a "higher patriotism and pride of race" could check national "deterioration" (Pearson 1907, 392, 398, 399).

If the national stock was to be redeemed, moreover, the state had to engage itself more aggressively in what one writer described as the "business of citizen-making" (Humphrey 1913, 457). Eugenacists worried that natural selection, the great "purifier of the state" was no longer in operation (Pearson 1907, 412). For this reason, one sociologist wrote, "the state . . . must [assume] a more intelligent interest in the whole program of race making" (Batten 1908, 259). If the American nation is to elevate the "innate capacity of its citizenry," suggested Charles Davenport, the most prominent American advocate of eugenics, society must free itself from the "fundamental falsehood that 'all men are created equal'" (1912, 281, 282). In a national population understood in terms of its hereditary fitness, eugenacists suggested, equal citizenship should be awarded selectively, according to the dictates of science.

It was widely believed not by only "professional" eugenacists but also by politicians, social scientists, journalists, and reformers that the quality of the American citizenry was rapidly deteriorating. Three causes—the declining birth rate of the "better classes," the relative fertility of the "unfit," and the unnatural selection of society's incapables due to the "short-sighted kind-heartedness" of philanthropists—were equally to blame (Heredity and Human Progress 1900, 350). One writer declared that "if present conditions are allowed to continue, it can be shown with mathematical certainty that the families of the present upper classes, with their share of the good qualities of our race, will simply cease to exist" (Extinction of the Upper Classes 1909, 97). In one of his many published articles advocating eugenics, President Roosevelt made the ethnocultural undercurrent of positive citizen reproduction quite clear. The "average native American family of native American descent has so few children," he worried, "that the birth rate has fallen below the death rate" (1907). "It is lamentable," he wrote on another occasion, "to see this Puritan conscience, this New England conscience, so atrophied, so diseased and warped, as not to recognize that the fundamental, the unpardonable crime against the race is the crime of race suicide" (1914, 32).²⁷

As the regulation of social reproduction became an increasingly important element of the reform agenda, so did the importance of the procreative dimension of marriage. The responsibilities of "patriotic parenthood" were highly distinguished by gender. In an ideological environment where "fit"

27. In spite of the highly suggestive ethnic and class bias of Roosevelt's warnings, more "principled" eugenacists accused the president of encouraging "reckless fertility," and for holding "the rabbit theory of national wellbeing." (Eugenics 1904, 446). A lawyer writing a few years later gave the "race" in "race suicide" a more explicit definition. "In the United States," he wrote, "the foreign element is so prolific and the native birth rate so much on the decline that the Anglo-Saxon race is threatened with extinction" (Manson 1914, 126).

procreation was constructed as an act of national service, men could serve their nation by marrying young and supporting large families, while women bore the duty of mothering the race. Women's procreative and hereditary contributions to the citizenry were variably considered the most patriotic or the most criminal of acts. "Motherhood" was not simply the private act of individual women, editorialized the *Survey*, but "a factor in the production of dominant races" (Parenthood and Race Culture 1910, 732).²⁸ For many Progressive Era eugenicists, women served as the hereditary gatekeepers of the citizenry. According to Michael Guyer, a University of Wisconsin zoologist and author of *Being Well Born*, "woman is the decisive factor in race-betterment, for it is she who says the final yea or nay which decides marriage, and thus determines in large measure the qualities which will be possessed by her children." When women realized that they were the "trustees" of "the immortal germ plasm," he continued, they would "see the necessity of demanding a clean bill of health on the part of their prospective mates" (1916).²⁹ As professional eugenicists, politicians, social scientists, family reformers, and journalists came to view the hereditary quality of the American population as a crucial determinant of the country's future, and thus as the primary object of state governance, patriotic motherhood was presented as an obligation for women who wished to remain dutiful to their nation.³⁰

28. On the construction of motherhood in Progressive Era discourses of "racial" and national uplift, and in "maternalist" social policy, see Bederman 1995; Mink 1990, 1995. For a different interpretation of maternalist social policy, see Skocpol 1992.

29. Quoted in Kevles 1985, 67. Two other enthusiasts of eugenics described the duty of conscientious motherhood in much less participatory terms. If the nation's "stock of human life . . . be divided into capital and income," the authors wrote, "while men represent the income, . . . women to a large extent must be considered as capital, . . . to be husbanded carefully for the future, thus to give credit and stability to the whole fabric of national life" (Wetham and Wetham 1909, 106).

30. Activists for a healthy citizenry frequently blamed the expansion of women's sphere and rights for the declining birth rate of the nation's "better stock." Champions of patriotic motherhood charged that women's "new freedom" had been "twisted into wrong where it has been taken to mean a relief from all those duties and obligations which . . . women cannot expect to escape" (Mr. Roosevelt's Views on Race Suicide 1906, 21). "Surely it is more than a coincidence that the period of growth of the so-called feminist movement," wrote two advocates of "husbanding" female reproductive capital, "is also the period of decline in the fulfillment of the essentially womanly duties," which was evidenced by "the fall of the birth rate." If the "higher civilization[s] . . . persist in withdrawing women from the homes and throwing them into the competitive struggle for existence, or the political organization of the country, that form of civilization carries with it the seeds of its own destruction" (Wetham and Wetham 1909, 106).

Roosevelt similarly editorialized that the "only new woman in whom I believe . . . is she who adds new qualities to, and does not try to substitute them for, the primal, the fundamental, virtues of the 'old' woman—she who was the wife, the mother . . . of the past." For both sexes, Roosevelt continued, no "career is more than a poor substitute for the career of married lovers who bring into the world . . . children sufficiently numerous so that the race shall go forward and not back." For a man, he declared, the "best career . . . is to be the breadwinner for his wife and children," while for a woman, no "career is so useful and honorable, nor needs such self-sacrifice and wisdom, as the career of a good and wise mother." If women were to avoid perpetuating the national trend toward "race suicide"—the "unpardonable crime

The national threat posed by the “pathos of having good old families represented in the next generation by smaller numbers” (Mr. Roosevelt’s *Views on Race Suicide* 1906, 21) was surpassed only by the “fecundity” of the unfit (Humphrey 1913, 458). While the nation’s “best blood fails to perpetuate itself,” editorialized the *Independent*, “the poor and worthless marry and have many children” (Parenthood 1908, 645). The least fit “one seventh of the present generation,” it declared, “will be the parents of one half of the next” (*Evolution Working Backward* 1906, 703). In America, wrote an author in the *Arena*, we “behold the melancholy spectacle of the renewal of the great mass of society” by the “floating population [which] is always the scum.” The unfit stock of feeble-minded casual laborers, moreover, was often explicitly identified as of foreign origin. We “cannot expect a rude and vigorous people to resuscitate us,” argued one critic, “and it is quite unlikely that we shall receive immigrants from another sphere. We must work out our own salvation by scientific methods” (Stanley 1890, 95). Harvard Professor J. B. Peabody similarly lamented that “instead of decreasing our own unfit classes” of “insane, feeble-minded, the idiot, the criminal, and the pauper,” we “go on adding to them by admitting every year thousands of unfit immigrants” (1912). There was, most agreed, a breeding war underway between the classes.³¹

The reverse evolution caused by the survival of the unfittest was often attributed to the sympathy and charity that American society lavished on its degenerates. “We see pain and suffering only to relieve it,” chided Pearson, “without inquiring as to the moral character of the sufferer or as to his national or racial value.” He went on to articulate an even more sensational image of infestation and pollution of the social body by artificially maintained degenerates. The label of “race suicide,” he wrote in *Popular Science*, resonates with “any one who has seen, even from afar, the nine circles of that dread region which stretches from slum to reformatory, from casual ward and stew to prison, from hospital and sanitarium to asylum and special school; that infernal lake which sends its unregarded rivulets to befoul more fertile social tracts” (1907, 406, 407–8). Because of the humanitarian effect of its expanding functions, alarmed eugenicists argued, the state was poisoning the biological constitution of its own future population.

against the race”—they would have to forgo extrafamilial interests and commit themselves to the reproduction of the citizenry (Roosevelt 1914, 32, 33).

31. One writer cautioned the readers of the *Forum* not to underestimate the menace of the degenerate: “The woman with a worthless husband who comes in on ‘scrubbing-day’ may enlist our sympathy because of her six children, but our minds stop short of projecting upon future generations those six children of a degenerate man, as against our own two, or one, or none. Yet his children, and theirs again, doubtless well be as prolific as he, and ours as unprolific as we. And so it is with degenerates generally,—we pity, we aid, but we mentally detach them as of no account in the social structure, whereas they are among the chief builders of it” (Humphrey 1913).

Just as the nation's "good old families" were charged with the racial responsibility to step up their birth rate, the hereditarily unfit bore the patriotic duty of *not* procreating. The anthropologist and social critic Elsie Clews Parsons wrote in 1906 that as scientific knowledge demonstrated "the disastrous results of the mating of those handicapped by . . . taints or lacks, the social obligation in marriage will be held more and more considerable." As society demanded a population endowed with "progressive traits, physical, moral, and mental, as well as a lack of disease on the part of child bearers and begetters," greater pressure would be placed "upon the individual." As people became increasingly aware of the "costs to the state by reproduction by its diseased and vicious subjects," she declared, "individuals tainted by epilepsy, insanity, inebriacy, deaf-mutism, venereal disease, etc." would be considered "morally guilty if they marry" (1906, 344).³² When the moral and economic burdens of the state were located in the hereditary condition of its population, Parsons suggested, individuals were conceived of as bearers and begetters of the future citizenry, while the marriage relation was constructed as a regulatory valve through which flowed the biological endowment of the nation.

Though in the postbellum era marriage was generally understood to be a bulwark *against* economic dependence, in the Progressive era it was increasingly feared to be a potential *source* of pauperism. A passage that Howard appropriated from a British text pointedly demonstrates the way in which conceptions of the marriage relation's public function were shifting in the late-nineteenth and early-twentieth centuries. Though to the "superficial observer," declared the text's author, "it may appear that every marriage must enrich the state," that idea proved utterly false. "To be a source of wealth to the state," he wrote, a family "must at least be self-supporting, which is exactly what the feeble, degenerate children of the great mass of our early marriages are not." "Instead of being a source of wealth to the state," the "ill-developed and unhealthy" offspring of "improvident parents . . . prove a serious drain on her resources." Such children "drag out a pitiful existence only to become inmates in our workhouses and infirmaries, our asylums and prisons." They are "supported at the public expense . . . [and few] ever become robust, useful, self-supporting citizens" (Strahan 1892, 245).³³ Economic independence was no longer a presumed consequence of the marriage relation. Though just a generation earlier, matrimony had been almost invariably encouraged as matter of good public economic policy, by the turn of the century marriage was increasingly understood to be potentially detrimental to the state.

32. Roosevelt expressed similar sentiments when, in the pages of the *Outlook*, he "wish[ed] very much that the wrong people could be prevented from breeding. . . . Criminals should be sterilized, and feeble-minded persons forbidden to leave offspring behind" (1914, 32).

33. Cited in Howard 1904, 243–44.

In a nation where economic independence had long been idealized as a prerequisite of full citizenship, and in an intellectual, legal, and political environment that understood capacity in terms of heredity, those dependent on public support represented the antithesis of fit citizens. As one author explained in the *North American Review*, there is "no pauper who may not wed a pauper and beget more paupers to the end of his story" (Phelps 1890, 130).³⁴ Though some early eugenicists believed that there was a "pauper germ" passed from generation to generation, after the turn of the century, economic dependence was more frequently characterized, along with other socially expensive deficiencies such as sexual immorality and criminality, as an attribute of hereditary mental weakness. The "menace of the feeble-minded" emerged as a national crisis with the rapidly growing popularity of the Binet-Simon Intelligence (IQ) test in the 1910s (Kevles 1985, 83–84). "It is universally conceded," declared one observer in the *Forum*, "that a high proportion of habitual criminals, paupers, prostitutes, vagrants, and incapables generally are mentally defective; that feeble-mindedness is the keystone of the whole miserable arch; that of all characteristics it is the most certain in its heredity, yielding a self-perpetuating, self-increasing army of miserales" (Humphrey 1913, 461).

In a dramatic regulatory convergence around the procreation of the citizenry, nuptial-reform advocates across a wide range of disciplines insisted that the marriage relation be mobilized by the state as an instrument of governance. The biological health of the polity, they argued, demanded a more aggressive extension of police power into the matrimonial sphere. Because "the safety of the social body requires that a check be put on the propagation of the unfit," Howard declared in 1904, "the state has a function to perform." In the future, he urged, "the marriage of persons mentally delinquent or tainted by hereditary disease or crime . . . [should] be legally restrained" (1904, 258). The conceptual sanctuary of private rights, suggested one physician, had to be exploded in the service of the public interest. "The worst enemy to man," he wrote in the *Survey*, is "the childish fear of interference which under the glamour of freedom keeps us all the more strongly in bondage" (Meyer 1916, 244).

Most legal observers likewise considered the eugenic health of the public a worthy justification for state regulation. Though "marriage . . . is a matter of . . . common right," argued one writer in the *Yale Law Journal*, "it is so firmly bound up with the very life of the state . . . as to be distinctively and preeminently within the police power." As long as nuptial regulations "can find reasonable justification as public health measures in the interests of those now living or of posterity . . . they will doubtless be upheld as a constitutional exercise of this power" (Spencer 1915, 64). Another advocate of injecting medical science into the law of marriage declared in the

34. Cited in Howard 1904, 254.

Harvard Law Review that “it is the noble mission . . . of the legislator to stay the evil” of biologically unsound marriages “at its source, and to say that, insofar as law can effect it, future generations will be of sound mind and body, imbued with all the qualities which make for national greatness” (Swindlehurst 1916, 140).

These statements suggest not simply an extension of legislative regulation into what had been conceived of as a predominantly “private” dimension of marriage—that is, procreation—but a more fundamental transformation in the relation of the state to its citizens. The *Outlook* reported that the “old idea that the state was a sort of policeman to protect the individual against the encroachments of his fellow-men has been superseded by a larger conception—that of the State as the organization of the whole community for the purpose of doing for itself whatever it can do better than any individual or group of individuals can do for it” (Eugenic Marriage Laws 1913, 342).

At first this passage suggests an example of traditional police power rhetoric—an announcement of the authority of the state to protect the interests of society over the rights and freedoms of individuals. When it is considered in the context of eugenic conceptions of the citizenry, as well as what I have argued was a shift in the primary object of governance from the family to the population, however, we see that by policing the heredity of its citizens, the state was also ensuring its *own* future fitness. When national health was imagined in terms of the biological fitness of the citizenry, individual citizens became not merely *constituents* of the state but constitutive of the state. When “nationhood” was reformulated as national heredity, the eugenic marriage law represented, in effect, a strategy of national self-constitution. “There is a growing realization,” wrote Parsons, “that the state must develop through the individual, but that the individual must develop through the state” (1906, 355). Through the hereditary and regulatory medium of marriage, the state and the citizen would literally become mutually constitutive.

Though the calls of scientists, reformers, academics, and journalists for eugenically inspired marriage laws preceded the legislative enactments by a few years, it would not necessarily be accurate to say that the multifaceted public discourse of national hereditary fitness literally *caused* the laws. The “legal,” “cultural,” and “scientific” dimensions of eugenic marriage reform cannot, at least on the level of public advocacy, be reified into conceptually distinct spheres. Legislatures, courts, professional eugenicists, reformers, politicians, and other rhetoricians operated in continuous dialogue with one another, frequently referring or responding to writers outside their immediate “disciplines.” The legislation and its judicial reception are best conceived of as the institutional manifestation of a broad and multifarious array of ideas. That is not to say, however, that all sources of eugenic discourse

were equivalent. The law, backed by the authority of the state and frequently enforced through a direct exercise of the police power, brought to bear a particularly powerful normative and coercive pressure on those it "touched."

Citizens most frequently touched by the eugenic marriage laws were, of course, those deemed tainted with a hereditary mental or constitutional deficiency. In 1909 the Washington state legislature enacted one of the more comprehensive, though by no means exceptional, sets of nuptial prohibitions:

No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, epileptic, imbecile, feeble-minded person, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or who is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, shall hereafter intermarry or marry any other person within this state. (Wash. Comp. Stat. Ann. §8439 [Remington 1916])

Virtually every imaginable social and medical problem, the law suggested, could and should be checked at its source by preventing the hereditary transmission of traits injurious to the public. In language reminiscent of rhetoricians such as Roosevelt, moreover, the statute constructed women as the hereditary gatekeepers of the future population. A 1905 act of the Indiana legislature laid bare the economic motives behind much of the Progressive Era legislation. That law forbade a marriage license to be issued to "any male person who is or has been within five years an inmate of any county asylum or home for indigent persons, unless it satisfactorily appears that the cause of such condition has been removed and that such male applicant is able to support a family and likely to so continue" (Ind. Code Ann. §8365 [Burns 1914]).³⁵ Although in the postbellum era marriage was aggressively and almost invariably promoted as *prima facie* economically beneficial to society, progressives just as often understood the marriage of the unfit to be

35. Several state laws laid specific emphasis on preventing unions that were likely to prove financially burdensome to the state. For the Michigan legislature, previous dependency served as conclusive evidence of the need for eugenic action: "No person who has been confined in any *public* institution or asylum as an epileptic, feeble-minded, imbecile or insane patient shall be capable of contracting marriage without filing in the office of the county clerk a verified certificate from two regularly licensed physicians of this state that such person has been completely cured of such insanity, epilepsy, imbecility, or feeble-mindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage" (Mich. Comp. Laws §11367 [1915]). The Michigan law underscored the increased role that medical professionals, and scientific knowledge more generally, played in the production of a fit population. With its explicit focus on public institutions, it likewise suggests a significant expansion, or diffusion, of the loci of the operation of state power.

a potential *cause* of economic dependency. The apparent incapacity for male economic independence was deemed incompatible with fit citizenship.

One of the first eugenic marriage laws to be tested in the courts was an 1895 Connecticut statute forbidding the intermarriage of a man and woman, "either of whom is epileptic, imbecile, or feeble-minded . . . when the woman is under 45 years of age" (Conn. Gen. Stat. §1354 [1902]). Violation of the law carried a penalty of up to three years imprisonment. In *Gould v. Gould*, Marion Gould sued her husband for a divorce because he had concealed his epilepsy from her prior to, and for four years following, their marriage. The court found that it was "within the power of the legislature, in the interest of public health, to prohibit marriages between . . . epileptic[s], when the woman is under forty-five years of age." In an explicit validation of the statute's eugenic underpinnings, Judge Baldwin wrote that it was a "matter of common knowledge" that epilepsy was "a disease of particularly serious and revolting character, tending to weaken mental force, and often descending from parent to child, or entailing upon the offspring of the sufferers some other grave form of nervous malady." One strategy of "guarding" against the "perpetuation" of such atrocities, the court continued, was "to forbid sexual intercourse with those afflicted by it, and to preclude such opportunities for sexual intercourse as marriage furnishes" by imposing "a restriction of the right to contract marriage" (*Gould v. Gould* 1905, 244).

In spite of the court's unequivocal endorsement of the act's eugenic motives, and in spite of what Judge Baldwin appeared to characterize as a legitimate exercise of police power, the decision in favor of the wife ultimately rested on the construction of the Goulds' marriage as a fraudulent contract. "The prohibition of the Act of 1895," the court reasoned, "fastened upon the defendant an incapacity which, if unknown to the plaintiff and fraudulently concealed from her with the purpose thereby to induce a marriage, made his contract of marriage in the eye of the law fraudulent."³⁶ Moreover, *Gould* suggests that although the court embraced the eugenic goals of the statute, the decision did not, as historian Michael Grossberg has written of the case, simply "indicate a willingness to retreat . . . from the common law defense of contractual rights . . . in reaction to perceived biological threats to public safety" (Grossberg 1985, 149).³⁷ The case does rep-

36. Elaborating on its reasoning, the court drew a telling analogy between the case and the judicial practice of granting annulments for impotence, which I discussed earlier. The fraud committed by Roy Gould, Judge Baldwin wrote, is like that of the person who enters into the contract of marriage "knowing that he is incapable of sexual intercourse, and yet, in order to induce the marriage, designedly and deceitfully conceal[s] that fact from the other party" (*Gould v. Gould* 1905, 250). The parallel indicates plainly that hereditary fitness—the capacity for healthful procreation—had been added to the ability for sexual indulgence, as an essential public function of the marriage relation.

37. Grossberg supports this conclusion by citing a passage from the contentious and somewhat reluctant concurring opinion of Judge Hamersley.

resent the court's willingness and desire to legally regulate the reproduction of the citizenry. It also demonstrates that the postbellum marriage relation was never truly "private," and further that the Progressive Era statutory "abridgments" of the common law of marriage did not necessarily produce an outright rejection of the language of contract.³⁸

Nuptial legislation prohibiting the marriage of the feeble-minded, the insane, idiots, and imbeciles was frequently subjected to judicial review in suits for annulment on the grounds of mental incapacity. Though under the common law those deemed mentally incompetent had always been legally prohibited from marrying by virtue of their incapacity to consent, Progressive Era legislatures concerned with the hereditary transmission of mental deficiency felt compelled to codify the disqualification. As one observer wrote in 1914 in the *Journal of Criminal Law and Criminology*, in "a number of cases the prohibition is apparently made primarily on eugenical grounds—for the purpose of cutting off the bad germ plasm—to diminish the number of children who will eventually need state aid" (Smith 1914, 365).³⁹

The judicial reception of the mental-deficiency provisions was mixed. In *Schoolcraft v. O'niel*, a New Hampshire court interpreted a 1915 statute prohibiting the marriage of "an epileptic, imbecile, feeble-minded, idiot or insane person" when the woman is under 45, to mean that such a marriage "is voidable . . . whether or not the fact of such insanity was fraudulently concealed from the husband." By declaring the question of fraud "immaterial," and by resting its conclusion on the specific conditions of the statute and not merely the absence of capacity to consent, this decision made a clean break from the common law of nuptial contract (*Schoolcraft v. O'niel* 1923, 828). The same year, however, a Wisconsin court refused to void the marriage of a man who, though severely "mentally incompetent," was capable of consent. In so doing the court explicitly rejected what it understood to be the eugenic aims of that state's statute. "The test of mental capacity to enter the marriage contract," the court declared, "is not whether the parties are of sufficient mentality to measure up to the responsibility incurred by bringing offspring into the world, but the true test is whether there is understanding and mental capacity to realize what is being done and consenting thereto" (*Roether v. Roether et al.* 1923, 576).

Frequently, however, even those courts that refused to annul the marriages of "mental defectives" expressed a clear consciousness of heredity issues that they believed bore on the decision. In a suit for annulment on the

38. See also *Beshman v. Beshman* 1919, in which the court found that in the absence of a statute prohibiting the marriage of epileptics, or proof of fraud of contract, epilepsy cannot be held to be grounds for annulment. This conclusion likewise suggests that in spite of the generally friendly judicial reception of the eugenic marriage law, the policing of heredity remained an uneven amalgam of statute and contract.

39. See also Vernier 1931, 171.

grounds that a man allegedly concealed a "taint of hereditary insanity," for example, a New Jersey court declined to dissolve the union because there was "no doubt of the husband's mental capacity to marry at the time of the marriage." The court then went to great lengths to demonstrate, however, that although the defendant was presently a lunatic there was no compelling evidence that his affliction was hereditary, and that it would have thus "fallen to his offspring" (*Allan v. Allan* 1915, 364).⁴⁰ Though Progressive Era courts did not always act in strict adherence to the eugenic marriage statutes, they nevertheless frequently justified their decisions on eugenic grounds. Judicial decision making in these cases often remained a strategic balancing act between the desire to preserve marriages in the interest of social stability, and an appreciation of the eugenic goals of the restrictive statutes. For the bench, too, the prevailing public policy of marriage had shifted considerably, though by no means definitively, from a near-universal promotion of the nuptial union in the postbellum era, to a more "guarded" conception of marriage as an instrument in the hereditary governance of the population.

A 1915 Wisconsin Supreme Court case, *Peterson v. Widule*, provides an excellent illustration of this point. The case tested the constitutionality of a 1913 statute requiring that to be granted a marriage license a man had to first obtain a physician-issued certificate documenting that he was free from venereal disease.⁴¹ Though at that time eight states already had laws prohib-

40. See also *Meekins v. Kinsella*, in which a New York court held that a woman's probable "hereditary predisposition" to idiocy was insufficient to annul her marriage because in spite of her frequent "delusions," on the "evening of the wedding" she, in the words of one witness, "knew what she was about" (*Meekins v. Kinsella et al.* 1912, 808, 807). The court went on to justify the decision, however, by pointing to the improbability that the marriage would result in the birth of a child. If future offspring were likely, the court implied, woman's capacity for consent might have been given less weight.

41. The Progressive Era regulation of venereal disease through marriage was considered, for all intents and purposes, a "eugenic" measure. Prince Morrow, the most outspoken and influential advocate of legal action toward the elimination of venereal disease, argued that VD was a vastly underrecognized factor in the "depopulation" and "degeneration of the race." Gonorrhea, he warned, destroyed the "reproductive capacity of the woman," and while syphilis didn't "impair the power of procreation," it was nevertheless, "from the point of view of race perpetuation . . . directly antagonistic to the intention of marriage" because "even when syphilis does not destroy the product of conception," Morrow wrote, "it transmits to the offspring a defective organization—the infant comes into the world a blighted being, lacking in development and physical stamina and stamped with inferiority." The sterility and physical deterioration wrought by venereal diseases, moreover, was not confined to the class of "vicious and abandoned women who indulge in licentiousness and irregular living." Venereal diseases "approach with equal step the habitations of the poor and the palaces of the rich," respecting "no social position and recoil[ing] before no virtue." Its victims are "young and virtuous women, the idolized daughters, the very flower of womanhood. They are the women endowed by nature with all those physical attributes of health and vigor which fit them to become mothers of the race" (1904, 182, 22–23).

The national epidemic of venereal disease, moreover, was a matter of pressing interest for the public welfare. "It is not to the advantage of the State," Morrow wrote, "to have as future citizens individuals who are stamped with inferiority and who bear the impress of degeneracy, physical, social or mental." Accordingly, Morrow urged strong legislation prohibiting the mar-

iting the marriage of venereally infected persons, the Wisconsin act attracted unprecedented attention and controversy because of its allegedly "coercive" character; namely, that it was relatively enforceable. By 1924, 8 additional states had adopted provisions similar to Wisconsin's, and 37 more had defeated 90 such proposals (Hall 1925, 8, 58).⁴²

The decision in *Peterson* gave a resounding endorsement both to the authority of legislatures to aggressively regulate entry into the marriage status and to the project of producing a fit citizenry through state governance. "The power of the state to control and regulate the marriage relation," declared Judge Winslow, "and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable." "Society has a right to protect itself from extinction," Winslow declared, "and its members from a fate worse than death" (*Peterson v. Widule* 1915, 647 (1915)).⁴³ In contrast to the courts that a generation earlier had refused to validate the policy aims of the mandatory solemnization acts, Winslow's approval of the law's aims clearly endorsed the legislature's authority to enact statutes that superseded the common law of nuptial contract.⁴⁴

If Judge Winslow's decision in *Peterson* embodied the discourse of a fit citizenry and expressed what this essay has argued was becoming the prevailing Progressive Era mode of nuptial governance, Judge Marshall's dissent in that case remained emblematic of an "older," yet still potent, public policy conception of the marriage relation. Marshall took issue most vigorously with Winslow's claim that the legislative regulations would, in effect, simply "safeguard," rather than "prohibit marriage." The statute, Marshall argued, represented instead the "legislative destruction or material impairment" of the "natural right" of marriage. His defense of that right is

riage of the venereally infected, and requiring certificates of medical fitness to obtain a nuptial license (1904, 225, v). On the policing of venereal disease in the Progressive Era, see Brandt 1985.

42. See Wis. Stat. § 2339 (1919).

43. The "spouse" that the law was intended to protect was, of course, always the wife. The goal of the law, wrote the court, was to prevent the "transmission of . . . venereal diseases by newly married men to their innocent wives." The explicit gender bias of the act was justified, reasoned the court, because "medical evidence . . . corroborates what we suppose to be common knowledge, namely, the great majority of women who marry are pure" (*Peterson v. Widule* 1915, 648). The cause of protecting feminine purity, the court suggested, was frequently inextricable from, and even necessary for, the perpetuation of a healthy citizenry.

44. The same vision of public welfare that shifted governance of the formation of marriages from the courts to state legislatures also elevated the medical profession to a position of unprecedented public authority. "If it be . . . within the police power to prohibit a marriage" estimated to be injurious to society, the court argued, "the power to determine that fact must be vested in some competent body or person, . . . [as] the exercise of the police power does not wait upon the slow process of jury trials." That "competent person," the court wrote, was "every licensed physician . . . of good moral character and scientific attainments." If the state was to wield the marriage relation skillfully as an instrument of governance, it required the expert guidance of medical science (*Peterson v. Widule* 1915, 647, 656, 654).

reminiscent of the public policy pursuits of postbellum defenders of nuptial privatism. The requirement of a certificate of health “imposes such an oppressive burden . . . as to proving competency to enjoy the natural right of marriage . . . as to discourage an institution which is absolutely essential to public Welfare.” By destroying the common right of marriage, Marshall continued, “the tendency will inevitably be to promote immorality and social and racial retrogression” (*Peterson v. Widule* 1915, 657, 660). The marriage relation, he suggested, remained too necessary to the moral order of society to “guard,” and thus restrict, in the manner proposed by the Wisconsin statute. Judge Marshall’s dissent—his defense of the “right” to marriage, as well as his assertion that the institution was intrinsically socially beneficial—demonstrates how the transformation that I have argued for was often uneven, incomplete, and highly contested.

As my discussion indicates, eugenic discourse was prevalent in the Progressive Era even among reformers whose larger approach to social reform was explicitly “environmentalist.” There is a risk of overstating the hegemony of hereditarian thought, as well as the erosion of hope for restoring the social and economic functions of the family. In fact, a good deal of Progressive Era reform engaged the working-class family as a unit—albeit a sick and beleaguered one—and sought a wholesale reconstruction of its values and behavior.⁴⁵ Indeed, this essay has demonstrated that for many social scientists (such as Howard, Goodsell, and Parsons) and reformers (such as Dike), an explicitly eugenic understanding of marriage did not preclude a profound awareness of and commitment to addressing the social and industrial conditions that contributed to the “degradation” of the poor. In the social diagnosis of many progressives, the biological degeneracy and environmental degradation of the urban population operated in tandem. Reformers simultaneously advocated checking the reproduction of the hereditarily unfit by tightening the legal controls of the inception of marriage; strengthening state surveillance of, and intervention into, already existing families through, for example, the juvenile courts and the discretionary administration of mothers’ pensions; and passing legislation to improve the hours, wages, and conditions of labor for industrial workers.⁴⁶

45. See, for example, Polsky 1991; Gordon 1988. By the Progressive Era, it should be noted, the mid-nineteenth-century philanthropic preference for separating children from the influence of the pauperized parents had largely disappeared. See Katz 1986, 103–9.

46. In his study of the Chicago municipal courts in the early twentieth century, Michael Willrich has convincingly demonstrated that frequently “eugenic jurisprudence” and “environmentalism” were not necessarily strict ideological commitments, but rather interdependent approaches to governance with the shared enterprise of extending “the reach of government institutions into the everyday lives of urban working-class populations” (1998, 71).

CONCLUSION: THE RACING OF DEPENDENCY AND THE GENDERING OF GOVERNANCE

This essay has argued that in the years between 1870 and 1920 there was a marked transformation in how nuptial reformers, the literate public, legislators, and judges understood the most vital social functions of the marriage relation. First, a profound change occurred both in popular and "official" conceptions of the urban poor and working-class citizenry—from a society largely contained within and governed by economically self-sufficient and morally virtuous family units, to a more individuated "population" characterized by pauperism, dependency, menacing ethnic heterogeneity, gender transgression, and immorality. Marriage was consequently transformed from an intrinsically beneficial institution to a potential source of biological unfitness. It was recast in law from a relation that ought to be consciously promoted by the state into an instrument wielded by the police power in its discretionary governance of social reproduction. Through the exclusion of those whom the state deemed unfit for procreation, public discourse and law conspired to help define the fit citizen and thus the contours of the "normal."

This process involved, I have suggested, the discursive and legal interplay of values and concerns about household independence, pauperism, gender, ethnicity, heredity, and citizenship. Though a more precise and fully elaborated account of the historical relationship between these discourses remains a task for another time, the foregoing discussion has a number of significant implications. If the regulatory transformation I have described has an explanatory "starting point," it is the historically potent model of the morally self-regulating, economically independent, single-male-breadwinner family—a model that embodied the complementary ideologies of both political economy and gender.

I have argued that in the last third of the nineteenth century, the "crisis of pauperism" and the increasing visibility of women, and particularly married women, in the wage labor force, among many other developments, were profoundly unsettling precisely because they contradicted the prevailing model of household independence. As reformers and policymakers groped to diagnose and remedy the problem, they seized on explanations that avoided the conclusion that the ideal they valued so highly had become hopelessly anachronistic in an age of industrial wage labor. As a way of reconciling the contradiction between the ideal of household independence and the reality of the late-nineteenth-century industrial economy, many observers pointed to the apparent "foreignness" of the increasingly immigrant wage-earning class that was allegedly failing the test of economic self-sufficiency and moral virtue. This choice in turn contributed to the increasing racialization of a class of immigrant laborers whose ethnic differ-

ence was in many cases already marked by language and culture. That notion of racial difference—or more precisely, deficiency—served as a palatable explanation for why so many families seemed unable to get their economic houses in order. It was within this context that hereditarian thought gained currency and helped to fuel the racialization of the dangerous classes by providing late-nineteenth-century reformers and policymakers with a “neutral,” “scientific” language with which to simultaneously reinforce and depoliticize social and racial hierarchy.

Gender likewise helped to mediate the contradiction between the ideal of the independent, single-breadwinner family and the reality of the working-class household economy. Nuptial reformers frequently characterized the rise of women’s wage labor and the failure of male providership as a matter of gender transgression rather than a consequence of the reorganization of labor under industrial capitalism. They were in general much more prepared to worry vociferously about the moral peril posed to women by the promiscuous mixing of the sexes on the shop floor than they were able to recognize that the (male) family wage had become an anachronism for many urban working-class households. Again, their diagnoses located the source of society’s ills in the transgressive behavior of particular individuals—this time wage-earning women and their emasculated husbands.

These ideological “containment strategies,” moreover, appear to have contributed to the emergence of a set of priorities of social normalization that placed women in a strategically vital role in the governance of the polity. A number of state and federal “maternalist” social policies—ranging from mothers’ and widows’ pensions, to the creation of the U.S. Children’s Bureau, to protective labor legislation for women workers—understood the family, and particularly women, as part of a strategy of governance aimed at a culturally and/or racially “foreign” citizenry (Mink 1995; Sapiro 1990; Polsky 1991). In spite of the fact that (or perhaps precisely because) large numbers of women were gaining unprecedented access to the public sphere—through their increasing presence in the wage labor force, expanded opportunities in higher education and the professions, the campaign for suffrage, and social reform work—Progressive Era social welfare policies constructed “motherhood” as the cornerstone of women’s civic identity.⁴⁷ By foregrounding the hereditary and ethnocultural dimensions of parenting, both the discourse of hereditary gatekeeping surrounding the eugenic marriage laws and the maternalist social policies that made cash payments to poor and immigrant mothers contingent on cultural assimilation helped construct a modernized version of republican motherhood. This model was no longer rooted in the beleaguered ideology of separate spheres, but in the

47. On the increasing public presence of women in the Progressive Era, see Peiss 1986; Meyerwitz 1988; Kessler-Harris 1982. On the Progressive Era women’s suffrage campaign, see Cott 1988.

national project of reproducing a fit citizenry. Both the public policy of marriage and some of the most ambitious Progressive Era state-building initiatives rested on a radically transformed understanding of the polity as an individuated population whose relation to the state was frequently mediated by, though no longer reducible to, the family.

REFERENCES

- Bardaglio, Peter W. 1995. *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. Chapel Hill: University of North Carolina Press.
- Basch, Norma. 1983. *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York*. Ithaca, N.Y.: Cornell University Press.
- Batten, Samuel Z. 1908. The Redemption of the Unfit. *The American Journal of Sociology* 14:233–60.
- Bederman, Gail. 1995. *Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917*. Chicago: University of Chicago Press.
- Bishop, Joel Prentiss. 1864. *Commentaries on the Law of Marriage and Divorce*. Vol. 1. Boston: Little, Brown.
- . 1891. *New Commentaries on Marriage, Divorce, and Separation*. Vol. 1. Chicago: T. H. Flood.
- Blackmar, Elizabeth. 1989. *Manhattan for Rent, 1785–1850*. Ithaca, N.Y.: Cornell University Press.
- Bloch, Ruth H. 1987. The Gendered Meanings of Virtue in Revolutionary America. *Signs: Journal of Women in Culture and Society* 13:37–58.
- Boyer, Paul. 1978. *Urban Masses and Moral Order in America, 1820–1920*. Cambridge: Harvard University Press.
- Boydston, Jeanne. 1990. *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic*. New York: Oxford University Press.
- Brandt, Alan M. 1985. *No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880*. New York: Oxford University Press.
- Burchell, Graham, Colin Gordon, and Peter Miller, eds. 1991. *The Foucault Effect: Studies in Governmentality*. Chicago: University of Chicago Press.
- Calhoun, Arthur W. 1919. *A Social History of the American Family from the Colonial Times to the Present*. Vol. 3. Cleveland: Arthur H. Clark.
- Chused, Richard. 1992. Married Women's Property Law: 1800–1850. In Cott 1992.
- . 1992. Late Nineteenth-Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures. In Cott 1992.
- Clark, Elizabeth B. 1990. Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America. *Law and History Review* 8:25–54.
- Cohen, Felix. 1935. Transcendental Nonsense and the Functional Approach. *Columbia Law Review* 35:809–49.
- Cook, Frank Gaylord. 1888a. Reform in the Celebration of Marriage. *Atlantic Monthly* 61:680–90.
- . 1888b. The Marriage Celebration in the United States. *Atlantic Monthly* 61:520–32.
- . 1888c. The Marriage Celebration in Europe. *Atlantic Monthly* 61:245–61.
- Cott, Nancy. 1977. *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780–1835*. New Haven, Conn.: Yale University Press.

- _____. 1988. *The Grounding of Modern Feminism*. New Haven, Conn.: Yale University Press.
- _____, ed. 1992. *History of Women in the United States: Historical Articles on Women's Lives and Activities*. Vol. 3, *Domestic Relations and Law*. New York: K. G. Saur.
- _____. 1995. Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century. In *U. S. History as Women's History*, ed. Linda Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar. Chapel Hill: University of North Carolina Press.
- Davenport, Charles B. 1912. Eugenics and Charity. *Report of the National Conference of Social Work* 39:280-82.
- Davis, David Brion. 1975. *The Problem of Slavery in the Age of Revolution, 1770-1823*. Ithaca, N.Y.: Cornell University Press.
- Degler, Carl N. 1991. In *Search of Human Nature: The Decline and Revival of Darwinism in American Social Thought*. New York: Oxford University Press.
- Dike, Samuel W. 1890. Uniform Marriage and Divorce Laws. *The Arena* 2:399-408.
- Donzelot, Jacques. 1997. *The Policing of Families*. Trans. Robert Hurley. Baltimore, Md.: Johns Hopkins University Press.
- DuBois, Ellen Carol. 1987. Outgrowing the Compact of Our Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878. *Journal of American History* 74:836-62.
- Eugenics. 1904. *The Nation* 78:446.
- Eugenic Marriage Laws. 1913. *The Outlook* 105:242-43.
- Evolution Working Backward. 1906. *The Independent* 61:702-3.
- Extinction of the Upper Classes. 1909. *The Nineteenth Century* 60:97-108.
- Forbath, William E. 1991. *Law and the Shaping of the American Labor Movement*. Cambridge: Harvard University Press.
- Foucault, Michel. 1979. Omnes et Singulatim: Toward a Criticism of "Political Reason." In *The Tanner Lectures on Human Values II*, ed. Sterling M. McMurrin. Stanford, Calif.: Stanford University Press.
- _____. 1991. Governmentality. In Burchell, Gordon, and Miller 1991.
- Fredrickson, George. 1965. *The Inner Civil War: Northern Intellectuals and the Crisis of the Union*. New York: Harper and Row.
- Ginzberg, Lori D. 1990. *Women and the Work of Benevolence: Morality, Politics, and Class in the 19th-Century United States*. New Haven, Conn.: Yale University Press.
- Goodsell, Willystine. 1915. *A History of the Family as a Social and Educational Institution*. New York: Macmillan.
- Gordon, Linda. 1988. *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston, 1880-1960*. New York: Penguin Books.
- _____, ed. 1990. *Women, the State, and Welfare*. Madison: University of Wisconsin Press.
- Grossberg, Michael. 1985. *Governing the Hearth: Law and Family in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.
- Guyer, Michael. 1916. *Being Well Born: An Introduction to Eugenics*. Indianapolis, Ind.: Bobbs-Merill.
- Hall, Fred S. 1925. *Medical Certification For Marriage*. New York: Russell Sage Foundation.
- Haller, Mark H. 1963. *Eugenics: Hereditarian Attitudes in American Thought*. New Brunswick, N.J.: Rutgers University Press.
- Hattam, Victoria C. 1993. *Labor Visions and State Power: The Origins of Business Unionism in the United States*. Princeton, N.J.: Princeton University Press.

- Heredity and Human Progress. 1900. *The Nation*, Nov. 1, 349–50.
- Holt, Thomas C. 1992. *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain, 1832–1938*. Baltimore, Md.: Johns Hopkins University Press.
- Horwitz, Morton J. 1977. *The Transformation of American Law, 1780–1860*. Cambridge: Harvard University Press.
- Howard, George Elliott. 1904. *The History of Matrimonial Institutions*. Vol. 3. Chicago: University of Chicago Press.
- . 1909. Divorce and the Public Welfare. *McClure's Magazine* 84:232–42.
- Humphrey, Seth K. 1913. Parenthood and Social Consciousness. *The Forum* 49:257–64.
- J., M. 1888. The Common Law Marriage. *Virginia Law Journal* 12:1–13.
- Katz, Michael. 1986. *In the Shadow of the Poorhouse: A Social History of Welfare in America*. New York: Basic Books.
- Keller, Morton. 1977. *Affairs of State: Public Life in Late Nineteenth Century America*. Cambridge: Harvard University Press.
- Kerber, Linda. 1980. *Women of the Republic: Intellect and Ideology in Revolutionary America*. New York: W. W. Norton.
- . 1988. Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History. *Journal of American History* 75:9–39.
- Kessler-Harris, Alice. 1982. *Out to Work: A History of Wage-earning Women in the United States*. New York: Oxford University Press.
- Kevles, Daniel. 1985. *In the Name of Eugenics: Genetics and the Uses of Human Heredity*. New York: Harvard University Press.
- Lebsock, Suzanne D. 1992. Radical Reconstruction of Southern Women. In Cott 1992.
- Manson, Edward. 1914. Eugenics and Legislation. *Journal of the Society of Comparative Legislation* 19:123–29.
- McCurry, Stephanie. 1995. *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country*. New York: Oxford University Press.
- Meyer, Adolf. 1916. The Right to Marry: What Can a Democratic Civilization Do About Heredity and Child Welfare. *The Survey* 36:243–46.
- Meyerwitz, Joanne. 1988. *Women Adrift: Independent Wage Earners in Chicago, 1880–1930*. Chicago: University of Chicago Press.
- Mink, Gwendolyn. 1990. The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State. In Gordon 1990.
- . 1995. *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942*. Ithaca, N.Y.: Cornell University Press.
- Mintz, Steven. 1989. Regulating the American Family. *Journal of Family History* 14:387–408.
- Mintz, Steven, and Susan Kellogg. 1988. *Domestic Revolutions: A Social History of American Family Life*. New York: Free Press.
- Montgomery, David. 1981. *Beyond Equality: Labor and the Radical Republicans, 1862–1872*. Urbana: University of Illinois Press.
- Morrow, Prince A. 1904. *Social Diseases and Marriage: Social Prophylaxis*. New York: Lea Brothers.
- Mr. Roosevelt's Views on Race Suicide. 1906. *Ladies Home Journal* 23:21.
- National Divorce Reform League. 1887. *Annual Report of 1886*. Montpelier: Vermont Watchman and State Journal Press.
- . 1889. *Annual Report of 1888*. Montpelier: Vermont Watchman and State Journal Press.

- Novak, William J. 1996. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.
- Parenthood. 1908. *The Independent* 64:644-45.
- Parenthood and Race Culture. 1910. *The Survey* 23:731-33.
- Parsons, Elsie Clews. 1906. *The Family*. New York: G. P. Putnam's Sons.
- Peabody, J. B. 1912. Putting It Up to Philanthropy. *The Survey* 29:98-99.
- Pearson, Karl. 1907. The Scope and Importance to the State of the Science of National Eugenics. *Popular Science Monthly* 71:385-412.
- Peiss, Kathy. 1986. *Cheap Amusements: Working Women and Leisure in Turn-of-the-Century New York*. Philadelphia: Temple University Press.
- Phelps, Elizabeth Stuart. 1890. Women's Views of Divorce. *The North American Review* 150:130-31.
- Polsky, Andrew J. 1991. *The Rise of the Therapeutic State*. Princeton, N.J.: Princeton University Press.
- Present Disintegration of the American Home. 1911. *Current Literature* 51:296-98.
- Procacci, Giovanna. 1991. Social Economy and the Government of Poverty. In Burchell, Gordon, and Miller 1991.
- Roosevelt, Theodore. 1907. A Letter from President Roosevelt on Race Suicide. *The American Monthly Review of Reviews* 35:550-51.
- _____. 1914. Twisted Eugenics. *The Outlook* 105:30-34.
- Ryan, Mary P. 1981. *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865*. New York: Cambridge University Press.
- Sapiro, Virginia. 1990. The Gender Basis of American Social Policy. In Gordon 1990.
- Schouler, James. 1882. *A Treatise on the Law of Husband and Wife*. Boston: Little, Brown.
- Siegel, Reva. 1994a. Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor. *Yale Law Review* 103:1073-1217.
- _____. 1994b. The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930. *Georgetown Law Journal* 82:2127-2225.
- _____. 1996. "The Rule of Love": Wife Beating as Prerogative and Privacy. *Yale Law Journal* 105:2117-2207.
- Skocpol, Theda. 1992. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*. Cambridge: Harvard University Press.
- Smith, Jessie Spaulding. 1914. Marriage, Sterilization, and Commitment Laws Aimed at Decreasing Mental Deficiency. *Journal of Criminal Law and Criminology* 1914:364-70.
- Spencer, Edward W. 1915. Some Phases of Marriage Law and Legislation from a Sanitary and Eugenic Standpoint. *Yale Law Review* 25:58-73.
- Stanley, Amy Dru. 1988. Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation. *Journal of American History* 75:471-500.
- _____. 1992. Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America. *Journal of American History* 78:1265-93.
- _____. 1996. Home Life and the Morality of the Market. In *The Market Revolution in America: Social, Political, and Religious Expressions, 1800-1880*, ed. Melvyn Stokes and Stephen Conway. Charlottesville: University Press of Virginia.
- Stanley, Hiram M. 1890. Our Own Civilization and the Marriage Problem. *The Arena* 2:94-100.
- Stansell, Christine. 1986. *City of Women: Sex and Class in New York, 1789-1860*. Urbana: University of Illinois Press.

- Stewart, David. 1887. *The Law of Marriage and Divorce*. San Francisco: Bancroft-Whitney.
- Strahan, S. A. K. 1892. *Marriage and Disease: A Study of Heredity and the More Important Family Degenerations*. London: K. Paul, Trench, and Trübner.
- Swindlehurst, Albert. 1916. Some Phases of the Law of Marriage. *Harvard Law Review* 30:124–40.
- Trachtenberg, Alan. 1982. *The Incorporation of America: Culture and Society in the Gilded Age*. New York: Hill and Wang.
- Vernier, Chester. 1931. *American Family Laws*. Palo Alto, Calif.: Stanford University Press.
- Walters, Ronald G. 1978. *The Anti-Slavery Appeal: American Abolitionism After 1830*. Baltimore: Norton.
- Weightman, Hugh. 1883. Marriage and Its Prohibitions. *American Law Review* 17:166–85.
- Wetham, W. C. D. and C. D. Wetham. 1909. The Extinction of the Upper Classes. *The Nineteenth Century* 60:95–108.
- Willrich, Michael. 1998. The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930. *Law and History Review* 16:63–111.
- Wood, Gordon. 1991. *The Radicalism of the American Revolution*. New York: Vintage Books.

CASES

- Allan v. Allan*, 95 A. 363 (N. J. 1915).
- Askew v. Dupree*, 30 Ga. 173 (1860).
- Beshman v. Beshman*, 174 N.W. 611 (Minn. 1919).
- Beverlin v. Beverlin*, 29 W. Va. 732 (1887).
- Campbell's Admin. and Heirs v. Gullatt*, 43 Ala. 57 (1869).
- Cartwright et al. v. McGown*, 121 Ill. 388 (1887).
- Catterall v. Sweetman*, 1 Robert 304 (1845)(cited in J. 1888, 11).
- Cole v. Langley*, 14 La. Ann. 770 (1859).
- Crawford v. State*, 73 Miss. 172 (1895).
- De Amarelli's Estate*, 2 Brew. (Pa.) 239 (1868).
- Deane v. Aveling*, 1 Robertson 279, 299 (1845)(quoted in Bishop 1864, 276).
- Devanbaugh v. Devanbaugh*, 5 Paige Ch. 554 (N.Y. 1836).
- Francois v. State*, 9 Tex. Civ. Cas. 144 (1880).
- Gould v. Gould*, 78 Conn. 242, 244 (1905).
- Henderson v. Cargill et al.*, 31 Miss. 367 (1856).
- Hull v. Rawls*, 27 Miss. 471 (1854).
- Hutchins v. Kimmell*, 31 Mich. 126 (1875).
- In re McLaughlin's Estate*, 4 Wash. 570 (1892).
- J. G. v. H. G.*, 33 Md. 401 (1870).
- Jones v. Jones*, 28 Ark. 19 (1872).
- Macguire v. Macguire*, 7 Dana 181 (1838)(quoted in Bishop 1864, 7).
- Meekins v. Kinsella et al.*, 136 N.Y.S. 806 (1912).
- Meister v. Moore*, 96 U.S. 76 (1877).
- Meyer v. Meyer*, How. Pr. 331 (N.Y. 1875).
- Peck v. Peck*, 12 R.I. 485 (1880).
- Peterson v. Widule*, 157 Wis. 641, 648 (1915).
- Philadelphia v. Williamson*, 10 Phila. Rep. 176 (Pa. 1873).

Port v. Port, 70 Ill. 484 (1873).
Richard v. Brehm, 73 Pa. 140 (1873).
Roether v. Roether et al., 191 N.W. 576 (1923).
Schoolcraft v. O'niel, 123 A. 828 (N. H. 1923).
State v. Bittick, 103 Mo. 183 (1890).
State v. Gibson, 36 Ind. 389 (1871).
State v. Kennedy, 76 N.C. 251 (1877).
State v. Ross, 76 N.C. 242 (1877).
State v. Walker, 36 Kan. 297 (1887).
Teter v. Teter, 101 Ind. 129 (1884).
Wendel v. Wendel, 52 N.Y.S. 72 (1898).
Wilkie v. Collins, 48 Miss. 496 (1873).