What is Family Law?: A Genealogy Part I

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INTRODUCTION

What is the place of the family in legal scholarship and teaching, and in deep, implicit ideas about how our legal order is arranged? How did it get to be that way? Published in two separate Parts, this Article tells a story of American family law: how the law of Domestic Relations emerged as a distinct legal topic in late-nineteenth-century legal treatises, and what ideological conditions facilitated its renaming and reconstruction as Family Law in the Family Courts and casebooks of the twentieth century. Almost without exception, throughout this account Domestic Relations/Family Law are what they are by virtue of their categorical distinction from the law of contract and, more broadly, the law of the market. This distinction did not always seem natural: this Article tells how it was invented. The resulting market/family distinction remains a latent but structural element of the legal curriculum and the legal order more generally today. This Article calls that distinction into question and suggests that family law should be restructured to connect it for the first time to domains of law more readily understood to relate directly to the market: economically significant productivity, social security provision, and the fair or unfair distribution of economic resources.

My story comes in three time periods, corresponding with Duncan Kennedy's three globalizations of legal thought.[1] The first is the classical

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1. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW

era, roughly the last half of the nineteenth century. The second is the era of "the social" —characterized by the sociological jurisprudes' and legal realists' attack on the classical legal order and restructuring of legal taxonomy—spanning roughly the first half of the twentieth century. And the last is the era of conflicting considerations, roughly the last half of the twentieth century.

In the early nineteenth century, there was no family law. The law of husband and wife and the law of parent and child were separate, parallel, and closely related legal topics, but they were equally proximate to the law of guardian and ward and—most significantly, for my purposes—the law of master and servant. This pattern corresponded with a social order in which cohabitation, legitimate sexual relations, reproduction, and productive labor were assumed to belong in one place: the *household.* A single figure was assumed to serve as husband, father, and master. He was not one but three legal persons. The wife, the child, and the servant were not just subordinate; they were similarly subordinate. By mid-century and for various reasons, some of them quite conspicuously legal and others social, this ordering came to seem inopportune. A pressure to divide marriage from the law of an emerging capitalist market order began to build. Meanwhile, inside legal thought, the critical category became *marriage* (not husband and wife), and the question of whether marriage "was contract" became salient.

In the early decades of the nineteenth century, it was easy to answer that question affirmatively: marriage was a civil contract (like many other types of contract). But with the rise of classical legal thought, of free labor, and of separate spheres ideology, the answer to that question increasingly had to be "no." By the 1860s, the consensus view, even among early opponents of the idea, was that marriage was *not* contract. Instead it became *status.*

This double transformation—of the law of husband and wife into the law of marriage, and of marriage from contract to status—marked the separation of the law of familial intimacy from the law of productive labor. It coincided with the emancipation of the servant from indenture and slavery and with the emergence of the laborer and employee selling his work for a wage. Socially, it coincided with the emergence of a market

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LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL 19 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*]. The same basic periodization receives different explanations in Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994).

for labor, an ideology of *laissez faire* for the market, and an ideology of domestic intimacy that could be articulated as the opposite of the market. The linkage between the law of husband and wife and that of master and servant was not merely dissolved; transformed into marriage and contract, the linkage became an opposition. Contract law housed the will of the parties, while the law of marriage, the law of quasi-contract (invented to segregate unintended contractual obligations from those based on an exercise of will) and tort provided the legal channels for the will of the state. Contract, quasi-contract, and tort became the law of everyone—the faceless individual of liberalism—while the law of marriage became the law of special persons, incapacitated to varying degrees from contract: the wife and the child across the board or nearly so, and the husband in his role as a husband. Whereas Blackstone's rights of persons embraced everyone, the new legal persons became deviants, "abnormal persons" – abnormal because they lacked the capacity to contract. The wife became detached from the husband and began to appear in lists alongside children and the insane.

In the corresponding ideology, the husband, wife, and child constituted "the family" and lived in an affective, sentimental, altruistic, ascriptive, and morally saturated legal and social space. The market was the family's opposite: rational, individualistic, free, and morally neutral. In my genealogy, each side of this market-family pair got its legal, social, and ideological clarification from the idea that the other was its opposite. With Kerry Rittich, I call this "family law exceptionalism" ("FLE"), the construction of the legal order to render the family and its law distinctive, special, other, exceptional.[2]

Because of the developments detailed in this Article, FLE was an intrinsic, not merely an accidental, part of the emerging classical legal order that American jurists constructed over the course of the nineteenth century. I give an account here of how Americans received the global diffusion of the idea that law was a system and needed systematic structure, and the subsidiary idea that the law of family was radically distinct from that of contract. This idea-set emanated from German legal thought of the mid-nineteenth-century and was carried around the world not only through the sheer prestige of German legal ideas but in the formation of the colonial legal order and the rise of global capitalism.

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2. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

America was no longer a colony, but it followed a path into the market/family distinction that is strikingly parallel to what scholars have detected in the colonial experience of Egypt, Algeria, West Africa, and Taiwan, as well as in the rise of nationalist legal thought in West Africa, India and Greece.[3] Connecting the American version of this story to its global counterparts is a long-term aim of this project.

While this transformation was taking place, marriage and divorce were the ruling preoccupations of the treatise writers, tracking legislative changes to the wife's coverture and the introduction of judicial divorce. Both of these reforms had the character of contract: the wife's contractual capacity was expanded, and marriage, now that it could be terminated for breach, more closely resembled other contracts. Proponents of marriage as status, however, insisted on the enduring investment of the state in the ascriptive character of ongoing marriages. The nomenclature for this change revived the old legal idea that husband and wife were bound by legal *relations*. The term chosen to describe those relations was "domestic": the law of "Domestic Relations" was born. The term "domestic relations" had been in common use among lawyers in the early decades of the nineteenth century but did not become the official name for the field, in the United States, until 1870. This shift in nomenclature coincided with the dawning perception among jurists that the field could not coherently retain the master and servant or the guardian and ward: husband and wife, parent and child remained in the new legal category Domestic Relations, corresponding with the emergence of "family" as a tiny nuclear unit housing only the intimacies that we often call the bourgeois or affective family. In the concluding sections of this Part, I show how this development coincided with the emergence of contract law as the law of labor and the evanescence of the law of master and servant.

Part II tells what happened when the proponents of sociological jurisprudence and the legal realists set out to destroy and replace the

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3. On FLE in colonization, see, for example, Lama Abu Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004); Judith Surkis, *Civilization and the Civil Code: The Scandal of "Child Marriage" in French Algeria*, in JUDITH SURKIS, SCANDALOUS SUBJECTS: INTIMACY AND INDECENCY IN FRANCE AND FRENCH ALGERIA (forthcoming); Hedeyat Heikal, Family as Jurisdiction: from Dispossession to the Family in Colonial Algeria (on file with the author); Yun-Ru Chen, *Maneuvering Modernity: Family Law as a Battlefield in Colonial Taiwan* (on file with the author); and Sylvia Kang'ara, *Western Legal Ideas in African Family Law* (on file with the author). On FLE in anti-colonial, postcolonial, and nationalist projects, see, for example, Partha Chatterjee, "The Nation and its Women," in PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES 113 (1993); Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L.873 (2010); and Sylvia Kang'ara, *Western Legal Ideas*.

classical legal edifice. At first they understood that FLE was an impediment to their work and sought to reunite domestic relations with the law of the market; but it was too hard for them to do it and they gave up. FLE retained its grip as the classical order disintegrated, eventually emerging as modern Family Law.

Family Law remains our topic in law schools today. It houses the entry rules of marriage, divorce, and some of the above for marriage alternatives (cohabitation and civil union). It includes the law of parentage (who is a parent?), including adoption. Constitutionally-driven rights in reproduction and parenthood take up a big segment of the course. But the course is mostly about the formation of the core relationships, which are paradigmatically marital and parental, and about the dissolution of marriage and its consequences for adults and children. Throughout the successive waves of change that I limn in Part II, what has remained constant is the division of intellectual labor between the law of the market and the law of the family, introduced in the 1850s for long-gone reasons. The property rules of ongoing marriage are almost never taught; the law of inheritance lives in another course; and the course omits welfare law, the law of poor families. The actual ways in which marital partners share their wealth (or don't) are completely off the agenda. The ways in which marriage and "infancy" condition the availability of credit and liability for joint and separate debts are similarly overlooked (the sole exception being the doctrine of necessaries). A lot of explicit rules about marital and parental wealth and obligation are parked in other courses and acknowledged in Family Law only fleetingly: employment benefits like health insurance and retirement savings with rights of survivorship, for instance, are taught if at all in employment and health law; marital and parent-child eligibility for public assistance, immigration, and intestate succession are taught in welfare law, immigration law, and trusts and estates. These omissions track the old family/market distinction.

What happens to family law if we rigorously suspend that distinction? Should we do that? In collaboration with colleagues, my hope is to reconstruct family law so that it becomes possible to teach the family and its law as *distributive*. We posit that the family and family law are hidden but crucial mechanisms for the distribution of social goods of an immense variety of kinds: material resources like money, jobs, nutrition; symbolic resources like prestige and degradation; psychic resources like affectional ties, erotic attraction and repulsion, the very conditions of access to human personality. We seek to study the ways in which it serves as a

legally regulated private welfare system, as a site of legally regulated productive labor, as a crucial unit of production and consumption. Many of the "culture wars" fights that now occupy the field obscure these distributional consequences and make it impossible to have descriptively adequate discussions of the stakes of various policy choices. We seek to change that, and to usher in a new range of work and new approaches to teaching that could expose the distributional stakes of rules that affect the family, whether they are housed in family law or elsewhere.

To conclude: this Article is divided into two Parts. Part I, published here, addresses the first phase of my story, in the rise and triumph of classical legal thought among American jurists of the nineteenth century. It addresses legal treatises primarily, spanning from 1765 to 1896. It tells the story of the status/contract distinction and of the emergence of Domestic Relations as the opposite of Contract. Part II addresses the second and third phases of my story, in the legal realist assault on the classical structure of the legal field during the first half of the twentieth century and politicization of it in the postwar era. This narrative thus spans from the 1920s through the 1990s. Because, as Morton Horwitz observes, the treatise ceased after about 1920 to be the modal form in which legal professionals produced and shared large changes in legal thought,[4] Part II considers law review articles, curricular reforms, conference programs, casebooks, and book reviews of casebooks. It tells the story of the struggle to introduce Family Law into the American legal vocabulary, and shows how wave after wave of change left the status/contract distinction in place.

I. THE LEGAL RELATIONS: BLACKSTONE AND REEVE

Is marriage contract or status? *Should it be* contract or status? These questions loom large in U.S. legal discussions of the institution.[5] What

4. Morton Horwitz, *Part III—Treatise Literature*, 69 LAW LIBR. J. 460 (1976).

5. At least five contemporary family law casebooks address the question whether marriage is status *or* contract (though they often then supplant that question by others, typically the question of the enforceability of an antenuptial contract). *See* DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 819-20 (2006); HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 175-77 (5th ed. 2003); PETER N. SWISHER, ANTHONY MILLER & JANA B. SINGER, FAMILY LAW: CASES, MATERIALS AND PROBLEMS 2-3 (1998); WALTER O. WAYRAUCH, SANFORD N. KATZ & FRANCES OLSEN, CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 89-90 (1994); D. KELLY WEISBERG, MODERN FAMILY LAW: CASES AND MATERIALS 114-15 (2006). The holding of *Maynard v. Hill*, committing contracts-clause doctrine to the idea that marriage is status-*not*-contract, is often invoked in conservative interventions

seems oddly absent from considerations of this question is an awareness of how *ideological* it was when it was first asked and, eventually, answered. As Duncan Kennedy explains in his account of the rise of classical legal thought and in particular of the "Transformation of Contract" by jurists and judges in the last half of the nineteenth century, the reclassification of marriage as *status* was unknown to American legal minds before 1852.[6] But as he also notes, by 1890 the Supreme Court could intone that marriage was status without offering a citation.[7] It had become legal common sense. It took several decades of work to produce this obviousness.

In the first three parts of this essay, I want to ascertain as precisely as I can what the classical legal thinkers meant by the word status, and what they meant by invoking it to define marriage. To do that I will retell Kennedy's story of the emergence of the status/contract distinction inside the emergence of classical legal thought, though with a stronger focus on marriage. Kennedy once said: "Marriage went from contract to status." He was right. What did this mean to those who made it happen?

Really to *get it*, we have to go back to William Blackstone and Tapping Reeve.

Blackstone classified the laws governing marriage in Book I of his *Commentaries*, where they appear in a series of topics as "Rights of Persons."[8] Appendix 1 shows the Table of Contents of Book I.

Many things could be said of a legal mind in which Blackstone's Rights of Persons have a lot in common. The law created not only "individuals" who have general rights, but also distinct "persons" with highly particular social beings. It provided the rules by which one could become one or the other kind of person. Once one was one or another type of person,

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into US marriage politics. See, for instance, the epigraph to INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW 6 (2006). For a very savvy explosion of the status/contract distinction for describing modern marriage and developing a normative view of the place of prenuptial contracts in it, see Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 111-20 (1998). For my own critique of the status/contract distinction in contemporary American family law thinking, see Janet Halley, *Behind the Law of Marriage, Part I: From Status/Contract to the Marriage System*, — UNBOUND: HARVARD J. OF THE L. LEFT — (forthcoming 2011); and *Behind the Law of Marriage, Part II: Travelling Marriage*, — UNBOUND: HARVARD J. OF THE L. LEFT — (forthcoming 2011).

6. DUNCAN KENNEDY, *The Transformation of Contract*, *in* THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 195-96 (1975) [herinafter KENNEDY, RISE AND FALL].

7. U.S. v. Grimley, 137 U.S. 147, 151 (1890); KENNEDY, RISE AND FALL, *supra* note 6, at 203-04.

8. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Table of Contents, (photo. reprint 1979) (1765).

furthermore, the law set forth the rules governing one's relations with other persons. The rights of the king and of corporations were equally the rights of persons; the reciprocal rights and duties of master and servant were equivalent to those of the husband and wife.

The rights of persons cut sweepingly across Blackstone's own private/public distinction. Chapters II through XII contain the "*public* relations of magistrates and people"[9]; then Blackstone sets forth "their rights and duties in *private* oeconomical relations."[10] "[M]arriage" is his second "private . . . relation of persons"; master and servant come first.[11] The "*private* oeconomical relations" house what we would now call employment (master/servant), marriage (husband/wife), parentage (parent/child), and wardship (guardian and ward). It also houses corporations.

Blackstone's term *oeconomical* derives from the ancient Greek word οἶκος and is our etymological root for the term *economy*. At the time Blackstone used the term, it meant "of or relating to household management, or to the ordering of private affairs; domestic[.]"[12] In that legal space, husband and wife, parent and child, guardian and ward, master and servant (and where slavery was recognized, though not in Blackstone's England, master and slave) lived out their hierarchical lives; reciprocal, not equal, rights prevailed. These legal relations were, moreover, no more or less economical than corporations. Beyond the world of legal concepts, considered as an architectural space and a social form, this classification invokes not the home or the family but the *household*, a space for both human and material production, for the making, consumption, and distribution of wealth and material goods. The legal distinction between the family and the market finds no expression in this legal or social order; the future trajectory of the word "economy" is one index of the gradual, as-yet-unforeseen emergence of that distinction as a structural element of Classical Legal Thought.

Finally, there is no suggestion that marriage is a "status"; the closest Blackstone seems to come to that term is when he discusses the "military

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9. *Id.* at 410.

10. *Id.*.

11. *Id.* at 421.

12. *Economic Definition* B.1.a, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/viewdictionaryentry/Entry/59385 (last visited Dec. 20, 2010). The OED declares that this sense of the word "economic" is obsolete and gives a final example dated 1791. *Id.*

and maritime states"[13]—a usage closer to the medieval concept of *estates* as ranks in the social order (which of course Blackstone retained) than to *status* as the term was to enter into American legal language.

Blackstone was a crucial authority for nineteenth-century American jurists, but he was joined by distinctly American sources. Tapping Reeve's 1816 *The Law of Baron and Femme*[14] tracks Blackstone's classification with some key modifications. Reeve's full title page is included here as Appendix 2.

By omitting all of the "*public* relations" and corporations, Reeve takes Blackstone's "*private* oeconomical relations" one step further: this book collects the law of the household. And Reeve puts its legal relations in their conventional nineteenth-century order: husband and wife, then parent and child, then guardian and ward, and then master and servant. The social hierarchies are now graphically represented. These shifts also intensify the boundedness of this legal space to the architectural and social household. Reeve introduces into Anglo-American law, perhaps for the first time, a legal classification that can meaningfully be tied, genealogically, to modern family law.

By the time Reeve published his treatise, the modern uses of the word "economic," turning it *from* the household *to* the market, were just beginning to emerge—and as a result, he avoided it. To Reeve, an "oeconomical relation" could still have been one "relating to the management of domestic or private income and expenditure[.]"[15] But in newly emerging meanings, it could also have been "of, relating to, or concerned with the science of economics or with the economy in general; relating to the development and regulation of the material resources of a community or state[.]"[16] Reeve dropped Blackstone's term, silently rejecting the new meanings of "economic" as inapt to his topic. His omission tacitly anticipates what will become the family/market distinction.

Before that distinction could take its classical form, the association of marriage with contract had to be effaced. The chief literary impediment to this process was Blackstone's famous insistence that "our law considers

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13. BLACKSTONE, *supra* note 8, at 395.

14. TAPPING REEVE, THE LAW OF BARON AND FEMME; OF PARENT AND CHILD; OF GUARDIAN AND WARD; OF MASTER AND SERVANT; AND OF THE POWERS OF COURTS OF CHANCERY, WITH AN ESSAY ON THE TERMS, HEIR, HEIRS, AND HEIRS OF THE BODY (New Haven, Oliver Steele 1816).

15. OXFORD ENGLISH DICTIONARY ONLINE, *supra* note 12, at B.1.a.

16. *Id.* at B.1.b and B.4.a. The OED's first example of "economic" used to describe a national economic system dates from 1815. *Id.*

marriage in no other light than as a civil contract."[17] What did Blackstone's equation of marriage with contract mean *to him*? I think it's perfectly clear that, if he were to hear jurists of the mid-nineteenth century insist that "marriage is a civil *contract,*" he would have thought they were putting the ac*cent* on the wrong syll*ab*le. For him, the point was that marriage was a *civil* contract. Up until the passage of Lord Hardwicke's Act in 1753—a mere twelve years before the publication of Blackstone's volume on the Rights of Persons—the validity of particular marriages had been subject to ecclesiastical law and was most finally determined in ecclesiastical courts. Blackstone's locution registers the important change wrought by the Act: civil law took upon itself the authority to determine the rules of marital validity. Though ecclesiastical courts persisted, the ultimate power to determine marital validity had shifted from religious to civil control.[18]

Moreover, though contracts come up constantly in his discussion of almost every major topic except Public Wrongs in Volume IV, Blackstone was completely innocent of any idea that contract constituted a distinct legal topic. As the great contractarian Theophilus Parsons would complain in the opening lines of his 1853 treatise *The Law of Contracts*,

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17. BLACKSTONE, *supra* note 8, at 421.

18. The shift from *sacrament* to *contract* was an effect of the Protestant revolution: none of the Protestant sects carried forth the Roman Catholic idea that marriage was a sacrament, but they all emphasized the religious significance of the relationship and the contract that commenced it. *See* JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION (1997). It is against this backdrop that Blackstone repeatedly emphasizes the *civil* character of the marriage contract. After defining marriage as a civil contract, as quoted in the text, he alludes to some marital matters that remained within the jurisdiction of the ecclesiastical courts and then concludes: "Thus taking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and lastly, actually *did* contract, in the proper forms and solemnities required by law." BLACKSTONE, *supra* note 8, at 421. It's almost a given that marriage is a contract: what call for italics are the specific requirements for its formation. It is applicability of civil law and its various requirements of contract that impress him here, not the fact that marriage is formed by (is) contract. Indeed, it is *not* formed by contract alone: as he goes on to explain, Lord Hardwicke's Act put the kibosh on all of that, so that the verbal contracts of canon law "are now of no force, to compel a future marriage." *Id.* at 427 (footnote omitted). Instead, the Act requires celebration in church or a public chapel by an authorized person; Blackstone looks for a precursor to this requirement and reports "it being said that Pope Innocent the Third was the first who ordained the celebration of marriage in the church: before which it was totally a civil contract." *Id.* Again, Blackstone is tracking the *civil* or *religious* character of the marriage contract.

Joel Prentiss Bishop, who as we will see was the chief exponent if not the inventor of the idea that marriage was status-not-contract, read Blackstone in just this way: "To distinguish, . . . it is presumed, marriage as the law views it from marriage as a religious rite, the courts and text-writers almost uniformly speak of and describe it as a 'contract,' a 'civil contract.'" JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS 26-27 [hereinafter BISHOP, MARRIAGE AND DIVORCE] (1st ed., Boston, Little, Brown 1852)].

"The title of the thirtieth chapter of the Second Book of Blackstone's Commentaries is, 'Of title by gift, grant, and contract.' And in no other chapter does he treat the law of contracts under that name."[19] Contract pervaded Blackstone's legal universe without provoking in his mind any need to attribute to it any taxonomic or conceptual coherence, or indeed any particular importance. Marriage was a contract because, as in all contracts, it could be formed only by willing parties, capable of contracting marriage, who did actually contract marriage according to the procedures required by law (another reference to Lord Hardwicke's Act). Full stop. As we will see, the emergence of contract as a distinct legal topic was produced in part through the gradual exile of marriage from its domain. Blackstone shows no indication that he saw it coming.

One of the marks of this process will be the gradual separation between the law of husband and wife and of parent and child, on one hand, and the law of master and servant on the other; in the process the law of guardian and ward will morph into trusts and estates and evolve down a third path of legal development. Early in the nineteenth century, American legal minds saw no big differences between these topics. Users of Reeve's treatise almost immediately dubbed it *Reeve's Domestic Relations*—perhaps they found "baron and femme" too aristocratic in flavor for their actual clients—and they did so in cases involving all four of these legal relations indifferently.[20] But by 1843 one court could shorten the list to two, "the domestic relations of husband and wife, parent and child[.]"[21] And another judge, writing in 1893 to reject two servants' claim that a miserly decedent had made a will bequeathing his property to them rather than die intestate, did so in language that decisively ejected them from this now narrower, more hallowed domestic sphere:

> The relations between Mr. Chappell [the decedent] and him [Ned Trent, one of the claimants] were those of employer and employé, or, more strictly speaking, that of principal and agent, or master and servant; nothing more, nothing less. Eliza Trent [the other

19. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS vii (photo. reprint 1980) (Buffalo, William S. Hein 1853) [hereinafter 1 PARSONS].

20. Four cases citing Reeve as an authority turned up on a Westlaw search for "Reeve & "Baron and Femme." Edwards v. Davis, 16 Johns. 281, 285 (N.Y. Supp. 1819) (discussing the duty of a child to support its parents); Welborn v. Little, 10 S.C.L. (1 Nott & McC.) 159, 161 (S.C.L. 1818) (discussing the rights and duties of parties to an indenture); Cusack v.White, 9 S.C.L. (2 Mill) 279, 281 (S.C.L. 1818) (discussing the husband's rights in his wife's chattels); Snook *ex rel.* Coursen v. Sutton, 10 N.J.L. 133, 136 (1828) (discussing the rights of a ward when he comes of age).

21. Paine v. Paine, 23 Tenn. (4 Hum.) 523, 533 (1843).

> claimant], on the death of her mother, succeeded to the duties and obligations of housekeeper. She did, unaided, the milking, cooking, washing, and other drudgery incident to housekeeping. Such were the social and domestic relations existing between Mr. Chappell, on the one hand, and Ned and Eliza Trent, on the other . . .[22]

As we will see, in 1893 it was not at all clear whether the legal relationship between Mr. Chappell and the Trents would turn out to be employment, principal/agent, or master/servant. The Court was appropriately circumspect about the correct term to use: it hadn't been decided. But it was quite certain that the only "domestic relations" Eliza Trent shared with her employer/principal/master were those of degradingly necessitous and hierarchical co-residence in the household. Domestic labor and domestic love were taking divergent ideological paths. Both were domestic, but they were starkly opposed in law; there, only the latter deserved the term. We see emerging here the mark of the modern legal family.

II. CONTRACT . . . AND A CIVIL INSTITUTION: STORY AND PARSONS . . . AND STORY

For American jurists of the mid-nineteenth century, the idea that marriage is contract did some important work. Our examples can be Justice Joseph Story and Theophilus Parsons. Story is a pivotal figure in this chapter: he first insisted that marriage was contract, with strong constitutional consequences, and later repented. His change of mind signals the defeat of Parsons's articulation of marriage as contract, and contract as virtually coterminous with the legal order *tout court*. The mutual segregation of marriage and contract is the overall theme of this chapter in our story.

While Story was a sitting Justice on the Supreme Court, he was presented with an opportunity to classify marriage. *Dartmouth College v. Woodward* was the challenge of Dartmouth College trustees to an act of the New Hampshire legislature that voided the College's precolonial charter and enacted a new one. [23] The new charter replaced the trustees, reclassified the College as a university, and substantially changed the

22. Chappell v. Trent, 19 S.E. 314, 338 (1893).
23. Dartmouth College v. Woodward, 17 U.S. 518 (1819).

rules of governance.[24] A key question in the case was whether the Legislature had violated the Contracts Clause of the Constitution, which requires that states not "impair[] . . . the Obligation of Contracts."[25] Was the original charter a *contract,* and did the legislative overhaul *impair* it?

Lawyers for New Hampshire argued that the charter was a "matter of civil institution" and thus subject to legislative control—like marriage.[26] Just as the legislature could determine the obligations of husband and wife by providing a means for divorce, it could devise new terms for the operation of the College.[27] Justice Marshall writing the opinion of the Court, and Justice Story writing a long concurrence, thought otherwise. We will concentrate here on Story's thinking because his change of heart fifteen years later marks the turning point in our story.

Story classified the charter as a contract. This was not easy to do. It cost him hard legal work, spanning many pages, to construe a charter establishing a purely charitable institution, to be run by persons other than the recipient of the original grant, as a contract. In the course of those pages, Justice Story depended on rules of contract—especially a web of implied contracts to supply consideration—which would seem completely archaic by the end of the status-not-contract genealogy we are pursuing here.[28] Much more swiftly, he went on to find that the imposition of the

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24. *Id.*

25. The Contracts Clause stipulates that "No state shall . . . pass any . . . law . . . impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1.

26. *Dartmouth College,* 17 U.S. at 600.

27. *Id.* at 600-01 ("Thus, marriage is a contract, and a private contract; but relating merely to a matter of civil institution, which every society has an inherent right to regulate as its own wisdom may dictate, it cannot be considered as within the spirit of this prohibitory clause. Divorces unquestionably impair the obligation of the nuptial contract; they change the relations of the marriage state, without the consent of both the parties, and thus come clearly within the letter of the prohibition. But surely, no one will contend, that there is locked up in this mystical clause of the constitution a prohibition to the states to grant divorces, a power peculiarly appropriate to domestic legislation, and which has been exercised in every age and nation where civilization has produced that corruption of manners, which, unfortunately, requires this remedy.").

28. If executory, Story argued, the grant once performed was a contract, *id.* at 683-84, and if it were deemed to be executory but not performed and thus to require consideration to be classed a contract — "which I utterly deny," said Story, *id.* at 690 — consideration could be found in the implied agreements of the original grantor to relinquish his own funds and funds he held in trust to the new trustees, to agree to the removal of the College from his home to a new location, and to serve as its first President, *id.* at 686, in the implied contract of the trustees to perform their assigned duties, *id.* at 688-89, in the implied contract of the Crown to the benefactors to protect their donations by respecting the terms of the charter, and in the implied contract between the new corporation and the donors to do the same, *id.* at 689-90. All of these were relinquishments of established rights and assumptions of new duties; if in a commercial contract payment of "a pepper-corn" was good consideration, in an agreement to establish a charitable institution, these relinquishments and promises surely constituted good consideration as well. *Id.* at 684, 687.

new charter impaired that contract.[29]

As part of his first argument, Justice Story explained why bringing marriage within the constitutional oversight of the Contracts Clause did not trouble him. A divorce granted for breach of marital obligations did not impair the marital contract; instead, it might be the only effective remedy for the breach:

> A general law, regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations were no longer observed, is, in no correct sense, a law impairing the obligations of a contract.[30]

The Contracts Clause applied—marriage was contract. But just as it was no impairment of contract for a state to grant remedies for breach of contract in bailments and sales of goods, it could be no impairment to grant similar remedies for breach of marital contracts.[31]

Story went on to give substance to his vision of the marital contract. Contracts-Clause control over legislative action in this area might be not only tolerable but necessary to protect marital rights—primarily, it would appear, the marital-property rights of husbands:

> But if the argument means to assert, that the legislative power to dissolve such a contract, without such a breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made

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29. *Id.* at 706-12.

30. *Id.* at 697-98.

31. Story here agrees with Chief Justice Marshall that marriage was a contract, but differs in his reasons for seeing no impairment in fault-based divorce. The latter saw divorce for breach of the marriage contract as no impairment because the breach had already destroyed the contract. The Contracts Clause, he said, "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional." *Id.* at 629. As Kennedy notes, both logics are equally contractarian. KENNEDY, RISE AND FALL, *supra* note 6, at 195.

> (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive, why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition, as any other contract for valuable consideration. A man has as good a right to his wife, as to the property acquired under a marriage settlement.
>
> He has a legal right to her society and her fortune; and to divest such right, without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate.[32]

Marriage is represented here as a transaction primarily affecting property rights. It is as clearly contractual as a man's promise to marry in exchange for the bride's father's marriage settlement on his daughter. The exchange of marriage for property rights was a contract, and the Contracts Clause should bar its legal impairment by divorce. At first Story imagines divorces entered against the will of both spouses, but note that by the end of my quotation (also the end of his discussion of this conundrum) he slips to divorces imposed on a husband, depriving him of the rights under a marriage settlement, against his will and without his fault. No wonder that Story, considering it in that way, was blithe about the prospect—held out to him as a bugaboo by counsel for New Hampshire—that the Contracts Clause might limit the scope of divorce laws. The clause *should* police legislation allowing sharp dealing in the making of marriages just as it would in bargains for the exchange of goods.

Another way to include marriage as contract was to expand contract to include virtually the entire legal order. This imperialism of contract is exemplified, for Kennedy, by Theophilus Parsons.[33] Writing in 1853, Parsons was ambitious for his category: "The Law of Contracts, in its widest extent, may be regarded as including, directly or indirectly, almost all the law administered in our courts."[34] Or even more grandly:

> The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of

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32. *Dartmouth College*, 17 U.S. at 697-98.
33. KENNEDY, RISE AND FALL, *supra* note 6, at 207.
34. 1 PARSONS, *supra* note 19, at vii.

> human life implies, or, rather, is, the continual fulfilment of contracts.[35]

Parsons's ambitions for contract caused him to overhaul Blackstone's taxonomy quite completely. Appendix 3 reproduces the Table of Contents for his Book III, on "The Subject-Matter of Contract."[36]

Marriage is now a contract in full earnest. It has its own special rules, but so do all the contract types. These rules were voluminous: Parsons devotes more than three hundred pages to the legal requirements of the various kinds of contractual obligation. According to Parsons, the law had a lot to say about the contents of particular contracts.

And it was entirely possible for a contract to arise without the parties' knowledge or assent or their performance of initiatory formalities:

> [I]n all the relations of social life, its good order and prosperity depend upon the due fulfillment of the contracts which bind all to all. Sometimes these contracts are deliberately expressed with all the precision of law, and are armed with all its sanctions. More frequently they are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of the parties. Far more frequently they are not expressed at all; and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge. In this sense, *contract* is coordinate and commensurate with *duty*: and it is a familiar principle of law that . . . whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do.[37]

The ample scope allowed to implied contract here is continuous with Story's way of reasoning about contract in *Dartmouth College*. Implied contracts, Parsons concludes, "form the web and woof of actual life."[38] We are as far from the world of laissez faire, the idea that contract is par excellence the domain of the will of the parties as opposed to the will of the state, and the idea of freedom of contract—*and* as far from the world of marriage-as-status-not-contract—as it is possible to be.

But these classical ideas and distinctions are aborning. Parsons's Book III contains material culled from Books I, II and III of Blackstone's

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35. *Id.* at 3.

36. *Id.* at xxiii-xxviii. Parson's *Law of Contracts* is a two-volume set, which he further subdivided into "Books."

37. *Id.* at 4.

38. *Id.*

Commentaries: only Blackstone's Book IV, on Public Wrongs, was not ransacked for the rules of contract. In the course of this overhaul, the law of personal relations evaporated. Most of the rules formerly resident there which could not be fitted into the substantive rules of the various contract types became rules about capacity to enter those contracts. These rules migrated to "Parties to a Contract," the topic of Parsons's first Book, and became a catalogue of parties lacking general or specific capacity—a list of "disabled persons."[39] Capacity to contract was the norm; the "persons" that had been intrinsic to a body of general law governing everybody became aberrational, problematic, exceptional. The faceless individual of liberalism is the rule; Parsons's Book I collects the exceptions.[40] The chapters in Parsons's Table of Contents which address the disabled persons appear in Appendix 3.

Note that Parsons's restructuring of his Blackstonian material abandoned the relations; what we find are persons. Kennedy notes that, for Parsons's contract regime, "[t]he idea of relationship was important if not essential to the plausibility of the idea of implication because it provided a source for the intentions and duties the judge imposed on the parties."[41] But Parsons's "disabled persons" have departed this enmeshed and morally saturated world, to stand alone in a new singularity.

Parsons was clearly troubled that he had to classify wives cheek by jowl with infants, bankrupts, insolvents, idiots, aliens, slaves, outlaws, and persons attainted and excommunicated. He described the "old rules" of coverture as "oppressive and unjust" and approved a trend in many states to "improve and liberalize the marital relation" by treating the wife as more "independent and equal." But he also noted that the shift was provoking controversy, and with good reason: he doubted that it could be desirable to make husband and wife "altogether, or in a great degree independent and equal. . . . The tendency of this would seem to be, necessarily, to make them bargainers with each other; and as watchful against each other, as careful for good security, as strict in making terms, and in compelling an exact performance of promises or conditions, and as prompt to seek in litigation a remedy for supposed wrong, as seller and buyer, lender and borrower, usually are[.]"[42] The rules of the marriage contract, therefore, justifiably enforce more altruism than do or should the

39. *Id.* at 242.
40. *Id.* at xix-xxii.
41. KENNEDY, RISE AND FALL, *supra* note 6, at 168.
42. 1 PARSONS, *supra* note 19, at 284.

rules of sales contracts, which expect and require more individualism.

This was not because marriage is a status—indeed, nowhere in the text of *The Law of Contracts* did Parsons use the term status, not once.[43] Rather, it was because "inconvenience and danger" would attend too expansive an equality of husband and wife. Parsons's admiration for equality between husband and wife registered a significant advance for feminist thinking from Story's somewhat masculinist slant on marital rights in *Dartmouth College*. But his hedged endorsement of the conservative countertrend suggests that he saw some need for a distinction between marriage and market contracts. He was a little foggy on what that distinction would be, and the prominent place he gave to social obligations recognized as implied contract surely worked to blunt any need for clarity on this point. Marriage could remain contract under these logical circumstances: Parsons did not need marriage-as-status.

Parsons devoted a whole section of his chapter on constitutional law to the question whether marriage falls within the prohibition of impairment of contract in the Federal Constitution. Not only that: he segregated it from his discussion of the effect of the Contracts Clause on other contracts, most of which he clumped together for this purpose. Once again, a difference between marriage and all other contracts is inchoate but discernable. And Parsons provided a very diffident account of the various answers to the question whether divorce is an unconstitutional impairment of contract, finding good authority for three completely inconsistent theses. They were that a divorce statute cannot change the indissolulability of existing marriages (implying, I guess, that it could provide for divorce ex ante, for new marriage contracts) [44]; that divorces for adultery or other breach of the marriage contract escape the Contracts Clause because there is then no contract to impair (impliedly states have

43. PARSONS, THE LAW OF CONTRACTS (4th ed. 1860). I was able to search only the fourth edition of Parson's *The Law of Contract*, the first available to me electronically via the online library of legal treatises, *The Making of Modern Law: Legal Treatises 1800-1926*. http://galenet.galegroup.com.ezp-prod1.hul.harvard.edu/servlet/MOML?af=RN&locID=camb55135&srchtp=a&c=1&an=19001590201&ste=12&stp=Author&docNum=F101177816&ae=F101177816&tiPG=1. To be sure, the term status appears in the index, under Slavery, referring to the "effect of marriage during slavery on the status of emancipated slaves," 2 PARSONS, THE LAW OF CONTRACTS 890 (4th ed., Boston, Little, Brown 1860), but the text referred to does not use the term. *Id.* at 341 n.i. The index of the original edition has no entry for Slavery. Clearly, the compiler of the index to the fourth edition was subject to the influence of legal developments that — following Kennedy — I attribute below to Joel Bishop, developments which Parsons himself could have known about but did not take into account.

44. 2 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 528 (photo. reprint 1980) (Boston, Little, Brown1853) [hereinafter 2 PARSONS].

the constitutional authority to grant divorces for cause but not in cases of collusion, mutual fault, or no fault)[45]; and "that marriage is not only a contract, but much more than a contract, and so much more that it is not to be considered as within the scope or intention of this clause of the constitution."[46] Once again, it did not occur to Parsons to dub that "so much more" *status*; nor does the term appear in his case excerpts cited for this view. And it wasn't at all clear to him which rationale protecting the trend towards divorce, if any, was "right" or would prevail. In Parsons's view, as of 1853, the question was too close to call.

Unbeknownst to Parsons, the seeds for the defeat of marriage-as-contract and the eventual triumph of marriage-as-status-not-contract had already been planted, and by none other than Joseph Story. Recall that, in his *Dartmouth College* opinion, Story had rejected the defendant's argument that marriage was a civil institution.[47] It was a contract, and legislatures establishing laws allowing divorce had to heed limitations imposed by the Contracts Clause. But in the course of writing the first two editions of his *Commentaries on the Conflict of Laws*, published in 1834 and 1841, Story changed his mind. The first edition introduced a chapter on interstate recognition of divorce with an observation justifying rules quite different from those described in the subsequent chapter on interstate enforcement of contract:

> Marriage is *not treated as a mere contract* between the parties, subject, as to its continuance, dissolution, and effects, to their mere pleasures and intentions. But it is *treated as a civil institution*, the most interesting and important in its nature of any in society. Upon it the sound morals, the domestic affections, and the delicate relations and duties of parents and children, essentially depend.[48]

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45. *Id.*

46. *Id.* at 529. Consistently with his contract imperialism, Parsons does not note a fourth theory, recognizable in some cases cited by Kennedy, that because marriage is a *relation*, like master/servant etc., it is not a contract at all and is thus untouched by the Contract Clause. Maguire v. Maguire, 37 Ky. (7 Dana) 181, 183-85 (1838); *In re* Justices' Opinion, 16 Me. 479, 481 (1840); White v. White, 4 How. Pr. 102 (N.Y. Sup. Ct. 1849). As we will see below, *Maguire* was an important citation for Parsons's chief opponent on this point, Joel Prentiss Bishop.

47. *See supra* note 27 and accompanying text.

48. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS AND JUDGMENTS § 200, at 168 (Boston, Hilliard, Gray, and Company 1834) [hereinafter STORY, CONFLICT OF LAWS (1st ed.)] (emphasis added). This passage appears unchanged in the second edition: JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND

At first Story remained loyal to his view that marriage is contract. But it is no longer just that: it is *also* a civil institution. To be sure, he said in 1834 and repeated in 1841 that "[m]arriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin as a contract of natural law."[49] But in the 1841 edition of *Conflict of Laws,* he added a footnote insisting on the peculiarity of this contract:

> I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by Jurists, domestic as well as foreign. But it appears to me to be *something more than a mere contract*: it is *rather* to be deemed an *institution of society*, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts.[50]

By now, marriage was not a mere or ordinary contract; it was founded on contract, but it should "rather" be deemed an institution of society. He has almost come around to the view of the attorney for New Hampshire in *Dartmouth College.*

Story's *Conflict* Table of Contents segregates the law of abnormal persons into its own place (Chapter IV), but also makes a new, categorical distinction between marriage, divorce, and contract. An excerpt from his Table of Contents presenting this division is included as Appendix 4. His title goes even further, making contracts modal and marriage special: *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to* ***Contracts,*** *Rights, and Remedies, and* ***Especially in Regard to Marriages, Divorces,*** *Wills, Successions and Judgments.* Marriage is not only becoming distinctive; it is becoming exceptional.

III. RECEIVING "STATUS": STORY AND LORD ROBERTSON

"Family law exceptionalism" (FLE) will be my term for the extremely

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ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS AND JUDGMENTS § 200, at 262 (2d ed., London, A. Maxwell 1841) [hereinafter STORY, CONFLICT OF LAWS (2d ed.)].

49. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 108, at 100; STORY, CONFLICTS (2d ed.), *supra* note 48, § 108, at 170.

50. STORY, CONFLICT OF LAWS (2d ed.), *supra* note 48, § 108, at 170 n.3 (emphasis added). All these passages remain unchanged in the third, posthumous edition of Story's *Conflict of Laws.* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS AND JUDGMENTS § 108, at 193; § 200, at 302 (3d ed,, Boston, Little, Brown 1846) [hereinafter STORY, CONFLICT OF LAWS (3d ed.)].

broad range of ideas and practices—legal, cultural, social, economic, ideological, aesthetic—that set marriage, reproduction, the family, childhood, sexuality, the home (the list could go on) aside from domains of life deemed to be more general, more political, more international, more economic (and again the list could go on indefinitely).[51] The term "family law" in this formulation is completely anachronistic for mid-nineteenth century American legal thought, as we will see: classicizing jurists had the option of adopting Family Law from new German taxonomies of law, but they rejected it, and a complex struggle had to be fought over the first five decades of the next century before Family Law could find its place among the topics of Anglo-American law. So please allow me to put "FL" in scare quotes when I say that the specific emergence of "FL"E in Story's *Conflict of Laws* was actually *marriage* exceptionalism: marriage was not simply contract; it was something else too, an institution of society. From this apparently small seed grew a great taxonomic tree, one shaped by winds—some highly welcome amongst U.S. legal elites, others not so much—from civilian Europe.

Story's recharacterization of marriage in *Conflict of Laws* depends largely on Scottish legal sources, and his analysis of interstate recognition of divorce turns on a sharp and unresolved disagreement on this topic between Scottish and English jurists.[52] This strong "Scottish turn" in Story's work is of a piece with his will to be influenced by civil law generally.[53] But it was specifically Scottish legal thought that provoked

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51. Halley & Rittich, *supra* note 2.

52. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 113, at 103-04. These are the cases Story cites at this point; note that many involve conflicts between Scottish and English law of marriage and divorce: Dalrymple v. Dalrymple, (1811) 166 Eng. Rep. 665 (K.B.) (upholding the conjugal rights of a Scottish woman who was married to an Englishman quartered in Scotland); Ilderton v. Ilderton, (1793) 126 Eng. Rep. 476 (enforcing dower rights in England for English subjects married in Scotland); Conway v. Beazley, (1831) 162 Eng. Rep. 1292, 1296-99 (holding that a divorce in Scotland was ineffective for two English subjects married in England with English domicile, since they had no domicile in Scotland); Gordon v. Pye (1815) 3 Eng. Eccl. R. 430, 468 (holding that Scottish courts were without power to dissolve the marriage of English subjects married and domiciled in England); HENRY HOME OF KAMES, PRINCIPLES OF EQUITY (Edinburgh, Adam Neill and co. 1800) (discussing Scottish equity jurisdiction over foreign contracts, marriages and legitimacy issues). Several of Story's cases involve other national conflicts of laws: Ryan v. Ryan, (1816) 161 Eng. Rep. 1162 (affirming the intestate succession of the second wife of an Irish man domiciled in Denmark); Herbert v. Herbert, (1817) 161 Eng. Rep. 737 (upholding the validity of marriage between two English subjects in Sicily, although the ceremonials did not conform to Sicilian requirements); Middleton v. Janverin, (1802) 161 Eng. Rep. 797 (invalidating a Flanders marriage between English subjects not valid by Flanders law); Lacon v. Higgins, (1823) 171 Eng. Rep. 813 (following *Dalrymple* in a case involving a marriage between English subjects in France).

53. Michael H. Hoeflich, *Annals of Legal Bibliography: J.G. Marvin*, 96 LAW LIBR. J. 333, 337-38 (2004) [hereinafter Hoeflich, *Annals*]; Michael H. Hoeflich, *Bibliographical Perspectives on*

his *pentimento* in *Conflict of Laws.*

As we have seen, Story begins his discussion of marriage by acknowledging the common law definition of marriage as contract. To be sure, it is "a peculiar and favored contract," but "[t]he common law of England (and the like law exists in America) considers marriage in no other light than as a civil contract."[54] For the idea that it is *also* a civil institution, Story turns to "some remarks on this subject made by a distinguished Scottish judge."[55] His source is Lord Robertson in a series of Scottish cases, of which *Duntze v. Levett* is perhaps the legal high-watermark.

Jane Duntze (or Levett) and Philip Stimpson Levett were English subjects; they married in England; and in the holdings of all the judges who decided the question, their legal residence was England.[56] Mr. Levett nevertheless took up temporary lodgings in Scotland and shared them with a paramour.[57] Mrs. Levett sued him in Scotland for divorce based on his adultery—a ground for divorce and a procedure for divorce that were well settled in Scottish law but categorically unavailable in England.[58] Mr. Levett objected to the application of Scottish law to his English marriage. The final Court of Sessions opinion, issued in 1816, held that

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Roman and Civil Law, 89 LAW LIBR. J. 41, 49 (1997) [hereinafter Hoeflich, *Bibliographical Perspectives*]; Michael H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth-Century Perspectives on the Utility of the Civil Law for the Common Lawyer,* 29 AM. J. LEGAL HIST. 36 (1885) [hereinafter Hoeflich, *John Austin*]; Michael H. Hoeflich, *Roman Law in American Legal Culture,* 66 TULANE L. REV. 1723, 1725 (1992); Michael H. Hoeflich, *Translation and Reception of Foreign Law in the Antebellum United States,* 50 AM. J. COMP. L. 753, 760, 763 (2002) [hereinafter Hoeflich, *Translation and Reception*]; Michael H. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century,* 35 AM. J. COMP. L. 599 (1987) [hereinafter Hoeflich, *Friendships*]; Gerhard Kegel, *Story and Savigny,* 37 AM. J. COMP. L. 39 (1989) (providing many parallels but no evidence that Story was directly influenced by Savigny).

54. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 108, at 100.

55. *Id.* § 109, at 101.

56. JAMES FERGUSSON, REPORTS OF SOME RECENT DECISIONS BY THE CONSISTORIAL COURT OF SCOTLAND IN ACTIONS OF DIVORCE, CONCLUDING FOR THE DISSOLUTION OF MARRIAGES CELEBRATED UNDER THE ENGLISH LAW 68 (Edinburgh, Archibald Constable and Company 1817) [hereinafter FERGUSON, REPORTS]. A few words about this text, which is not a regular case reporter. At the time Fergusson published his Reports, neither the Consistorial Court nor the Court of Session had a settled practice for publishing decisions, and Fergusson's way of presenting the cases is quite dauntingly complex. He first presents summaries of the cases, with parsimonious quotations but including the dizzying career of each case up and down the ladder of appeal and remand. *Id.* at 23-247. He then presents an Appendix in which matter from all four cases is collected with lengthy thematic Notes. *Id.* at 249-470. He presents the name of the wife in *Duntze v. Levett* in the alternative ("Jane Duntze or Levett"), I surmise, because it was unclear throughout the litigation whether she would be able to obtain her divorce and revert to her maiden name. *Id.* at 68.

57. *Id.* at 69-70.

58. *Id.* at 72.

Scottish courts had jurisdiction over the husband because of his temporary presence in Scotland and over the wife because of her husband's presence there and that Scottish law applied.[59]

Lord Robertson wrote in support of this outcome. A choice of law rule favoring Scottish law was, he said, necessary to protect Scotland from the barbarities of English marriage law:

> If a man in this country were to confine his wife in an iron cage, or to beat her with a rod the thickness of the Judge's finger, would it be a justification in any court, to allege, that these were powers, which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?[60]

White men saving white women from white men. It appears that, in the federal experience of Edinburgh vis à vis London, no less than in the colonial experience of London vis à vis Bombay,[61] civilization could be marked by legally mandated decencies in the relations of husband and wife, and barbarism by legally sanctioned abuse of wives.

The claim that marriage was contract formed a doctrinal impediment to Lord Robertson's assertion of Scottish legal independence. If marriage were contract, Lord Robertson acknowledged, *lex loci contractus* would be the rule; English law would apply; and benighted, feudal English marriage rules could easily be imposed on Scottish courts. To fend off this result, he produced an expansive distinction between marriage and contract, in which marriage appears—for the first time in our story—as status-not-contract. Story found Lord Robertson's arguments in this case "so striking, that they deserve to be quoted at large";[62] his quotation of them runs three pages. I have shortened Story's quotation somewhat to eliminate duplication:

> Marriage being entirely a personal *consensual* contract, it may be thought, that the *lex loci* must be resorted to in expounding every question, that arises relative to it. But it will be observed, that marriage is a contract *sui generis*, and differing, in some respects, from all other contracts, so that the rules of law, which are

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59. *Id.* at 166-67.

60. STORY, CONFLICTS (1st ed.), *supra* note 48, § 111, at 102-03 (quoting FERGUSSON, REPORTS, *supra* note 56, at 399 app., n.G).

61. *See, e.g.*, Janaki Nair, *"Social Reform" and the Woman's Question*, *in* WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY 49 (2000),.

62. STORY, CONFLICTS (1st ed.), *supra* note 48, § 109, at 101.

applicable in expounding and enforcing other contracts, may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations, or duties, arising from it, are not left entirely to be regulated by the agreements of the parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will. It confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract.

§ 110. "No wonder that the rights, duties, and obligations, arising from so important a contract, 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. And such laws must be considered as forming a most essential part of the public law of the country. As to the constitution of the marriage, as it is merely a personal, consensual contract, it must be valid every where, if celebrated according to the *lex loci*; but, with regard to the rights, duties, and obligations, thence arising, the law of the domicil must be looked to. It must be admitted, that, in every country, the laws relative to divorce are considered as of the utmost importance, as public laws affecting the dearest interests of society.

§ 111. "It is said, that, in every contract the parties bind themselves, not only to what is expressly stipulated, but also to what is *implied* in the nature of the contract; and that these stipulations, whether express or implied, are not affected by any subsequent change of domicil. This may be true in the general case, but, as already noticed, marriage is a contract *sui generis*, and the rights, duties, and obligations, which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by the private contract, but by the public laws of the State, which are imperative on all, who are domiciled

within its territory. . . ."[63]

On this reasoning, Scottish courts would be obliged to recognize the validity of the Levett marriage, but equally obliged to apply their own law when Mr. Levett brought the marriage to Scotland and committed adultery there.

Large shifts in the position of marriage in the legal order are visible in these paragraphs, and Story drew remarkably parsimoniously from them. For Story, marriage is "something more than a mere contract" because it is an institution of society. Whereas contract is the site of the parties' "mere pleasures and intentions," marriage is a civil institution. These are important shifts: contract is mere, and is the site of mere whim; marriage is an institution, is of the utmost gravity, and belongs to society as a civil institution. But there is much more in Lord Robertson's representation of the contract/marriage distinction than that. Story did not explicitly adopt Lord Robertson's additional ideas that the law of marriage is public law, and distinct from the law of contract (which is private?); that marriage is *ius gentium*, a matter of the international law of nature; that it has generality and fundamentalness that are not necessarily captured in any particular country's positive law; and that it confers *status*. Note that this new term appears in Story's block quotation in italics: it is a foreign word.

The legal rules about the formation, continuance, dissolution, and effects of marriage are, Story acknowledged, matters for each country to determine when it adopts laws to govern this special civil institution. Lord Robertson made a stronger point: marriage is fundamental to social order, and therefore completely public and under the exclusive control of the territorial state. This fundamental and foundational posture of marriage explains why it cannot be left to the "discretion or caprice" or the "will" of the parties. Lord Robertson did not say, but he did imply, that mere contracts *can* be left to the caprice, discretion, and will of the parties. Parsons would have found this assertion incomprehensible.

The distinction between contract as private and marriage as public is emerging here. Recall that for Parsons, neither marriage nor contract was "private"; implied contract was the web and woof of actual life, and marriage was just as saturated with express and implied contract as commerce. By quoting Lord Robertson at length, Story has set up the template upon which later jurists would write that contract is the site of

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63. STORY, CONFLICTS (1st ed.), *supra* note 48, § 109-111, at 101-02 (quoting FERGUSSON, REPORTS, *supra* note 56, at 397-99 app. n.G).

individual will, private pleasures, selfish intentions, and hard bargains—and in which they would insist that marriage is a public institution pervaded by public enforcement in the name of the public good. As Kennedy demonstrates, the will theory would find a home in this template, and the drive to make marriage the opposite of contract would encourage legal thinkers to make it the repository of mandatory altruism and communal life.[64] Only some of those embellishments appear here, but Story has introduced into American legal thought the conceptual armature which will house them.

Why was Story so committed to Scottish law as a source of authority? One possible explanation is simply that Story looked to civil law for answers to international matters—and conflicts was basically international law; and that Story apparently did not know German, which was during his lifetime the preeminent civilian legal language[65] while Scotland was the only civil law jurisdiction producing treatises and other legal materials in English. If this were the only reason, it is pretty empty of ideological significance.

But there was possibly a more substantive motive, one which will emerge in the next stage of our story, and which I introduce here because I think it was already at work. By writing a treatise on the conflict of laws at all, Story was attempting to construct legal rules that could mediate the interjurisdictional resentments of the various states of the Union. Story thought that the English/Scottish encounter provided particularly apt material for his effort to bring international law home for a federation: "It is to the decisions of the English and Scottish courts, that we must look for the most thorough and exact discussions of this subject [i.e., interstate recognition of divorce]. From the different nature of their respective laws on the subject of divorce, from their national union, and from their constant and easy intercourse, the courts of both countries have been frequently called upon to pronounce very elaborate judgments on the jurisdiction and law of divorce in contestations before them."[66]

To figure out what this might have meant, we need to pause for a

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64. See KENNEDY, RISE AND FALL, *supra* note 6, at 171, 185 for the conclusion that this emerging distinction and strengthening opposition between individualist and communal orders was an important driver in the direction of a strong contract/status distinction.

65. Story commissioned translations of German legal materials into English for his personal use, a fact from which Hoeflich plausibly concludes that he did not know German. Hoeflich, *Translation and Reception*, *supra* note 53, at 758-59; *see also* Hoeflich, *Annals*, *supra* note 53, at 336; Hoeflich, *Bibliographical Perspectives*, *supra* note 53, at 49.

66. STORY, CONFLICTS (1st ed.), *supra* note 48, § 215, at 178.

moment to identify the national context of the Scottish marriage cases.[67] Scotland and England were separate nations, their intercourse governed by the Treaty of Northampton of 1328. This treaty settled thirty-two years of war between the two countries. But their relations were continually vexed by the idea of a legal merger or takeover. One major shift in that direction occurred in 1603 with the Union of the Crowns—the accession of Scottish King James VI to the throne of England as its James I.[68] A decisive shift occurred in 1707 when, through Acts of Union passed by the Scottish and English Parliaments, Scotland and England formed the United Kingdom.[69]

The two nations purported to be coequal states in this Union, but in several ways Scotland actually ended up in a subordinate position. The Acts of Union required that the Scottish Parliament be dissolved; Scotland's representation in the new Union's Westminster-based Parliament would always be a minority stake.[70] The authority of that Parliament to change Scottish law was vast. The laws governing trade, customs and excises were to be made uniform; a new Scottish Court of Exchequer was required to apply the law and use the procedures of the parallel English court; the laws of "publick right Policy and Civil Government" were to be made uniform. That is to say, all law governing commerce and all law structuring government were to be converted to English law.[71]

Important provisions preserved Scottish legal identity, however. Scottish courts—including the Court of Session—were to be preserved; ferocious language forbade English courts from hearing "Causes in Scotland" or interfering with the execution of Scottish judgments.[72] Three

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67. Special thanks to Iain Frame for guidance on Union and Scottish legal nationalism and legal union.

68. MICHAEL LYNCH, SCOTLAND: A NEW HISTORY 244 (1991)

69. *An Act for the Union of the Two Kingdoms of England and Scotland*, 8 STATUTES OF THE REALM 566 (George Eyre & Andrew Strahan, eds., London 1702-1707) [hereinafter ENGLISH UNION ACT]; An Act for the Union of The Two Kingdoms of England and Scotland, 11 ACTA PARLIAMENTORUM ANNAE 406 (1707) [hereinafter SCOTTISH UNION ACT].

70. SCOTTISH UNION ACT, art. III; *see also* C. Paul Rogers III, *Scots Law in Post-Revolutionary and Nineteenth-Century America*, 8 LAW & HIST. REV. 205, 216, 234 n.157 (1990).

71. John W. Cairns, *Scottish Law, Scottish Lawyers and the Status of the Union*, *in* A UNION FOR EMPIRE: POLITICAL THOUGHT AND THE BRITISH UNION OF 1707 at 243, 266-67 (John Robertson, ed., 1995) [hereinafter Cairns, *Scottish Law*].

72. The Act provided that "no Causes in Scotland be cognosible by the Courts of Chancery, Queen's-Bench, Common-Pleas, or any other Court in Westminster-hall; and that the said Courts, or any other of the like nature after the Union shall have no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same[.]" SCOTTISH

domains of law were excepted from union and allocated to Scottish courts: what we would now call property law (this included heritable jurisdictions and other offices deemed property rights[73]), the law of defamation and libel, and the law governing marriage, divorce, legitimacy and inheritance. Thus, Scottish law and Scottish jurisdiction were preserved for "private Right," which could be altered from London only "for evident utility of the subjects within Scotland."[74] The Consistorial Courts of Scotland had jurisdiction to decide cases in a narrow range of subject matters, all of which embodied crisp conflicts between Scottish and English law.[75] According to James Fergusson, who published the treatise in which Story discovered Lord Robertson and who was a judge on the Consistorial Court of Scotland, these were "Marriage"; "Conjugal Rights and Redress" (including divorce), "Legitimacy and Bastardy," "Confirmation of Executors and Testementary Causes"; and "Slander, Defamation and Libel."[76] Appeals from the Consistorial Court went to the Court of Sessions, on which Lord Robertson sat. Decisions of the Court of Session were appealable not to a Scottish highest court but to the British House of Lords.[77]

After Union, Scottish legal minds were preoccupied by controversies about the right amount of English law to take on board. Though it would be easy to see this as a process of the forceful merger of the weaker into the stronger power, apparently that would be a mistake. Union had been supported by a variety of political forces within Scotland, and in its wake the Scottish legal intelligentsia debated whether to move Scotland onto the English constitution, whether their legal systems were predominantly alike or mutually alien, whether to look to common law sources and methods, and indeed whether Scottish and English law shared origins or were each other's origins.[78] The idea of Anglicization presides over a

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UNION ACT, *supra* note 69, art. 19.

73. *Id.* art. 20; *see also* Cairns, *supra* note 71, at 251.

74. *Id.* art. 18.

75. JAMES FERGUSSON, A TREATISE ON THE PRESENT STATE OF THE CONSISTORIAL LAW IN SCOTLAND, WITH REPORTS OF DECIDED CASES (Edinburgh, Bell & Bradfute 1829) [hereinafter FERGUSSON, CONSISTORIAL LAW].

76. *Id.* at Table of Contents.

77. Rogers, *supra* note 70, at 216,.

78. Many students of Scottish legal history posit entrenched opposition within Scottish legal circles to English law, for instance C. Paul Rogers, who refers to a "long antagonism to England resulted in its strong resistance to English common law." Rogers, *supra* note 70, at 215 (1990). Others set out the terms of a profound ideological disagreement within a general consensus that adopting some elements of English law was a good idea. *See* Cairns, *Scottish Law*, *supra* note 71, at 252-67 (setting forth a range of Scottish opinion for and against "Anglicization" of Scottish law and

thoroughly ideological thicket into which one ventures at one's peril. Enter we must, but it is important to do so forewarned that the degree of antagonism of the two legal systems and the Scottishness of Scottish law were themselves contested in post-Union Scotland.

Controversy extended to marriage law. On the question which interested Story—jurisdiction and choice of law for divorce—the Consistorial Court and the Court of Session took opposing positions. The former thought that English spouses should not be able to construct jurisdiction in Scotland and to trigger the choice of Scottish law by mere residence there, and then proceed to violate the most basic duties of marriage on Scottish soil and to secure what were almost surely collusive divorces. Fergusson was a vigorous proponent of the Consistorial Court's position.[79] He published his *Reports* in Scotland and in London, making a direct appeal both to Scottish judges to stop divorcing English couples and to Parliament to pass a statute prohibiting the practice.[80] But the Court of Session took the opposite view; there, Lord Robertson's contempt for the English husband's iron cage and his stick as thick as the judge's thumb prevailed. Appeals to the House of Lords did not follow from Court of Session judgments, moreover, probably because the divorces were indeed collusive. They were effectively final. More broadly, the Court of Session played a pivotal role in anchoring Scottish legal nationalism (for instance, it made a large symbolic point by moving into the chambers vacated by the dissolved Scottish Parliament).[81] And specifically, it turned the law of marriage into a pivotal spot for Scottish resistance to English law.[82]

The conflicts in the law of marriage between England and Scotland

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concluding that the trend to adopt English law, especially for commercial matters, was "not necessarily imposed . . . but to some extent willing adopted as modernization"); NICHOLAS PHILLIPSON, THE SCOTTISH WHIGS AND THE REFORM OF THE COURT OF SESSION, 1785-1830 at 178-179 (1990) (arguing that, despite the "apocalyptic" tone of Scottish dirges over Scottish legal particularity, all the actual "Anglicisers" were Scottish); Hector L. MacQueen, "Regiam Majestatem," *Scots Law, and National Identity,* 74 SCOTTISH HIST. REV. 1, 2, 20-23 (1995) (discussing how Whig pressure to modernize Scottish law "into a law fit for a polite and commercial country" was opposed by Tory nationalists, but within a consensus that preservation of Scottish legal distinctiveness was important).

79. FERGUSSON, CONSISTORIAL LAW, *supra* note 75, at 18-22, 102-04.

80. *Id.* at 20-21. Fergusson would have been dismayed to learn that his publication of Lord Robertson's famous quotation, far from defeating it, disseminated it!

81. N.T. Phillipson, *Lawyers, Landowners and the Civic Leadership of Post-Union Scotland,* 21 JURID. REV. 97, 98 (1976); MacQueen, *supra* note 78, at 24.

82. Leah Leneman, *English Marriages and Scottish Divorces in the Early Nineteenth Century,* 17 J. LEGAL HIST. 225, 234, 241 (1996).

were large. The two legal orders' paths to secularization of marriage law were intertwined but strikingly different. Where England had had Anglicanism as its national religion since 1534, Scotland had remained Catholic until its Revolution in 1560 and then became Presbyterian;[83] whereas England had jealously ejected canon law and gave pride of place in its legal order to the common law and its own statutory law, in 1560 Scotland excluded papal jurisdiction and shut down ecclesiastical courts, but retained canon law.[84] And whereas English law imagined marriage as part of an order based on a constitution and the common law, the Scottish Enlightenment flourished in the legal languages of customary law, Roman law, civil law, and regally-sponsored statutes.[85]

At the time Lord Robertson decided *Duntze v. Levett*, the differences in the two nations' laws on marriage and divorce were stark and a point of considerable resentment on either side of the border. Marital formation rules differed.[86] Scotland had a set of prescribed formalities for entering marriage, but it also recognized "irregular marriage" formed by the mere consent of the two parties.[87] Partly in order to protect English parents' control over their children's marriages, England had by this time adopted Lord Hardwicke's Act,[88] which invalidated marriages entered into using the verbal formulae of canon law, required the publication of banns and a public church ceremony for the formation of a valid marriage, and made secular courts the only site for adjudication of disputes over whether a legal marriage had been properly formed. As we have amply seen,

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83. *See* Charles J. Guthrie, *A History of Divorce in Scotland*, 8 SCOTTISH HIST. REV. 39, 48 (1910) ("The Established Church was Presbyterian from 1560 (or 1567) to 1610, Episcopalian from 1610 to 1638, Presbyterian again from 1638 till Cromwell's 'usurpation,'" Episcopalian again from the [Glorious] Restoration in 1660 till the Revolution in 1688, and since then Presbyterian.").

84. MacQueen, *supra* note 78, at 14.

85. Rogers, *supra* note 70, at 216; Peter Stein, *The Influence of Roman Law on the Law of Scotland*, 8 JURID. REV. 205 (1963) [hereinafter Stein, *Influence*]. This claim is of course part of the controversy about the degree to which Scottish and English law converged or differed. Two provisos: First, Roman law deeply influenced English law, though in different ways at different times. David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts Before 1600*, 13 OXFORD J. OF LEGAL STUD. 388 (1993); John W. Cairns, *Blackstone, An English Institutist: Legal Literature and the Rise of the Nation* State, 4 OXFORD J. OF LEGAL STUD. 318 (1984); Daniel R. Coquillette, *Legal Ideology and Incorporation, I: The English Civilian Writers, 1523-1607*, 61 B.U. L. REV. 1 (1981). And Hector L. MacQueen makes a brilliant case that the degree to which Scottish law drew from Roman law not only varied from era to era but was ideologically contested between unifiers and Scottish nationalists in highly contingent and sometimes contradictory ways. MacQueen, *supra* note 78, at 13-25.

86. FERGUSSON, REPORTS, *supra* note 56, at 1, 72.

87. FERGUSSON, CONSISTORIAL LAW, *supra* note 75, at 108-12.

88. 26 Geo. II. c. 33.

England permitted divorce by parliamentary bill only, while Scottish spouses were entitled to judicial divorce for adultery and "continued non-adherence."[89] And legitimacy rules differed: Scotland retained the canon-law rule that parents could legitimate an otherwise bastard child by marrying after its birth; the English common law had long resisted legitimation *per subsequens matrimonium*, and, at the Reformation, had eliminated it.[90] According to Fergusson, the "several laws" of England and Scotland, "as to this most important relation of domestic life, have been perhaps the most opposite of Christendom."[91]

These differences and the social events they gave rise to were notorious and politically sensitive. "Gretna Green" marriages—"clandestine" procedures joining English subjects in marriage under permissive Scottish rules, so called because the town of Gretna Green was so accessible to maritally inclined English subjects—were made possible by the marriage-entry difference plus a strong choice of law rule requiring recognition of marriages valid where performed.[92] English parents were horrified: "'Edinburgh!' was always the answer—'the very last place in the world we should think of sending our son to: he would be married in 24 hours; there is no saying what would happen.'"[93]

In one notorious case, *Sugden v. Lolly*, English courts had gone so far as to convict an English man of bigamy for remarrying in England after obtaining a Scottish divorce that was perfectly valid under Scottish law; he was sentenced to transportation and only escaped this severe penalty by a pardon.[94] In 1755 Parliament ordered the Lords of Session to prepare a bill banning clandestine marriages in Scotland—a Scottish Lord Hardwicke's Act —but it died in the face of Scottish claims that it would interfere with Scotland's religion, which had been preserved by the Acts of Union.[95] When transportation by rail made elopement to Scotland ridiculously easy and interference by parents all but futile, Parliament

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89. FERGUSSON, CONSISTORIAL LAW, *supra* note 75, at 102.

90. STORY, CONFLICT OF LAWS (3d ed.), *supra* note 50, at 137; STEIN, *Influence*, *supra* note 85, at 209.

91. FERGUSSON, CONSISTORIAL LAW, *supra* note 75, at 18.

92. FERGUSSON, REPORTS, *supra* note 56, at 464. For a colorful account, see T. C. Smout, *Scottish Marriage, Regular and Irregular 1500-1940*, *in* MARRIAGE AND SOCIETY: STUDIES IN THE SOCIAL HISTORY OF MARRIAGE 204, 207-10 (R. B. Outhwaite ed., 1981).

93. Smout, *supra* note 92, at 207 (quoting Lord Brougham before a parliamentary select committee in 1849).

94. This is the famous "case of Lolly." FERGUSSON, REPORTS, *supra* note 56, at 9-10. For an account, see LAWRENCE STONE, ROAD TO DIVORCE, 1530-1987, at 358-9 (1992).

95. Smout, *supra* note 92, at 208.

crammed down a residency requirement of 21 days on Scottish marriages.[96]

On his side, Fergusson saw the divorce holdings of the Court of Session as political retaliation against these English initiatives and insisted that such a motive was an improper one for a court to adopt.[97] We have to see Lord Robertson's ruling and logic in *Duntze v. Levett* as making a strong assertion—understood at the time to be saturated with political meaning—of continued Scottish legal independence.

In the Scottish/English encounter, marriage and divorce became indicia of federal union and national separation. Jurists on both sides were willing to sharpen the *national* character of marriage law. Meanwhile, the commercial law of England flooded Scotland without any similar resistance. No one questioned that parties to a business contract formed in England would be subject to English law even in Scottish courts. Hector L. MacQueen argues, moreover, that by the time Fergusson published his treatise, not even a Tory nationalist would stand outside the consensus view that "[a] commercial and industrial country increasingly" should seek, "not a nationally distinctive law, but a law which would not put difficulties in the way of cross-border [commercial] activity."[98]

The bracketed addition to MacQueen's conclusion is necessary because marriage was excluded from the consensus for unification. As marriage became "something more than a mere contract," it became not only exceptional but national. And note that Lord Robertson did not craft a distinction between contract on one hand and marriage-legitimacy-inheritance-property law-and-defamation on the other. As we have seen, all the legal terms described legal domains that remained distinctively Scottish upon the Union. For Lord Robertson, however, they reduced to status, and status reduced to marriage. Marriage was taking up a decisive, first-order place in the symbolic order of a modernizing capitalist world.

Back to Story. As we have seen, he very selectively adopted elements of Lord Robertson's status/contract distinction. I think that's because the idea of a commercial law that unleashed individual will was completely alien to his thought. Instead, Story praised the legal world in which "commerce shall extend its social influences; . . . justice shall be

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96. *Id.* at 210.

97. FERGUSSON, REPORTS, *supra* note 56, at 107 ("Reprisals and retaliation are extraordinary measures, which independent states may sometimes find reason to adopt, but which are totally foreign to the duties of courts of law.").

98. MacQueen, *supra* note 78, at 24.

administered by enlightened and liberal rules; . . . contracts shall be expounded upon the eternal principles of right and wrong."[99] He was much closer to Parsons than to the emerging classical jurists on implied contract as the carrier of decent social norms. But by quoting Lord Robertson at length, he unleashed into American legal thought the idea of marriage-as-status-not-contract, complete with its corollary idea that marriage housed the will of the state while contract gave effect to the will of the parties. Subsequent legal thinkers would take Story's formulation much further than he was willing to go. Thus the classical divisions began to take shape in the U.S. well before one can discern any role for the will theory as a conscious motive.

And a glance forward. If Lord Robertson's view of marriage prevailed, states would have dominion over marriages domiciled within their borders because marriage was *status*. At the time that Story imported this idea from Scotland, it brought with it implications for the greatest American conflict of the nineteenth century: after all, master and servant were also *status*. At the time Story wrote, it was not necessarily clear that choosing the law of domicile for controversies involving slaves would eventually lead to *Dred Scott* and help set the terms for the Civil War.[100] As we will see, the rise of free labor—through the abolition of slavery, the disappearance of indenture, and the expansion of contract labor to cover the field—was going to require that the husband and wife follow a different legal path to modernity than the one taken by master and servant. The former was headed to status and the domestic sphere, the latter to contract and the market. The cataclysm of the Civil War changed many things: one of them was the legal idea that marriage and labor were in any way similar.

IV. STATUS NOT CONTRACT: BISHOP

Joel Prentiss Bishop published the first edition of his *Commentaries on the Law of Marriage and Divorce* in 1852,[101] just one year before Parsons first published his *Law of Contracts*. Bishop laid out a path virtually opposite to Parsons's, and, as we will see, the American legal

99. Joseph Story, *An Address Delivered before the Members of the Suffolk Bar, at Their Anniversary, on the Fourth of September, 1821, at Boston*, 1 AM. JUR. 1, 7 (1829) [hereinafter Story, *Address to the Suffolk Bar*].

100. Dred Scott v. Sandford, 60 U.S. 393 (1856).

101. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18.

intelligentsia soon followed him down it.

Bishop was distressed by the incoherence of the legal rules governing marriage and divorce in the conflict of laws and under the Contracts Clause. Marriage was presenting a crisis for federalism: "Many of the peculiar questions of constitutional law and conflict of laws relating to divorce, . . . arising under the constitutions of the United States and of the several States of this Union, have proved more embarrassing than almost any other to our courts, and have led to irreconcilable diversities of decision."[102]

Bishop thought that the classification of marriage as contract was the cause of the mischief. He cited Scottish cases and treatises more thoroughly than Story,[103] and relied expressly on, and quoted, Story's "something more than contract" passages.[104] But he went further, to say decisively what that elusive "something more" was. It was *status*:

> The word marriage is used to signify the act of entering into the married condition, or the condition itself. In the latter and more frequent legal sense, it is a civil status, existing in one man and one woman, legally united for life for those civil and social purposes which are founded in the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations . . . . [M]arriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity. While the contract remains executory, that is, an agreement to marry, it differs in no essential particulars from other civil contracts, and an action for damages for breach may be maintained on a violation of it. But when the contract becomes executed in what the law recognizes as a valid marriage, *its nature*

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102. *Id.* at 33.

103. *Id.* at 27-29. Bishop relied not only on the sections of Story's *Conflict of Laws* that we have studied, on Fergusson's *Records*, and on *Duntze v. Levett*, Ferg. R. 38, 385, 397 (3 E.E.R. 360, 495, 502); he also brought in LEONARD SHELFORD, A PRACTICAL TREATISE OF THE LAW OF MARRIAGE AND DIVORCE, AND REGISTRATION; AS ALTERED BY THE RECENT STATUTES: CONTAINING ALSO THE MODE OF PROCEEDING ON DIVORCES IN THE ECCLESIASTICAL COURTS AND IN PARLIAMENT; AND THE RIGHT TO THE CUSTODY OF CHILDREN; VOLUNTARY SEPARATION BETWEEN HUSBAND AND WIFE; THE HUSBAND'S LIABILITY TO WIFE'S DEBTS; AND THE CONFLICT BETWEEN THE LAWS OF ENGLAND AND SCOTLAND RESPECTING DIVORCE AND LEGITIMACY. WITH AN APPENDIX OF STATUTES (London, S. Sweet 1841) and PATRICK FRASER, A TREATISE OF THE LAW OF SCOTLAND, AS APPLICABLE TO THE PERSONAL AND DOMESTIC RELATIONS, COMPRISING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD MASTER AND SERVANT AND MASTER AND APPRENTICE (1st ed. Edinburgh, T. & T. Clark 1846) [hereinafter FRASER, DOMESTIC RELATIONS (1st ed.)]. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, at 27 n.5, 28 n.1.

104. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, at 26, 33.

> *as a contract is merged in the higher nature of the status.* And, though the new relation may retain some similitudes to remind us of its origin, the *contract does in truth no longer exist,* but the parties are governed by the *law of husband and wife.*[105]

For Story, as we have seen, marriage was contract, but a "peculiar contract," involving "something more than contract," and that something more was the social institution of marriage. For Bishop, the contract of marriage dissolves upon solemnization into something new and different: marriage is *status* and as such it is *not contract.*

This innovation seems to be Bishop's own. He claimed credit for it modestly in 1852[106] and not so modestly in 1891.[107] And he strongly associated it both times with self-conscious legal modernization:

> Thus to say, that marriage is a contract, when speaking of the marital condition, and not of the agreement to assume it, is, as we have seen, according to the general current of authorities, inaccurate; since they further declare, that it differs in many particulars from other contracts. And when the differences are pointed out, we perceive that they have covered every quality of the marriage, and left nothing of the contract. To term it, therefore, a contract, is as great a practical inconvenience as to call a certain well-known engine for propelling railroad cars "horse," adding, "but it differs from other horses in several important particulars," and then to explain the particulars. It would be more convenient to use at once the word locomotive.[108]

In 1891, near the end of his life, Bishop concluded that this locomotive was headed for the consolidated legal order described by Kennedy as

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105. *Id,* at 25 (emphasis added).

106. *Id.* at 26 ("Various definitions have been given of marriage; and the foregoing is not in the language of any former one. It is believed to be free from some of the objections which may well be urged against all former definitions, whatever defects it may have of its own.") (footnote omitted).

107. "*Bishop on Marriage and Divorce* was published in 1852. In it the author, it is believed for the first time in any legal treatise or judicial opinion, broke away from the old shackles, and defined marriage as a status. The result has already been stated, citing many subsequent cases, the forms of expression from the bench have been gradually modified, until now those earlier ones above quoted would seem quite antiquated." JOEL PRENTISS BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION AS TO THE LAW, EVIDENCE, PLEADING, PRACTICE, FORMS AND THE EVIDENCE OF MARRIAGE IN ALL ISSUES ON A NEW SYSTEM OF LEGAL EXPOSITION 13-14 (Chicago, T.H. Flood and Company 1891) [hereinafter BISHOP, NEW COMMENTARIES]. As Kennedy quite aptly put it, Bishop took the opportunity of his newly revised treatise to "crow." KENNEDY, RISE AND FALL, *supra* note 6, at 198.

108. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, at 34. Bishop gives a more decisive version of this passage in the *New Commentaries.* After "left nothing of contract" he added: "All is subsumed in the status." BISHOP, NEW COMMENTARIES, *supra* note 107, at 14.

classical legal thought.

As Bishop saw it in 1852, the idea that the Contracts Clause applied to marriage and divorce was producing intolerable inconsistency in the American legal system:

> In England and continental Europe, little inconvenience can result from making use of the word contract rather than status as applied to an executed marriage, for the jurists of those countries were not troubled with many of the peculiar questions of constitutional law and the conflict of laws relating to divorce, which, arising under the constitutions of the United States and of the several States of this union, have proved more embarrassing than almost any other to our courts, and have led to irreconcilable diversities of decision.[109]

In 1891, in a substantially overhauled treatise entitled *New Commentaries on Marriage, Divorce, and Separation*, Bishop congratulated himself on bringing order to the field:

> [W]ith gratitude to the Author of all Light, I soon began to discover that the courts, as fast as occasions arose, and they became acquainted with the reasonings of my book, dropped their former reasonings and substituted those therein suggested. The result was that the decisions themselves were rendered uniform, so that to-day the conflicts on marriage and divorce law are probably less than on any other legal subject.[110]

The revelation that marriage was status-not-contract was "General and Fundamental,"[111] and allowed the classical ordering of the whole legal field which it redefined. Bishop was a self-conscious classicizer, and shifting marriage from contract to status was a key building block of his classicizing legal taxonomy.

V. WHAT DID STATUS MEAN?: STORY, LORD ROBERTSON AND BISHOP

This section presents a purely legal genealogy of marriage as status, without suggesting that law was the only contributor to the rising ideology of marriage law exceptionalism and its ideological and material counterpart, the separate spheres.[112] Bishop not only imported heavily

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109. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, at 33.

110. BISHOP, NEW COMMENTARIES, *supra* note 107, at v.

111. *Id.* at Table of Contents.

112. For the best account of how law and society diverged in the development of American marriage law, see Martha Minow, *Forming Underneath Everything that Grows: Toward a History of*

from Lord Robertson and other sources; he also received ideas and representations from his broader culture. The account given here focuses on the specifically legal strand of the larger genealogy. What did "status" mean to Story, Bishop, and other mid-century American legal minds? What follows is a short, partial genealogy of the reception of the civil-law term *status* into the American legal vocabulary, and then an account of what Bishop thought marriage-as-status was.

As we have seen, in Lord Robertson's and in Bishop's taxonomies, marriage became *diacritical* with contract. Each defined the other by negation and thus became more dependent on that other for its own conceptual bite. Bishop's invention was not only categorical; it was also substantive. The very meaning of marriage and of contract had to change if they were to be thinkable as opposites.

Clearly, status was, for Story, a foreign term, coming from civilian sources and of interest only because it helped supply an international-law concept useful in the conflict of laws. He adopted it very gradually, always in italics, which indicate that, to him, it was a foreign term. Over time his followers dropped the practice of printing it in italics. Between the first edition of Story's *Conflict of Laws* in 1834 and Bishop's 1852 *Marriage and Divorce,* the word became a commonplace term in American legal writing. In the course of this transition, it acquired specific meanings, some of which survive today (transformed, of course) while others have become obsolete.

In 1834, the date of the first edition of his *Conflict of Laws,* Story silently declined to adopt the term. When it appeared in his Latin sources, he translated it as "state."[113] Story's word choice here seems motivated by a desire to stick close to the French term—*l'état*[114]— hedged by an equally strong desire to avoid "estate"—which had been good enough for Blackstone—presumably because of its antiquated, even feudal connotations. Beyond these associations, it seems that, for Story writing in 1834, the term *status* had no English-language signification of its own: it was embedded in the French *Code Civil* distinction between "les lois personelles" and "matière réelle"—between the "personal laws" and "all consideration of property"—which forms the great taxonomic distinction

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Family Law, 1985 WISC. L. REV. 919 (1985).

113. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, at 51-52, 58.

114. Thus Story quotes the Code Civil, for instance, for the general rule: "*Les lois concernant l'état et la capacité des personnes régissent les François même résident en pais étranger.*" *Id.* at 67 (quoting the *Code Civil*, art. 3).

of the Napoleonic Code.[115] It was thoroughly foreign.

It seems that Story started to use the word "status" as an English-language term largely because the English/Scottish conflict-of-law sources on which he depended did so. It begins to appear in English only in his Scottish quotations. We have already seen Lord Robertson's dicta defining marriage as a *status*. Story's only other English-language use of the term *status* in 1834 appears in a quotation from an English case refusing inheritance of landed property in England to a child who—said the court—was a bastard in England though legitimate in Scotland.[116] Legitimation *per subsequens matrimonio* might be good enough for inheritance of property in Scotland, but impossible in England. But again, though Story quoted at great length from this case—*Birthwistle v. Vardell*—he did not follow up by designating legitimacy as a status.

By 1846, the date of the third edition of *Conflict of Laws,* Story had decided to adopt the term as an *English* law term. He always italicized it, but it began to appear in his own sentences.[117] I think it's clear that Story adopted *status* as an English law term in part because English and Scottish judges were doing so, and that English and Scottish judges were doing so because civil law concepts of international law—what came to be known as Conflict of Laws—were acknowledged on both sides of the border as the decisive legal language for intrafederal disputes over marriage and legitimacy rules.

Story had a second large influence leading in the same direction, but more explicitly international, indeed imperial, in character. The Introduction to Story's third edition acknowledged William Burge's 1838 *Commentaries on Colonial and Foreign Laws Generally, and in their*

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115. *Id.* at 51 ("[c]es loix personnelles" translated by Story as "[p]ersonal laws"); *id.* at 56 ("*matière réelle*" translated by Story as "subject-matter").

116. *Id.* at 86 (quoting *Doe dem. Birthwistle v. Vardell,* 5 B. and Cresw. 438).

117. Story's first, fourth and fifth adoptions of status as an English-language term appear in discussions of *Birthwistle,* to which entire new sections are devoted. Almost 15 pages are devoted to full-page footnotes presenting diverging opinions from Birthwistle, STORY, CONFLICT OF LAWS (3d ed.), *supra* note 50, at 145-59, this despite the fact that the case was still on appeal to the House of Lords. *Id.* at 127 n.1. The case clearly had Story's attention. His initial adoptions of *status* in these passages are chary: for instance, "It seems then generally admitted by foreign jurists, that, as the validity of the marriage must depend upon the law of the country, where it is celebrated, the *status*, or state, or condition, of their offspring, as to legitimacy or illegitimacy, ought to depend upon the same law." *Id.* at 134. *See also id.* at 144 (further new material discussing Birthwistle and using status). Another entirely new section is devoted to a famous English case involving the validity of a Scottish divorce; here we find Story's second and third uses of the *status* as an English-language word. *Id.* at 137 (discussing *Dalrymple v. Dalrymple,* (1811) 161 Eng. Rep. 665, 665-68 (K.B.)).

Conflict with Each Other, and with the Law of England[118] as one of two new works to which he owed his most substantial revisions. Story incorporated large-scale references to and quotations from Burge,[119] and citations to Burge accompany most of Story's uses of the term *status* as an English legal term.[120]

Burge's handbook, published in London in 1838, disseminated the know-how of "the supreme appellate tribunal of the British Colonial Empire" about the law in force in the British colonies—and because most of them were civil law countries, Burge made the civil law generally, and Dutch, Spanish, and French law in particular, his first sources of law to compare with the English law already known to his readers.[121] In doing so, Burge adopted the Latin term *status* as an English word, explicitly borrowed from Roman sources, that would be crucial in settling conflicts of laws questions. For instance: "We now proceed to the consideration of the civil qualities or capacities of persons. . . . They are frequently expressed by the terms 'status,' 'l'état,' . . . . "Status est qualitas, cujus ratione homines diverso jure utuntur.'"[122] Burge went on to use the term status not as a foreign word but as an English one, and gave a list of statuses that must be honored in choice of law decisions: "the status of legitimacy and illegitimacy, minority and majority, marriage, alienage by birth, and naturalization. . . . To these may be added the status of slavery, the incapacity or status consequent on sentences of interdict against prodigals and lunatics, of excommunication, outlawry, and civil death."[123] By 1838, status had arrived—explicitly from civil law—as a crucial term for the legal managers of an Empire. It carried the French legal idea that persons had statuses which did not change as they moved from place to place around the world, and that required the application of their home law to legal disputes putting the existence and consequences of those statuses at stake.

I don't think that Story noted any tension between his Scottish sources and the French idea transplanted by Burge. Both legal federations like the United States and Great Britain on one hand, and colonial rule on the

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118. WILLIAM BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER, AND WITH THE LAW OF ENGLAND (London, Saunders and Benning 1838) (hereinafter BURGE, COLONIAL AND FOREIGN LAWS).

119. STORY, CONFLICT OF LAWS (3d ed.), *supra* note 50, at viii.

120. *Id.* at 134 n.1, 135 nn.1, 2 & 137 n.5.

121. BURGE, COLONIAL AND FOREIGN LAWS, *supra* note 118, at ii-iii & xiv-xvi.

122. *Id.*, at 57 (quoting "Heinic. Elem. Juris. Civil lib. 1, tit 3, § 76").

123. *Id.* at 57-58.

other, provoked conflicts of laws; only a body of *international* law could resolve them; and the Roman law heritage, including French law, provided what the common law did not by way of concepts, terms, and rules. But there was a huge tension between them: the Scottish rule insisted on the territorial power of the newly assimilated weaker state to choose and apply its own law, while Burge's French rule insisted on a law of persons that would have required Scottish courts to enforce English marriage rules.

This was about as far as Story got in assimilating Lord Robertson's understanding of marriage as status. A large taxonomic problem attached to the term loomed, but there is no sign that Story saw it. The common law did not divide itself into the law of persons and the *loi réelle*; indeed, it did not divide itself systematically at all. And the civil law idea that the "states and capacities of persons" constitute a "personal law" that travels with different human beings wherever they go contains no inherent derogation of persons or their capacities. It could happen to anyone. But in a legal order in which the will theory and the law of contract gain increasingly strong purchase and begin to command taxonomic control over the emerging American classical legal order, the competing distinction between the *droit des personnes* and the *droit réelle* would become an irrelevancy, and Burge's list of persons will begin to seem problematic, deviant, exceptional. The persons who have statuses will seem not privileged but incapacitated.

As it became received into emerging classical legal thought in later-nineteenth-century Anglo-America, status was *parole* shifting into a new *langue*. My argument is that this new *langue* resituated *status*—eventually naturalized as status—in a contract/status distinction that was new and that gave marriage a distinctly *retardataire* role to play in the grand march of history towards contract. The very idea that marriage required definition was new. Blackstone, Reeve, and Parsons were content to classify marriage and spell out the legal rules, but Story, Bishop, and their sources seemed compelled to define it. As we have seen, Story's efforts in this direction are tentative, at least in retrospect. Bishop, on the other hand, has almost too much to say.

First, *marriage* has become the important legal topic, displacing the *relation of husband and wife*. Recall that for Blackstone and Reeve, the relation of husband and wife sat with other legal relations, and the legal rules spelled out the reciprocal rights and duties of the paired persons inhabiting the relation. For Story and Bishop, the topic is *marriage*, a

condition *shared* by husband and wife. This shift is both taxonomic and lexical. When Bishop cited authorities from English and American courts describing the *personal statuses* of husband and wife, he seamlessly concluded that the rules applicable to them were applicable to marriage because "[w]e have seen that *marriage is a status*[.]"[124] We are seeing the partial, to be sure incomplete, displacement of *husband and wife* as legally distinct *persons* by *marriage* as an *institution*.

In this emerging classical understanding, marriage is fundamental to the legal and social orders; it is necessary for civilized society. It is "the most important of all human transactions"[125] and "the very basis of the whole fabric of civilized society[.]"[126] By constituting the statuses of parent and child and the relations of affinity and consanguinity, "it pervades the whole system of civil society."[127] Marriage is fundamental, crucial, and elementary: "Marriage . . . establishes fundamental and most important domestic relations. . . . [E]very well organized society is essentially interested in the existence and harmony and decorum of all its social relations, [and] marriage. . . [is] the most elementary and useful of them all[.]"[128] Human civilization depends on it:

> [T]his union of marriage . . . produc[es] interests, attachments, and feelings, partly from necessity, but mainly from a principle in our nature, without which, perhaps, it [presumably referring to "our nature"] could not exist in a civilized state[.] So it has been deemed in all societies, civilized, and not corrupt, in all ages."[129]

Marriage "is a contract coeval with, and essential to, the existence of society[.]"[130] When the U.S. Supreme Court adopted Bishop's view in *Maynard v. Hill*, it put this point in the form which American lawyers know so well: marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress."[131]

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124. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, at 583-84 (emphasis added) (footnote omitted). The question under consideration at this point in the text is whether a state court can divorce a married couple when its only ground for jurisdiction is the current residency of one of the parties.

125. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 109, at 101 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 397 (Lord Robertson)).

126. *Id.* § 109, at 101.

127. *Id.* (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 397 (Lord Robertson)).

128. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 34, at 29 (quoting *Maguire*, 7 Dana at 183).

129. *Id.* § 35, at 30 (quoting Dickson v. Dickson's Heirs, 1 Yer. 110, 112-13 (1826)).

130. *Id.* § 34, at 28 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 401 (Lord Bannatyne)).

131. Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

For Blackstone, the relations of husband and wife were private; in the emerging classical formulation, marriage was erased from the private and reinscribed as public. Marriage is public and communal, not private and individual; and it is therefore governed by public law, not private law. We can detect this in the lexical shift from "the law of husband and wife" to "the law of marriage." Lord Robertson, quoted at such length by Story and requoted by Bishop, insisted repeatedly it was governed by "public law"—unlike "mere contract" which was governed by private law.[132] Neither Story nor Bishop quite groked the civil law implications here. To Story, this meant that marriage was an "institution of society."[133] And Bishop understood that "[m]arriage, though in one sense a contract . . . is, nevertheless, *sui generis*, and unlike ordinary commercial contracts, is *publici juris*[.]"[134] The German/Roman idea that the entire legal order was divided into public and private law was being haltingly adapted to common law conditions here; the marriage/contract distinction was clearly one conduit for its importation.

As Story and Bishop constructed marriage-as-status, they also constructed contract, its diacritical other. In the passage quoted by Story, Lord Robertson used the formula "rights, duties, and obligations" five times to designate the ascriptive contents of marriage; whereas marriage was thus saturated by law, "other contracts" are "left entirely to be regulated by the agreements of the parties" and are "control[led]" by the "declaration of their will."[135] Lord Robertson even described this will as nothing more than the "discretion or caprice" of the contracting parties.[136] Bishop insisted on it: marriage "can be violated and annulled by law, which no other contract can; it cannot be determined by the will of the parties, as any other contract may be; and its rights and obligations are derived rather from the law relating to it, than from the contract itself."[137] 'Obligations . . . arising from voluntary engagement, take their rule and substance from the will of man, and may be framed and disposed of at his

132. STORY, CONFLICTS (1st ed.), *supra* note 48, § 109-111, at 101-02 (quoting FERGUSSON, REPORTS, *supra* note 56, at 397-99 app. n.G).

133. *Id.*

134. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 34, at 29 (quoting *Maguiree*, 7 Dana at 184).

135. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, §§ 109-12, at 101-03 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 397 (Lord Robertson)).

136. *Id.* § 110, at 102 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 398 (Lord Robertson)).

137. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 35, at 30 (quoting Townsend v. Griffin, 4 Del. 440, 442 (1846)).

pleasure[.]"[138] That is to say, the obligations of contract are defined entirely by the will of the parties, or their mere pleasure; once a contract is formed it is governed by its own terms, not by law; the parties, and only the parties, can terminate it completely. This is the famous "will theory" of contract; it was explicitly hostile to the richly ascriptive contract order envisioned by Parsons. This understanding would eventually morph into the ideas that contract is by definition *free*; that the role of the state in contract is to "let it be"—*laissez faire*; and that contract is the paradigm body of law for emerging modern capitalism and its market.

For Bishop, marriage creates not only "rights, duties and obligations," but "disabilities, and . . . privileges between husband and wife."[139] This is a small lexical move, but one that is pregnant with possibility. Bishop's formulation is continuous with Parsons's segregation of married women into his list of "disabled persons." For Bishop, however, it is not the wife alone but both parties who are disabled: no one can "take the power over the wife from the husband, and place it in her or any other; or the right of provision and protection of the wife from her husband[.]"[140] We are seeing here the inception of the legal idea that rights belong to contract and are general, while the obligations of marriage are not rights but disabilities, and are special, exceptional.

The public, ascriptive, and special character of marriage finds its warrant in several other rules that are deemed alien to contract. Lord Robertson, as we've seen, observed that, even though insanity rendered a spouse permanently incapable of fulfilling essential marital duties, the marriage remained indissoluble.[141] An equally indissoluble marriage could be created by parties "who are not capable of forming any other lawful contract"—for instance, minors.[142] And the public will applies criminal penalties to violations of the most important obligations of marriage:_"The breach of some of its obligations has in general been considered as a violation of the fundamental laws of the State, and

138. *Id.* § 36, at 31 (quoting FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103, at 89).

139. *Id.* § 35, at 30 (quoting *Dickson*, 1 Yer. at 112).

140. *Id.* § 36, at 31 (quoting FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103, at 89); *see also id.* ("it is not in the power of the *parties*, though of common consent, to alter any substantial [element]") (quoting FRASER, DOMESTIC RELATIONS (1st ed.), supra note 103, at 89) (emphasis added).

141. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 109, at 101-02 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 397-98 (Lord Robertson)).

142. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 35, at 30 (quoting *Townsend*, 4 Del. at 442).

therefore visited with severe penalties[.]"[143]

Finally, marriage-as-status contains not only the husband and wife but the parent and child. As we've seen, Lord Robertson saw these relations as radiating weblike throughout society: marriage " . . . confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society."[144] And these relations, too, reflect not the will of the parties but the will of the state: the statuses of parent and child "can never be taken away, or in the slightest degree infringed by the will or acts of one or both of the parties."[145]

This understanding of marriage as fundamental was remarkably sentimental, but the sentiments are very stern. The late-nineteenth-century cult of domesticity—with its insistence on mutual affection, mutual succor, and the delights of mutual companionship—makes a very scant appearance in Story's and Bishop's definitions of marriage. Instead, all the references to that effect that I have been able to gather so far are basically about social control and moral self-regulation. Thus, Story acknowledged the moral and affective dimensions of marriage this way: "Upon its sound morals, the domestic affections, and the delicate relations and duties of parents and children, essentially depend."[146] This is far more tender than Story's assertion of the husband's right to the wife's property in the *Dartmouth College* case, but it is not about mutual affection either: the ordering of domestic affections and delicate relations *by sound morals* is the new point. Bishop never alludes to the emotional life of marriage, except though his quotations from a single case, *Dickson v. Dickson's Heirs*: there, marriage is said to produce "feelings" arising from "a principle in our nature" which require marriage if we are to "exist in a civilized state[.]"[147] That is to say, marriage transforms potentially destructive natural appetites into well ordered civilized feelings.

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143. *Id.* § 36, at 31 (quoting FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103, at 89).

144. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 109, at 101 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 397 (Lord Robertson)); *see also* BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 36, at 30 (quoting FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103, at 89).

145. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 36, at 30 (quoting FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103, at 89).

146. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 200, at 168.

147. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 35, at 30 (quoting *Dickson*, 1 Yer. at 112).

To sum up: marriage is fundamental, public, controlled by the will of the state rather than that of the parties. It is the opposite of contract, which is variable, private, and controlled by the will of the parties not that of the state. One consequence of this transformation can be detected through another Reeve/Bishop comparison: whereas for Reeve the law of husband and wife belonged in the same book with the law of master and servant—a housing continuous with Blackstone's "private oeconomical relations"—for Bishop the law of marriage and divorce was a separate legal topic. The law of master and servant was migrating to contract,[148] partly because it was being delinked from marriage and divorce.

Dividing marriage from labor was a fundamental change of immense social and political importance, in part because it implicated slavery, the single most controversial and politically decisive issue in mid-nineteenth-century America. The necessity of this transformation did not occur to Bishop, who seems a little tone deaf to what was at stake here. Bishop quotes Chief Judge Taney's decision in *Strader v. Graham*[149] as consistent with his rule about jurisdiction and choice of law in interstate divorces: the right law to apply was the law of the domicile—the slave's domicile, it seems, in *Strader*, and that of the spouses in divorce cases. Thus as Chief Justice Taney intoned in *Strader*, "Every State has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory."[150] In *Strader* itself, this meant that Kentucky courts were entitled to apply Kentucky law to the question of the status, slave or free, of two enslaved musicians who travelled to Ohio at their owner's behest and then fled; slave-state courts could award damages against those who received the slaves in Ohio and let them escape; nor could the defendants maintain in their defense that the musicians had become free upon arrival in Ohio. *Strader* was immediately and intensely controversial, because it implied that private and legal actors in free states were obliged to respect and enforce the enslavement of sojourners in the North who were held to slavery in the South.

Bishop seems not to have grasped that, though technically the domicile

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148. For a gripping exposition of this process as it rearranged, through wave after wave of restructuring and recharacterization, the relations of master and slave, master and servant, and contract for the sale of free labor, see ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 (1991).

149. Strader v. Graham, 51 U.S. 82 (1850),

150. *Id.* at 93, *quoted in* BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, at 583.

rule is the same for slavery and marriage, abolitionists in the North would see the *Strader* rule as the equivalent of a rule requiring Scottish courts to allow English husbands sojourning in Scotland to cage up and beat their wives because that was allowed under the English law of marriage. Instead, he gives a bold misreading of *Strader,* making it consistent with his choice of law rule for marriage: "if two persons in South Carolina sustain the mutual status of master and slave, the tribunals of Massachusetts will take cognizance of it while they remain there; but if they remove to Massachusetts, the relation will not be recognized in the latter State, because slavery is against the policy of its laws, and because, indeed, they know of no such condition existing within its borders."[151] The strongest suggestion that he senses something is awry here comes when he deduces from his *Strader* quotation, plus another from Burge's *Colonial and Foreign Laws*[152]—both of which speak of the status of *persons*—a rule about the status of *marriage*: "We have seen that *marriage is a status*; and the question of *divorce*, therefore, is one of *status*." Bishop summarizes these propositions without mentioning that he is also substantially transforming them. I think we are seeing here the beginnings of a very American resistance to the civilian "law of persons," and to the choice of law consequences of that legal idea, in particular to the idea that slave status belonged to enslaved persons and had to be respected even in free states. Dividing marriage from the law of labor was a crucial move, as it allowed them to develop different choice of law rules: marital status could be untethered from the emerging idea that labor was always contractual.

For Bishop, the locus of marriage was complex. Marriage was both universal and local. On one hand, it was *iuris gentium* and therefore an inescapable part of every sovereign legal order.[153] As Bishop put the point: "Marriage, being founded in nature, is a thing of natural law, and under that law it is entered into by the mutual consent alone of two competent persons. From the law of nature it has ascended through the municipal institutions of all civilized countries into the general

151. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 718, at 585.

152. Burge, Bishop reports, "says the status of persons is 'conferred by the laws of the domicil'; and within this principle he expressly includes the condition of marriage, in respect both to its institution and dissolution." *Id.* at 582-83 (quoting BURGE, COLONIAL AND FOREIGN LAWS, *supra* note 118, at 57-58).

153. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 109, at 101 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 397 (Lord Robertson)).

international code."[154] No civilized state could disestablish marriage, and every state must recognize particular marriages that were entered into according to the law in force where they were contracted. The formation of marriage was contract, and contract was universal: "As to the constitution of the marriage, as it is merely a personal, consensual contract, it must be valid every where, if celebrated according to the *lex loci*[.]"[155]

But unlike contract, which must also be performed and enforced under the *lex loci,* the law of the ongoing marriage could, did and should vary significantly according to the law of the state of domicile, and that (unlike slave status for Justice Taney) could change as the parties moved about the face of the earth. These rules were not universal; they were local: particular sovereigns had exclusive power to set down the particular laws governing marriages within their territories. Bishop insisted on sovereign control again and again: "Now all courts recognize the laws both of nature and of nations, and draw from them rules for decision in proper cases, when not controlled by any superior provisions of the municipal, statutory, or common law"[156]; "[m]arriage . . . is regulated and controlled by the sovereign power of the State"[157]; the power over marriage and divorce "cannot be surrendered or subjected to political restraint or foreign control, consistently with the public welfare. And therefore, marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts."[158]

Whereas the contracts within a given sovereign state might be governed by law from different foreign states, and thus were, in our contemporary parlance, legally plural, the marriages resident there were legally all the same. And whereas the terms of particular contracts varied immensely according to the will of the parties, the terms of marriage did not: as Bishop insisted, "The obligation is created by the public law, subject to the public will, and not to that of the parties."[159] This is a major division of law; its implications would not be clear, even to Bishop, until the

154. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 144, at 113 (footnotes omitted)..

155. STORY, CONFLICT OF LAWS (1st ed.), *supra* note 48, § 109, at 102 (quoting FERGUSSON, REPORTS, *supra* note 56, app., n.G, at 398 (Lord Robertson)).

156. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 144, at 113.

157. *Id.* § 34, at 29 (quoting *Maguire*, 7 Dana at 183).

158. *Id.* (quoting *Maguire*, 7 Dana at 183).

159. *Id.* § 34, at 30 (quoting *Maguire*, 7 Dana at 184).

architecture of classical legal thought worked itself pure.

VI. THE PARADOX OF MARRIAGE AS STATUS NOT CONTRACT: *MAYNARD V. HILL*

The U.S. Supreme Court's 1888 decision in *Maynard v. Hill* cemented into our constitutional order the idea that marriage is status, almost verbatim as Bishop described it:

> [W]hile marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relationship between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its public character the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[160]

Despite the fact that this passage foregoes use of the term "status"—the Supreme Court would not define marriage as status until 1890[161]—it has become the *locus classicus* for marriage-as-status thinking. What is less often noticed is the deeply paradoxical relationship between the Court's idea of marriage and the actual attributes given to marriage in its actual holding. In order to understand this paradox, it will be helpful to review the history of the case.[162]

David and Lydia Maynard married in Vermont in 1828; soon they moved to Ohio and had several children. In 1850 David left for what is

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160. Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

161. United States v. Grimley, 137 U.S. 147, 151 (1890).

162. I derive the following story behind this famous case from *Maynard v. Hill*, 125 U.S. 190 (1888); *Maynard v. Valentine*, 3 P. 195 (Wash. 1880) ; and THOMAS W. PROSCH, DAVID S. MAYNARD & CATHERINE T. MAYNARD: BIOGRAPHIES OF TWO OF THE OREGON IMMIGRANTS OF 1850 (1906). I have tried to make the story told above perfectly consonant with all these sources. This was not difficult, as — though each text provides more detail here or there — there are no material disagreements among them. Where I rely on only one of these sources rather than several of them, I provide a citation.

now Seattle, promising to bring his wife to join him within two years and to pay support in the interim. He did neither; instead, in 1852 he obtained through political means of some sort[163] a bill of divorce from the Oregon Territorial legislature. Lydia Maynard received no notice of, and did not know about, this event. There seems to be no evidence that the legislature did, or was legally required to, inquire into the existence of any grounds for the divorce. (At that time in the Oregon Territory, as in many states, legislative bills were the only way to obtain a divorce; judicial divorce was still a controversial novelty.) Very promptly after the bill was issued, David married another woman.

The case began with David's effort to perfect his title under the Donation Act in some land located in what was to become Seattle. He had applied to the General Land Office in Oregon Territory, and it, in turn, found Lydia Maynard somehow and notified her of the proceedings. (As his wife she would have dower rights that would travel with the title of any land of which David was seized during the marriage. Without her waiver of those rights, she would be entitled on his death to a life interest in a portion of those lands, even if they had been sold to others.) Lydia travelled to Seattle to assert her interests: her claim was not against David or against David's second wife, who made no claim to the land, but against various other settlers to whom David had made conveyances. In the first hearing of the matter Lydia won. When David appealed to the same commissioner, however, he prevailed.[164] Well after both David and Lydia died (in 1873 and 1875, respectively), her children sued in the territorial court, lost at every level, and appealed to the U.S. Supreme Court.

As we have amply seen, by that time a crucial question had emerged that posed a deep challenge to a well-entrenched representation of

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163. Prosch tells us that Maynard was one of the small group of settlers who formed the then-brand-new legislature for the Oregon Territory, that he got his bill of divorce at its initial session; and that at the same session he also successfully proposed the formation of new counties and secured the location of the King County seat on Maynard's donation claim. Prosch concludes: "It is plain from the results that the Doctor was looked upon at Salem as a pretty good fellow. That he could have anything he chose to ask for that the Legislators could give was quite evident." PROSCH, *supra* note 162, at 33. Maynard's biographer is clearly concerned here about the fairness of this unilateral divorce and of the home cooking that produced it.

164. This is one of the few facts for which I have only one source. PROSCH, *supra* note 162, at 55-56. Prosch was very sympathetic with the interests Lydia would have displaced, "the Terry estate, Hugh McAleer and others who had bought of Maynard and did not want to lose their properties." *Id.* at 55. "Of course, all this made much commotion in Seattle. . . . It was felt that if the new claimant from Wisconsin [Lydia's residence by that time] won her case the people of Seattle would have to pay." *Id.* at 56.

marriage as contract: in issuing the divorce, had the Territorial legislature violated the Contracts Clause of the Constitution? The Contracts Clause stipulates that "No state shall . . . pass any . . . law . . . impairing the Obligation of Contracts."[165] If the divorce were an impairment of contract, the Maynard divorce would be void; Lydia would be recognized as David's lifelong wife; and under the Donation Act she would have legally protected dower rights in David's land. For her (actually, by the time the Supreme Court ruled on the case, for her kids) to get any relief, then, the Court would have had to say that Lydia and David Maynard's marriage was a contract.

It would have been easy: there was massive legal authority in place to support a description of marriage as contract. Blackstone had described marriage as a "civil contract," and myriad courts had followed suit.[166] But it would have been a highly disruptive move for the Court to make. Many controversial questions—whether states had the power to grant divorces at all, and if so, whether courts or legislatures were empowered to do this and what grounds were needed to justify particular divorces—would be instantaneously federalized and constitutionalized if the Contracts Clause invalidated David and Lydia Maynard's divorce.

But here is the rub: in the name of honoring marriage-as-status, the Court effectively validated David Maynard's decision to walk away from his first marriage with Lydia Maynard with fewer legal consequences than would have followed if he had failed to fulfill a contract to deliver a peck of grain. Because marriage is a status, completely public in character, an invariable obligation, and the foundation of family and society—David was divorced from Lydia without having performed any of the elemental duties of his marriage to her, without her fault, without even notice to her! Lydia lived out her life in Ohio as a wife; if she had sued David there to enforce his marital obligations, the marriage would have been "status" there too; meanwhile her husband was for a brief time single and then validly married to another![167]

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165. U.S. CONST. art I, § 10, cl. 1.

166. 1 BLACKSTONE, *supra* note 8, at 421. A Westlaw search for state cases describing marriage as a "civil contract" before 1888 yielded 245 decisions.

167. The idea that domicile produces both subject matter jurisdiction and choice of the forum's law was behind the validity of David Maynard's divorce: as the Territorial Supreme Court reasoned, "it is said that the wife was never domiciled in the said territory of Oregon, and consequently said act can have no effect upon her or her rights; but with this claim we cannot agree, for if we admit that under the facts pleaded she was domiciled in the state of Ohio, still, as the husband was a resident of said territory, the legislature could regulate his status therein; and, having released him from the bonds of his marriage, he was, at least while in said territory, absolved from all its duties and thus

David and both of his wives had a pretty clear idea of their plural status. On the day Lydia arrived in Seattle to put in her presence in the initial litigation over the land claim, we are told by his biographer,

> He stepped into the barber shop, and said: "Dixon: fix me up in your best style." "What's up, Doctor? What are you going to do?" "I am going to give the people here a sight they may never have again. I'm going to show them a man walking up the street with a wife on each arm." Sure enough; when the steamer came in from the upper Sound Maynard and his second wife were there to meet the first wife, and they walked together to his home where they dwelt until Lydia left on her return to Wisconsin, somewhat to the surprise of the general public.[168]

That is to say, marriage as status-not-contract is a doctrinal and ideological reality, but its contents do not entirely correspond with marriage as a positive, enforced, lived legal institution: marriage as its *effects*.

This paradox may be even clearer if we contrast Bishop's repeated insistence that marriage is not terminable with the cases he depended on for his underlying proposition that marriage is status. As we have seen, Bishop insisted that "marriage . . . is regulated and controlled by the sovereign power of the State, and cannot, like mere contracts, be dissolved by the mutual consent only of the contracting parties[.]"[169] Nor can spouses "make the marriage for a time[.]"[170] Indeed, "society has even more interest in preserving it than the parties themselves."[171] "[I]t is a civil status, existing in one man and one woman, legally united for life[.]"[172] You would think that divorce did not exist.

Furthermore, all of the cases that Bishop cites to assert the central importance of marriage to the stability of society, on inspection, turn out to hold particular *divorces* valid. Not only that: they consistently elect an expansive rather than a narrow reallocation of rights arising from the

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released he occupied the status of a single and not that of a married man, and the wife could not come here and assert any right as such wife thereafter." *Maynard v. Hill*, 5 P. 71 (Wash. 1884). Note the proviso that the court's own ruling probably did not apply in Ohio, and that David Maynard was probably married to Lydia Maynard there. The same idea, adopted in the jurisdiction of Lydia Maynard's domicile, would produce exactly the opposite, equally correct outcome.

168. PROSCH, *supra* note 162, at 60.

169. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 34, at 29 (quoting *Maguire*, 7 Dana at 184).

170. *Id.* § 36, at 31 (quoting FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103, at 89).

171. *Id.* § 35, at 30 (quoting *Dickson*, 1 Yer. 110, 113 (1826)).

172. *Id.* § 29 at 25.

divorce. They all intensify their commitment to the *idea* that marriage and its stability were fundamental to social order, while simultaneously intensifying the exposure of *actual* marriages to divorce, to the consequences of divorce, and to the interstate effects of divorce decrees.

In one of Bishop's marriage-as-status cases, a woman who had obtained a divorce on the grounds of her husband's fault sought to assert her rights to her separate property, which her husband had encumbered in the exercise of his curtesy rights. The court held that the divorce had dissolved his property rights arising from the marriage just as effectively as his death would have done.[173] In another case, the court was faced with a statute rendering all divorce decrees final. Even though the challenged divorce had been granted to a nonresident wife against a nonresident husband in clear legal error, the court upheld it. The best it could do for the husband was to void and remand the property decree.[174]

Clearly both courts had alternatives that could have protected the objecting husband: in the first case, they could have protected his curtesy rights; in the second they could have found a way to invalidate his wife's jurisdictionless divorce. Instead, the judges ratified sovereign power to terminate marriages—and thereby rendered marriage *more*, not *less*, socially fragile. The third case makes the point with striking *éclat*. In that case, the wife had abandoned her first husband, refused to return to him, and moved to Tennessee. He sued for divorce in the state of their domicile, Kentucky. Her answer admitted her fault and averred that she "never would again live with him: that in so doing she had consulted her own happiness, which she supposed it was her duty to do."[175] Under Kentucky law, once divorced she was not free to remarry and would have been liable to a charge of bigamy if she attempted it. But she remarried in Tennessee. When her second husband died soon thereafter, she asserted dower rights there. In a challenge brought by the second husband's other heirs, the Tennessee Court was unable to find any legal basis in its own law for invalidating this second marriage. Bishop quotes a paragraph that can only be read as the Court's protracted cry of horror at this gap in local law which left it bound to grant her dower rights in the second husband's estate.[176]

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173. *Id.* § 35, at 30 (quoting *Townsend*, 4 Del. at 442).

174. *Id.* § 34, at 29-30 (quoting *Maguire*, 7 Dana at 184-85, 189).

175. *Id.* § 35, at 30 (quoting *Dickson*, 1 Yer. at 111).

176. *Id.* These excerpts from the original passage will convey some of its intensity of feeling: "I think not too much will be asserted, when it is said, that when a community, upon every slight pretext,

The paradox of all these cases lies at the disjuncture between the state's control over marriage and marriages, on one hand, and individuals' strategies exploiting choice-of-law rules to wrest control into their own hands. But this power of the sovereign to determine the validity of marriage and divorce obscured a profound contradiction between the jurists' ideology that marriage-as-status-not-contract constituted marriage as fundamental to social order and the actual outcomes of these and dozens if not hundreds of other cases. Bishop does emphasize that divorce is available only as a sanction on marital wrongdoing: "The suit for divorce . . . is not an action upon contract, but a proceeding *sui generis*, founded upon the violation of duties which the law enjoins[.]"[177] This justification for the rise of divorce served to mediate the contradiction that is so patent here.[178]

In at least one of Bishop's own cases, the court thought that the judicial power reached so far as to dissolve marriages in which both spouses were happy, if dissolution served the public good or justice. According to the court in *Maguire v. Maguire*, marriage

> . . . establishes fundamental and most important domestic relations. And therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like mere contracts, be dissolved by the mutual consent only of the contracting parties, but may be *abrogated by the sovereign will, either with our without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved.* Such a remedial and conservative power is inherent in every independent

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grants divorces, to gratify the lust or interest of particular individuals, as a general rule of polity, corruption and political death are approaching. . . . Every honest and prudent man, who wishes well to the society in which he lives, ought to shudder whenever he sees the supreme power of the country legislating upon this topic." *Id.*

177. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 38, at 32.

178. It was an important part of the Supreme Court's articulation of the new doctrine in *Grimley*: "Marriage is a contract; but it is one which creates a *status*. Its contract obligations are mutual faithfulness, but a breach of those obligations does not destroy the status or change the relations of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other — no matter how great their disregard of marital obligations. It is true that courts have power under the statutes of most States, to terminate those contract obligations and put an end to the marital relations. But this is never done at the instance of the wrongdoer. The injured party, and the injured party alone, can obtain relief and a change of *status* by judicial action." *United States v. Grimley*, 137 U.S. at 151-52.

nation[.][179]

The *Maguire* court saw a smooth, coherent legal order in which the sovereign held all relevant powers and individual spouses none (aside from the decision to enter into the marital relation). What made the bond between individual husbands and wives more contingent, strengthened sovereign control over marriage. *That* is what intensified its fundamentalness. But it left individual marriages *more* fragile than contract: "it can be violated and annulled by law, which no other contract can[.]"[180] This contradiction between the law on the books and the law in action is a deep trait of Bishop's invention, marriage-as-status-not-contract.

VII. RECEIVING "SYSTEM": SAVIGNY

In an 1829 address to the Suffolk Bar, Story looked with dread at the "mass of the law, . . . accumulating with an almost incredible rapidity" and warned of the "fearful calamity, which threatens us, of being buried alive, not in the catacombs, but in the labyrinths of the law."[181] Impending chaos could be averted only if American lawyers acquired "habits of generalization[.]"[182] Very early on, Story felt the impulse to classicize which, around the time of his early death in 1845, was sweeping the American legal intelligentsia and, by the 1880s, transforming American law.

The classicizing impulse in America was driven by envy not of the *Code Napoleon* but of modern Roman law, which was being built mainly in Germany in the early decades of the nineteenth century. Story counseled the Boston bar that their salvation lay in foreign, civilian, and especially Roman sources:

> Where shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposit of the learning and labors of the jurists of the ancient world, the Institutes and Pandects of Justinian. The whole continental jurisprudence rests upon this broad foundation of Roman wisdom; and the English common law, churlish and harsh as was its feudal education, has condescended silently to borrow many of its best principles from

179. BISHOP, MARRIAGE AND DIVORCE, *supra* note 18, § 34, at 29 (quoting *Maguire*, 7 Dana at 184) (emphasis added).

180. *Id.* § 35, at 30.

181. Story, *Address to the Suffolk Bar*, *supra* note 99, at 31.

182. *Id.*

this enlightened code.[183]

Story was not alone. In 1818, Hugh Swinton Legaré, a South Carolina lawyer hungry for legal enlightenment, was foiled by political turmoil on the Continent in his original desire to study law in Germany, and went instead to Scotland.[184] (We will see again and again that the Scottish connection played an important role in transmitting civilian influence to America.) Legaré was in the vanguard: as Michael H. Hoeflich relates, over the next two decades American lawyers joined the global trend, and went to Germany for legal study.[185] To Legaré, Blackstone's *Commentaries* was a throwback: "in spite of all the pompous eulogies that have been passed upon" this classic treatise, "'it is a good gentleman's book, clear, but not deep.'"[186] Instead, American jurists should emulate the civil law of his time:

> In comparing what the Civilians have written upon any subjects that have been treated of by English text writers, or discussed in the English courts, it is, we think, impossible not to be struck with the superiority of their truly elegant and philosophical style of analysis and exposition. Their whole arrangement and method—the division of the matter into its natural parts, the classification of it under the proper predicaments, the discussion of principles, the deduction of consequences and corollaries—everything, in short, is more luminous and systematic—everything savors more of a regular and exact science.[187]

In making this turn, American jurists joined what Duncan Kennedy has called the "first globalization of law and legal thought,"[188] an ascendency of German legal thought and a complex process of transplanting it through colonization, indirect rule, inspiration of local elites, travel for legal education, political and economic forces seeking uniformity of law, and the sheer fashionableness and charisma of Roman law. Ugo Mattei observes that, by the early nineteenth century, "German scholarship became the most prestigious source of law. . . . Everywhere, in the

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183. *Id.* at 29.

184. Michael H. Hoeflich, *Savigny and his American Disciples*, 37 AM. J. COMP. L. 17, 28 (1989) [hereinafter Hoeflich, *Disciples*]; Hoeflich, *Friendships*, supra note 53, at 607.

185. Hoeflich, *Friendships*, *supra* note 53, at 609-11. *See also* Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966) [hereinafter Stein, *Attraction*].

186. Stein, *Attraction*, *supra* note 185, at 429 (quoting 2 WRITINGS OF HUGH SWINTON LEGARÉ 110 (1845) [quoting Horne Tooke, without citation]).

187. *Id. See also* Hoeflich, *Friendships*, *supra* note 53, at 607 (quoting the typescript of a letter dated April 2, 1829 in the Library of Congress).

188. Duncan Kennedy, *Three Globalizations*, *supra* note 1, at 21, 25-37.

common law, in the civil law, and even in non western legal systems 'the German systematic and dogmatic method and the concepts defined within it were spreading triumphantly.' . . . In the common law world, basic introductions to English law . . . employed the typical German terminology to analyze common law structures."[189] And it wasn't just German terminology that travelled: German legal ideas, legal books, legal methods, legal education and legal taxonomy were charismatic and, in some colonial settings, virtually unavoidable.[190]

Story and Legaré yearned for system, and many of the things they wanted turned out to be highly salient characteristics of classical legal thought. The passages just quoted show that they hungered for general principles, elegance of analysis and exposition, and a philosophical style of analysis; that they loved the idea that deduction and analogy, working down from general principles, would render the law logical and coherent. But the *desideratum* that boosted the status/contract distinction to structural dignity was premised on the idea that law divides into natural parts, so that writing about it should imitate its form through the use of correct classifications. In the late 1820s, Story and Legaré already thought that the arrangement of legal topics expressed something essential about each of them individually and about the system of which they are the part. This is precisely the impulse which, in art and architecture, characterizes a classical style. I will call it the classical ideal and will speak of a desire for system. And I am going to argue that, as the yearning for system emerged in the first half of the nineteenth century in America—and not coincidentally all over the world—it carried the ideas that, within private law, contract and marriage differed on an axis dividing the general from the particular.

Nor was legal thought the only driving force behind the segregation of family law/domestic relations/personal status law. Again and again, in different ways in different places, an emerging global market known as capitalism found the contract/marriage distinction in legal thought and

189. Mattei, *supra* note 1, at 202-03 (quoting Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 37 AM. J. COMP. L. 1, 240 (1991)). The exceptions were the relatively few sites primarily attuned to French influence. *Id.* For a fascinating account of how Quebeçois lawyers resisted German influence in favor of French sources, and of the political and ideological implications of this move, see Eric H. Reiter, *Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec*, 22 L. & HIST. REV. 445 (2004).

190. *Compare* Mattei, *supra* note 1, who explains the spread of ascendant legal ideas as a function of desire for them in sites of reception, *with* Kennedy, *Three Globalizations*, *supra* note 1, who tends to attribute it to colonialism, the spread of capitalism, the role of colonial elites, and other forms of power.

made it newly important. Indeed, Story's address to the Suffolk Bar specified the need for modernization and uniformity of commercial law as a primary reason to turn to civilian sources: "The whole continental jurisprudence rests upon this broad foundation of Roman wisdom; and the English common law, churlish and harsh as was its feudal education, has condescended silently to borrow many of its best principles from this enlightened code . . . . The law of contracts and personalty, of trusts and legacies, and charities, in England, have been formed into life by the soft solicitudes and devotion of her own neglected professors of the civil law."[191] Just a few years later he wrote to Francis Lieber that "I look chiefly to the study of foreign law, and especially foreign commercial law, for the most important improvements which are likely to be made in our commercial jurisprudence."[192] Other American jurists concurred. David Hoffman, a professor of law at the University of Maryland from 1816-36, and perhaps the first designated professor of law in America, advised: "In our courts of Admiralty and maritime jurisdiction, also, and in our courts of Equity, on various subjects, as likewise in the law of Contracts, of Executors, of Bailments, Legacies, Presumptions, Accession, Confusion, Extinguishment, Set-Off, &c. &c we should appeal to the Civil Law . . . ."[193] The rise of capital brought with it the rise of contract, and as contract moved into place as the general, it drew its opposite, status, into place as the particular.

Thanks to bibliographical research by Hoeflich[194] and political historical analysis by John W. Cairns,[195] together with the resources of the Harvard Law Library, we can watch the desire for system emerge in American legal life. I will pay special attention to indications that Americans noticed in the work of Gustav Hugo, the founder of the German Historical School, and Freidrich Carl von Savigny, the proponent of a contract/family distinction which was to infiltrate Bishop's contract/status distinction and raise it to structural importance. Once again, the Scottish avenue for civil-law influence in America is crucial. Cairns argues that, as English initiatives to modify Scottish law—

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191. Story, *Address to the Suffolk Bar, supra* note 99, at 29 (citation omitted).

192. Letter from Joseph Story to Francis Lieber (Jul. 24, 1833) in Hoeflich, *Friendships, supra* note 53, at 604.

193. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 508 (2d ed. 1836).

194. In this research, I found Hoeflich, *Disciples, supra* note 184, particularly useful: he identified most of the texts that I inspected to calibrate Savigny's influence in American law.

195. John W. Cairns, *The Influence of the German Historical School in Early Nineteenth Century Edinburgh*, 20 SYR. J. INT'L. L. & COM. 191 (1994).

especially the law of marriage and divorce—accelerated in the early nineteenth century, Scottish jurists resisted by claiming that law was historically contingent and local, not universal and rational.[196] This, he plausibly claims, made them particularly happy to adopt the German Historical School as their favorite source of authority for legal ideas.[197] Both Cairns and Hoeflich focus on two important figures in the early years of the Scottish Enlightenment, David Irving and John Reddie, both active promoters of the German Historical School.[198] What I add to their work here is some very telling detail about how Irving's and Reddie's books were received in America.

In 1846 the Harvard Law Library published a catalogue, almost certainly composed by law student John Gage Marvin, showing that it not only had Irving's *Civil Law* in its 1837 edition but held two copies of it, a rare practice perhaps motivated by an expectation of heavy use.[199] It also listed two copies of Savigny's *History of the Roman Law in the Middle Ages* in the original German, two copies in the 1839 French translation, and two copies of the 1829 Edinburgh-based English translation, plus two topical treatises by Savigny in French translation.[200]

In 1847, John Gage Marvin published a massive *Legal Bibliography* constituting his then-ideal law library.[201] Here Marvin listed Irving's *Civil Law*,[202] and added Reddie's 1826 *Historical Notices of the Roman Law, and of the Recent Progress of its Study in Germany*,[203] each with a paragraph of special praise. When Story died in 1845, he owned an

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196. *Id.* at 193.

197. *Id.* at 194.

198. When Legaré studied in Edinburgh, Irving was his teacher. Hoeflich, *Friendships*, *supra* note 53, at 607.

199. HARVARD LAW SCH. LIBRARY, A CATALOGUE OF THE LAW LIBRARY OF HARVARD UNIVERSITY IN CAMBRIDGE, MASSACHUSETTS 120 (4th ed., Cambridge, Metcalf & Co, Printers to the University, 1846) [hereinafter HARVARD 1846 CATALOGUE]. Hoeflich indicates that this list was compiled by John Gage Martin. Hoeflich, *Annals*, *supra* note 53, at 333. For a fascinating account of commercial and auction catalogues during this period, see M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA (2010), especially Chapter 3, "Spreading the Word: Catalogues and Cultivation," *id.* at 74-104, and Chapter 4, "Bidding for Law Books," *id.* at 105-24.

200. HARVARD 1846 CATALOGUE, *supra* note 199, at 217.

201. J.G. MARVIN, LEGAL BIBLIOGRAPHY OR A THESAURUS OF AMERICAN, ENGLISH, IRISH AND SCOTCH LAW BOOKS: TOGETHER WITH SOME CONTINENTAL TREATISES. INTERSPERSED WITH CRITICAL OBSERVATIONS UPON THEIR VARIOUS EDITIONS AND AUTHORITY. TO WHICH IS PREFIXED A COPIOUS LIST OF ABBREVIATIONS, 404, 631 (Philadelphia, T. & J.W. Johnson, 1847) [hereinafter J.G. MARVIN, LEGAL BIBLIOGRAPHY].

202. *Id.* at 415.

203. *Id.* at 602.

autographed presentation copy of Reddie's book.[204] Irving, "an early exponent of Savigny,"[205] was the Keeper of the Advocates' Library in Edinburgh from 1820 to 1848.[206] He had published a first edition of *Observations on the Study of Civil Law* for his students in 1815, dedicating it to Gustav Hugo and referring particularly to Hugo's first edition.[207] Irving's 1837 edition—the one listed by Marvin—adds significant passages dependent on Savigny's *History of the Roman Law in the Middle Ages*, specifically admiring Savigny for restoring the continuity of Roman Law throughout the feudal era.[208] Marvin also added recently published English-language translations of Hugo's *Survey of the Roman or Civil Law,* and of Savigny's *History of the Roman Law in the Middle Ages* and *Of the Vocation of Our Age for Legislation and Jurisprudence.*[209]

Marvin's *Legal Bibliography* thus manifests a growing appetite for and access to knowledge about the German Historical School. The book's structure is a further innovation among general booklists, as it integrates foreign with Anglo-American sources in a single list. Hoeflich comments:

> The great genius of Marvin's work lay precisely in his integration of foreign legal materials with Anglo-American materials and in treating them all in exactly the same way. The signal to the reader was clear: for purposes of legal authority, foreign materials could be just as useful as Anglo-American materials. . . . Marvin's 1847 *Legal Bibliography* may well be viewed as one of the most important practical tools in Story's attempt to foster the spread of continental legal learning in the United States.[210]

A remarkable manuscript inscribed *The Property of John Gage Marvin[,] Librarian of Dane Law School[,] 1845* shows Marvin coming up with his classicizing idea. This MS is a handwritten alphabetical list of legal books. On the recto of the first leaf we find the following dialogue

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204. PHILLIPS AND SAMPSON, CATALOGUE OF LAW AND MISCELLANEOUS BOOKS BELONGING TO THE LIBRARY OF THE LATE MR. JUSTICE STORY 8, entry #199 (Boston, Alfred Mudge, 1846).

205. Hoeflich, *Bibliographical Perspectives, supra* note 53, at 52.

206. David Laing, *Memoir of Dr Irving, in* DAVID IRVING, THE HISTORY OF SCOTTISH POETRY xix, xxi-xxii (Edinburgh, Edmonston and Douglas, 1861).

207. DAVID IRVING, OBSERVATIONS ON THE STUDY OF THE CIVIL LAW ded. p., 56 n.x (Edinburgh, A. Balfour, 1815).

208. DAVID IRVING, INTRODUCTION TO THE STUDY OF THE CIVIL LAW, ded. p., 83-84, 164-165 (London, A Maxwell 1837).

209. MARVIN, LEGAL BIBLIOGRAPHY, *supra* note 201, at 404, 631.

210. Hoeflich, *Annals, supra* note 53, at 340-41.

between Marvin and himself. I use different typefaces to indicate Marvin's shifts from pencil to pen and back; clearly he wrote these entries at intervals, not all at once; see Appendix 5 for a photographic reproduction:

> I will prepare the American part and if it takes in a second edition enlarge and incorporate the English and Continental Bibliography. . . . In this way there will be a continual opportunity of improvement.
>
> *Perhaps it will be best to omit the Continental writers for a new work.*
>
> How would it do to include the continental with the other and make a sort of an Encyclopedia of Legal Biography?[211]

We see Marvin here in the very act of conceiving the encyclopedic legal bibliography.

And there is more to be gleaned, thanks to Marvin's hopes of a second edition of the *Legal Bibliography*.[212] Marvin inserted interleaf pages in a copy of his bibliographical masterwork, and made copious handwritten entries on them adding further citations and commentary.[213] We can be sure that Martin made these amendments between February 13, 1847, when he signed off on the printed *Legal Bibliography,*[214] and July 3, 1849, when he departed for California and the Gold Rush.[215] I will call this the *Amended Legal Bibliography.* This interesting volume shows Marvin carrying on his campaign for foreign and especially German Historical School sources. Marvin inscribed several encomia for the German Historical School derived from recently published lectures on the

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211. J. G. Marvin, Biographical and Bibliographical Notes, 1845, Harvard Law School MS 1069 (letter of permission to quote from this MS on file with the author). Thanks to David Warrington for surfacing this remarkable item.

212. MARVIN, LEGAL BIBLIOGRAPHY, *supra* note 201, at vii.

213. J. G. MARVIN, LEGAL BIBLIOGRAPHY, OR, A THESAURUS OF AMERICAN, ENGLISH, IRISH, AND SCOTCH LAW; TOGETHER WITH SOME CONTINENTAL TREATISES. INTERSPERSED WITH CRITICAL OBSERVATIONS UPON THEIR VARIOUS EDITIONS AND AUTHORITY. TO WHICH IS PREFIXED A COPIOUS LIST OF ABBREVIATIONS (Philadelphia, T. & J.W. Johnson, 1847 (letter of permission to quote from this MS on file with the author). The Harvard Law Library's HOLLIS entry for this unique item is Law School Rare K 38 M37x 1847, and it notes: "Copy 1 ... is the author's own copy, interleaved and extended to two volumes, with his extensive holographic notes." The hand is identical to that quoted in note 212 above, from J.G. Marvin's MS booklist of 1845 (letter of permission to quote from the manuscript portions of this document on file with the author).

214. MARVIN, LEGAL BIBLIOGRAPHY, *supra* note 201, at vii.

215. Howard Jay Graham, *John G. Marvin and the Founding of American Legal Bibliography*, 48 LAW LIBR. J. 194, 211 (1955).

history of Roman law, given at the Middle Temple by George Long and published for some reason not in London but in Philadelphia[216]—itself a new entry in the *Amended Legal Bibliography*. I will return to the purpose and contents of Long's lectures anon; here, I want to notice how Marvin deployed them.

Long's *Discourses* declare themselves "indebted" to Savigny in terms that are almost devotional. Of the four precursors which Long identified as constituting his primary sources—Sir Matthew Hale's *Analysis of the Civil Part of the Law*, John Austin's *Outline of a Course of Lectures on General Jurisprudence,* Savigny's *System des Heutigen Römischen Rechts*, and Thibaut's *System des Pandekten Rechts*[217]—Long devoted a special tribute to Savigny:

> [O]bligations may be so great, and the character of him to whom they are due so exalted, that the receiver can only present with all humility the tribute of his gratitude and admiration, and express a hope that he has made a worthy use of those lessons of wisdom, to the understanding of which he has diligently devoted whatever of ability he may possess . . ..[218]

For his *Amended Legal Bibliography*, Marvin added Long's *Discourses* and selected not this passage but another to adorn his entries for Savigny:

> 'It is nothing extravagant when I say that any praise which could be bestowed on the writings of Savigny and Thibout, by any man the most competent to judge, would not be exaggerated. They are characterized by a soundness of knowledge, clearness of expression, perspicuity of [argument] and subtlety and depth of thought, that seldom have been equaled by any writer on any subject, and cannot be surpassed.'[219]

And he quoted from another treatise the following recommendation about Long's lectures themselves: "On the Civil Law, Mr Long's two discourses ~~delivered in the Middle~~ should be read. In these discourses Students will find whence the excellence of the Roman Law arose, and an interesting historical account of it."[220] Marvin was eager to guide his readers to an English language source for Savigny and the German

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216. GEORGE LONG, TWO DISCOURSES DELIVERED IN THE MIDDLE TEMPLE HALL BY GEORGE LONG WITH AN OUTLINE OF THE COURSE (Philadelphia, T. &. J.W. Johnson, 1848).

217. *Id.* at 62.

218. *Introduction* to LONG, TWO DISCOURSES, *supra* note 216.

219. MARVIN, LEGAL BIBLIOGRAPHY, *supra* note 201, at interleaved page facing 631.

220. *Id.* at interleaved page facing 474 (alteration in original).

Historical School, eager to endorse Savigny as a font of legal wisdom, but careful to select passages that tone down Long's introductory rave. He adds praise for Thibout (whose books he never listed, perhaps because he never got a chance to see any of them), Savigny's opponent in the codification debates. Compared to Long, Marvin's attitude of reception is slightly cooler, more reserved.

Long is of particular interest for the reception of German legal thought in America because, at almost exactly the same time that he published his lectures on Roman law, Luther S. Cushing was giving a parallel lecture series at "the Law School at Cambridge"—Cambridge, Massachusetts, that is[221]—and because we have direct evidence that Cushing consulted Long's *Discourses* while he was preparing his lectures for publication. The premise of the German Historical School that Roman sources were not to be imitated slavishly but adapted to the needs of contemporary legal minds was important for both Long and Cushing. Here is a passage from Long's *Discourses* that Cushing wrote onto a slip of paper and inserted into his MS lectures, whence it was included in the printed version of his Harvard lectures:

> The merits of the Roman jurists did not consist in making a systematic arrangement of the whole matter of law, though they have done much towards helping us make it. Their merit lay in their skilful application of principles to the resolving of particular cases in which they display a rectitude of purpose, a happy brevity of expression, and a mastery of their matter, that have commended the admiration of all judges and the best models for our imitation.[222]

Cushing's selective admiration of Long's *Discourses* can help us identify the path chosen by the Americans. The outtakes are significant. Long had been appointed to a new position in the Middle Temple, as the Reader on Jurisprudence and the Civil Law, after a Committee on Legal

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221. LUTHER S. CUSHING, AN INTRODUCTION TO THE STUDY OF ROMAN LAW (Boston, Little, Brown, 1854). Cushing indicates that he gave his lectures in 1848-49. *Id.* at v.

222. LONG, TWO DISCOURSES, *supra* note 216, at 26 n.1. The identical passage can be found in Luther Stearns Cushing, Notes for Lectures on Criminal Law, Roman Law, and Real Property (1848) (unpublished manuscript) (on file with the Harvard Law School Special Collections). Volume 2 of this manuscript is titled *Roman Law*. A torn half-sheet of paper is inserted between pages 26 & 27 of Volume 2 of the manuscript. On one side appears the quotation from Long in a hand that resembles that of the main text, but shakier, surely that of an older or ailing Cushing. On the other side and in another hand appears an account of loans, one of which is dated Oct 1 to Oct 10 1853. Query whether this suggests that the quotation from Long was written after October 1853? At any rate, Cushing borrowed from his transatlantic colleague sometime between 1848 and 1854.

Education in the Middle Temple selected this as the "first step for the promotion of Legal Education[.]"[223] Long was responsible for "General Jurisprudence," that is, for producing a "'Philosophy of Positive Law, as being something which comprehends the principles of all systems of law. By virtue of its universality, it is rightly called General; and inasmuch as it is a systematic exposition of principles with their logical consequences, it is appropriately called a Philosophy.'"[224] The Committee added a focus on Civil Law to "indicate what may be called Modern Roman Law, that is to say, those portions of the civil law which being of a universal character and applicable to the relations of modern society, have formed the basis of the jurisprudence of many continental nations, and entered so largely into our own.'"[225]

Long's *Discourses* include an "Outline of a Course of Lectures on General Jurisprudence and the Roman Law to be Delivered in the Middle Temple, 1846-7." This is a taxonomy of all of law. In English, the closest exemplar is surely Austin's *Outline of a Course of Lectures on General Jurisprudence, or the Philosophy of Law*, which he published as an addendum to his *Province of Jurisprudence Determined*; both of them seem to follow Arnold Heise's outline of civil law published in Heidelberg, in German, in 1807.[226] These outlines of all of law map it into systematic divisions. They culminate, surely, in the stunning fold-out tables of all of law included in Austin's *Lectures on General Jurisprudence*, published posthumously by his wife Sarah Austin in 1863.[227] Appendix 6 reproduces one of Austin's stunning tables. They give visual shape to the idea of law as system. True to his mandate, Long divided his lectures into a General Part and a Special Part: "There are many general notions which pervade all Law and every part of it. These General Notions can be properly explained independently of the Particular

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223. LONG, TWO DISCOURSES, *supra* note 216, at 5.

224. *Id.*

225. *Id.* (quoting the "Report of the Committee of this Society on Legal Education").

226. JOHN AUSTIN, OUTLINE OF A COURSE OF LECTURES ON GENERAL JURISPRUDENCE, OR THE PHILOSOPHY OF LAW, in AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED (London, John Murray, 1832), aft. 391 (hereinafter AUSTIN, PROVINCE); Arnold HEISE, GRUNDRISS EINES SYSTEMS DES GEMEINEN CIVILRECHTS ZUM BEHUF VON PANDEKTEN-CORLESUNGEN (Heidelberg, Mohr und Zimmer, 1807).

227. JOHN AUSTIN, LECTURES ON JURISPRUDENCE, BEING THE SEQUEL TO "THE PROVINCE OF JURISPRUDENCE DETERMINED" TO WHICH ARE ADDED NOTES AND FRAGMENTS NOW FIRST PUBLISHED FROM THE ORIGINAL MANUSCRIPTS (London, John Murray, 1863) [hereinafter AUSTIN, LECTURES]. The LECTURES occupy two volumes, labeled Vol. II and Vol. III, respectively, on their title pages. Sarah Austin's republication of Austin's 1832 *The Province of Jurisprudence Determined* is Volume I in this series. I will follow her numeration.

things to which they apply, and when they are properly apprehended, they render the study of the Special Part easier."[228] Austin recommended precisely the same procedure: "The object . . . is to distinguish the Universal from the Particular."[229]

But here we encounter a distinct difference between Long and Austin. For Long, the General Part of the Outline first defines law and then sets forth its "objects," the Rights and Duties of Persons, divided into the Law of Things and the Law of Persons.[230] The topics of the Special Part are four: "Property of Ownership;" "Contracts (Obligationes);" "Marriage, and the Relations which arise from it;" and "On Testamentary Succession, and Succession ab Intestuto."[231] For Austin,

> The Law of Persons being the Law of *Status*, and the Law of Things being *the* law *minus* the Law of *Status,* it is clear that the distinction between the law of Persons and the Law of Things, turns upon the notion of *Status* or *Condition* . . . . And the bulk of the legal system, *minus* these *status* or conditions, is distinguished by the name of "the Law of Things" from that peculiar department to which conditions are banished.[232]

As Kennedy observed, "The [American] Classics created . . . by subtraction. . . . They created also by abstraction, by asserting and then trying to show that there had been an essence hidden at the core of the pre-Classical hodgepodge."[233] Heise, Savigny, the Pandektists, and Long and Austin following them, all sought a general law, abstracting in part by subtracting from it law that was irretrievably particular. As we will see, the Americans did the same, but they did not do so in the form of outlines of all of law, in fold-out tables, or in top-down establishment of general principles. Nothing of the kind appears in Cushing's contemporaneous lectures on Roman law for his Harvard students. The philosophical approach was not for them. Instead, as we will also see, they built their Classical order topic by topic, abstracting and subtracting topic from topic and then within topics. And in doing so they hewed more closely to Savigny and to Austin than Long did, by deeming Contract the perfect

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228. LONG, TWO DISCOURSES, *supra* note 216, at 58.

229. 2 AUSTIN, LECTURES, *supra* note 227, at 420.

230. LONG, TWO DISCOURSES, *supra* note 216, at 56-57.

231. *Id.* at 59-62.

232. 2 AUSTIN, LECTURES ON JURISPRUDENCE, *supra* note 227, at 382-83. For the more concise version to which Long had access, in the *Outline* included in PROVINCE OF JURISPRUDENCE DETERMINED, see PROVINCE, *supra* note 226, at xvii, ix, lxiv, and lxvii.

233. KENNEDY, RISE AND FALL, *supra* note 6, at 207.

candidate for generality and subtracting marriage and other statuses from it. The resemblance is far too strong to be coincidental.

In a recent article, Duncan Kennedy gives a close reading of the only English-language translation of Savigny's most explicit reflection on this dichotomy.[234] This text, first published in German in 1840,[235] was translated into English far too late to appear in any of Marvin's catalogues or to influence Bishop directly, but it almost certainly influenced the American classicizers through the ample routes for German Historical School influence flowing through Edinburgh, from London, and increasingly as the century progressed, directly from Germany. In it, Savigny divided private law into two domains: family law and potentialities law, the latter further subdivided into the law of property and of obligations, or contract. (Though patrimonial law is the more conventional translation for the latter, I will follow Kennedy in sticking with the English translator's somewhat awkward term.)

In Savigny's formulation, the body of law that opposed contract was family law. As I will show in Part II of this Article, this term was to become deeply controversial in the U.S. context but not until the rise of legal realism in the twentieth century. In the latter decades of the nineteenth century, American jurists just ignored the term. The American title for the field evolved under conditions that seem entirely indigenous. In this they resembled legal orders influenced by French law: the Anglo-Americans liked and stayed loyal to their own terminology (husband and wife, parent and child, then the law of marriage and divorce, and finally

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234. Duncan Kennedy, *Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought,* 56 AM. J. COMP. L. 811 (2010) [hereinafter Kennedy, *Savigny's Distinction*]; FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (Hyperion Press 1979) (William Holloway, trans., 1867) (hereinafter SAVIGNY, SYSTEM OF MODERN ROMAN LAW). .On Savigny's influence on Austin, see Andreas B. Schwarz, *John Austin and the German Jurisprudence of His Time,* 2 POLITICA 178, 179 (1934). "Austin's was first and foremost a systematic mind, systematic in a very wide sense of the word. . . . [H]e saw the task of legal science in the development of a 'system of law considered as an organic whole.' Austin's desire for system found great satisfaction in German jurisprudence, which at that time was grappling particularly with the problems of classification and in which the method of deriving the whole of law from general principles was in full development." *Id.* at 190. Michael Hoeflich thinks that Austin derived more than that from his studies in Roman law: "In the 'main course' of the *Lectures,* Austin utilized Roman and civil law in several ways. First, Roman and civil law provided both an inspiration for and a source of Austin's scheme of abstraction and systematization. Second, Roman and civil law provided the necessary logical and precise set of legal terminology for exposition and explanation of the system developed by Austin. Third, in those areas where Austin's efforts transcended systematization and exposition and concerned substance, Roman and civil law also provided both vocabulary and rules." Hoeflich, *John Austin, supra* note 53, at 47.

235. FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HUTIGEN RÖMISCHEN RECHTS (Berlin, Viet und Comp., 1840) [hereinafter SAVIGNY, SYSTEM DES HUTIGEN RÖMISCHEN RECHTS].

domestic relations), and French-influenced legal orders did the same (personal status law). But it's important not to let the tail wag the dog here: nomenclature had far less impact than structure, and the structure that emerged, again and again, all over the world, through the influence of German legal thought in the first globalization, was the construction of legal orders around a market/family distinction.

A key point that we can gain from examining Savigny is that, when we attribute family law to premodern legal orders, we are committing a small sin of anachronism. Family law under its various labels—family law as a category—was a nineteenth century invention. And it was not an only child or an orphan: it came into being as part of a system, part of the very idea that law is and should be a system. Let us begin a relinquishment of the idea that family law had any existence before this moment of its invention by setting aside the common misunderstanding that Family Law is a Roman law category dating back to Justinian or other Roman law sources. As Wolfram Müller-Freienfels informs us, "[e]ven during the long reign of Roman law in antiquity, there was never a specific family law as a systematic unit unto itself."[236] It was not a legal category in

236. Wolfram Müller-Freienfels, *The Emergence of* Droit de Famille *and* Familienrecht *in Continental Europe and the Introduction of Family Law in England*, 28 J. FAM. HIST. 31, 32 (2003) (hereinafter Müller-Freienfels, *Emergence of* Droit de Famille). Do not be deceived by modern books like BRUCE W. FRIER & THOMAS A.J. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW (2004), into supposing that family law comes to us from Roman law. As the editors indicate in their introduction, the Roman term "*familia*" really meant household, *id.* at 3, and clearly this is a *legal*, not a *social* household. Their Case 4, defining the Roman law term *familia*, comes from Ulpianus's *Ad Edictum*, dated approximately 200 A.D. In the part of Ulpinius' definition that they include and translate, *familia* is, "[b]y a particular rule, ... a number of persons who, either by nature or by law, are subjected to the power (*potestas*) of one person: for example, a *pater familias* . . . ."; it is also, "[b]y a common rule, . . . all agnates. . . . [even if] they each have their own *familiae* . . . , since they stem from the same home and lineage"; in addition, "[w]e also customarily describe slaves as *familiae*." *Id.* at 18-19. The family of Roman law is thus defined by the power of its head over its members; the members include only one marital pair, that of the head, *all* agnates even if they also legally belong to other *familiae*, and the slaves under power of the head—and all of this without any reference to where anyone lives.

Frier and Thomas make an indicative omission from Ulpinius. They delete his first definition of *familia* and thus project the modern concept of family law back onto their Roman source. Here is the omitted passage: "nam et in res et in personas deducitur. in res, ut puta in lege duodecim tabularum his verbis 'adgnatus proximus familiam habeto'. ad personas autem refertur familiae significatio ita, cum de patrono et liberto loquitur lex: 'ex ea familia', inquit, "in eam familiam": et hic de singularibus personis legem loqui constat." DIG. 50.16.195.1-4 (Ulpian, *Ad Edictum* 46). This passage can be translated to say that the term familia "relates both to things and to persons: to things, as, for instance, in the *Law of the Twelve Tables* in the words 'let the nearest agnate have the household.' The designation of household, however, refers to persons when the law speaks of patron and freedman: 'from that household' or 'to that household'; and here it is agreed that the law is talking of individual persons." *Id.* (Alan Watson trans.). Frier and Thomas omitted this first definition, I would suggest, because they simply could not imagine inheritance and master/servant as "family law." As

Justinian's Institutes, where the great division was between *personae*, *res*, and *actiones*.[237] Nor did the early rationalist synthesizer Samuel Pufendorf acknowledge it as a legal topic.[238] The makers of the French *Code Napoleon* were explicitly hostile to the idea of family law, probably pursuing an anti-corporatist idea: they incorporated instead the law of marriage in the first book of the Code, *Des Personnes*. According to Müller-Freienfels, Family Law as a distinct legal domain made its first appearance in Gustav Hugo's *Institutionen des heutigen Römischen Rechts,* published in 1789.[239] Hugo, the founder of the German Historical School, divided all of private law into five topics: real rights, personal obligations, *family laws*, inheritance laws, and legal procedure. He retracted this innovation in the second edition of his *Institutionen*, reverting to the more widely known and familiar tripartite division of Justinian's *Institutes*.[240] But the idea had legs: Müller-Freienfels next sees it in the Prussian General Laws of the Land (the *Preussische Allgemeine Landrecht*) of 1794, widely acknowledged as the first legal code produced by natural law rationalizers.[241] There, the second part, devoted to the law of the community (as opposed to the law of the individual person, in part one), begins with sections titled "Of Marriage," "Of the Rights and Obligations of Parents and Children," "Of the Rights and Obligations of the Remaining Members of the Family," and "Of Common Family Rights." Here is how Müller-Freienfels tells the rest of the German Historical School story:

> Hugo's . . . five-part division with the separate part "Family Law" became widely known due to the fact that Hugo's younger

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we will see later in this Genealogy, it is highly characteristic of modern conceptions of family law to exclude these topics: that is what the classicizers did in creating the domain.. Note that Watson translates *familia* as "household": perhaps the better English term for this body of Roman Law rules would be "household law"!

237. JUSTINIAN'S INSTITUTES (Peter Birks & Grant McLeod, trans., 1987).

238. SAMUEL FREIHERR VON PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (Londini Scanorum, 1672). The first English translation of this important treatise is PUFENDORF, OF THE LAW OF NATURE AND NATIONS: EIGHT BOOKS (Basil Kennett, et al., trans., Oxford, L. Lichfield, 1710). Book VI of the English translation includes only three chapters: "Of Matrimony," "Of Paternal Power," and "Of Despotical Power, or the Authority of the Master over the Servant." Pufendorf's taxonomy may well have influenced Blackstone's; it shows no trace of Family Law.

239. Müller-Freienfels, *supra* note 236, at 37 (referring to GUSTAV HUGO, INSTITUTIONEN DES HEUTIGEN RÖMISHEN RECHTS (1789)).

240. GUSTAV HUGO, LEHRBUCH DER GESCHICHTE DES RÖMISCHEN RECHTS (Berlin, A. Mylius, 1799).

241. Müller-Freienfels, *Emergence of* Droit de Famille, *supra* note 236, at 33-34 (referring to ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN (Berlin, Georg Jacob Decker und Sohn, 1794)).

> colleague in Göttingen, (Georg) Arnold Heise, adopted this system for his *Outline of a System of the General Civil Law for Pandectist Lectures*, which was tremendously successful. . . . His *Outline* became hugely popular as an aid to students. Savigny, who knew Heise from his student days, treasured the outline a great deal and even used this scheme himself as a basis for his chief work, *The System of Today's Roman Law* (1st volume 1840). . . . [T]his scheme gained a great reputation and exerted a strong influence since Savigny's "system" dominated from then on as no other manual in "codification-free" German private law in the nineteenth century would. . . .
>
> Throughout his entire life, Savigny was to remain true to his basic view that family law ought to exist as an independent part of the law. . . .
>
> This division set the basis for the *Pandektensystem*, which was to characterize German law in the second half of the eighteenth [sic; he must mean nineteenth] century.[242]

Müller-Freienfels thus posits that Savigny was the great propounder of family law, not simply as the right way to classify the field but as the right way to situate it in a complete legal order:

> In his [*The System of Modern Roman Law*, Savigny] . . . upgraded the scheme, and with it, the independent "Family Law" from a simple "external systematization" to a truly "intrinsic systematization." In doing so, Savigny idealistically understood the "inner order of the Law" as an order of existing leading principles. He also believed . . . that legal materials should be compiled in such a way that each legal subject would "have its own place, from which the answer to every legal question, the solution to every judicial problem, could be derived."[243]

What did family law mean to Savigny when he crafted it into his *System of Modern Roman Law* in 1840? According to Kennedy, Savigny's family law and contract law address diametrically different aspects of human nature:

> Man is an "incomplete being," because men need women to be complete and vice versa, and because men and women need children, and children need paternal care, in order to overcome

242. *Id.* at 37-38 (referring to HEISE, *supra* note 226, and SAVIGNY, SYSTEM DES HUTIGEN RÖMISCHEN RECHTS, *supra* note 235).

243. *Id.* at 38. It is not clear whence Müller-Freienfels derives his quotations.

> mortality and live forward in time. . . . Family law governs the relations of husband and wife and parent and child (plus guardian and ward). By contrast, potentialities law governs the relations between independent individuals exercising their wills vis-à-vis one another: property deals with an individual will controlling an object (to the exclusion of other wills), obligations with one will controlling another.[244]

This division of private law into one domain dedicated to the human need to find completion through the marital and parental/child relations, and a second domain dedicated to humans as sole individuals free in the exercise of their wills, elaborates Hugo's community/individual distinction and should be extremely familiar by now: it came into American legal thought through the conjoint efforts of Story and Bishop and was, by 1852, encapsulated in the notorious status/contract distinction. As we have seen, Story was innocent of any idea that contract protected an arbitrary, self-serving individual will; we will have to wait until Bishop's *Non-Contract* law was published in 1889 for that idea to emerge as an explicit tenet in our story; and Story and Bishop, following Lord Robertson, saw the law of marriage not as private but as public law. But the basic distinction is otherwise the same.

In Savigny's thought, family law and potentialities law have not merely opposite but chiasmatically opposite relations to the general and the particular. As Kennedy puts it:

> Savigny is asserting that the abstract conceptual definition of the nature of legal relations [in potentialities law, that is, property and obligations], as establishing co-existing provinces of absolute mastery for the individual will, provides a single, necessary content for the actual rules of property and obligations. (In the actual unfolding of potentialities law he consistently acknowledges, as we will see, a large space for the merely positive.)
>
> By contrast, with regard to the rules of family law it appears that "doubt" can "arise in what their real legal contents consist." The reason for this seems to be that family law is not merely natural, but also cultural, because it is intrinsically "moral," and morality is an aspect of the Volksgeist, i.e., of the spirit of each particular people. I have already quoted Savigny mentioning that in spite of its naturalness and necessity, "the special shape, in which [family

244. Kennedy, *Savigny's Distinction, supra* note 234, at 814 (citations omitted).

> relations] are recognized is very manifold according to the positive law of different peoples." True to the anti-natural-law program of the historical school, Savigny recognizes that different peoples with different spirits produce different norms fully deserving the name of law[.][245]

Elsewhere, Kerry Rittich and I have called this the Savignian pattern.[246] Schematized, it looks more or less like this:

Family Law	Contract Law
Family Law as the Domain of Status	Contract Law as the Domain of Will
Family Law as Universal in the Sense that it is Fundamental Everywhere	Contract Law as Particular in the Sense that Every Contract is Unique
Family Law as Particular in the Sense that Each Nation's Family Law Expresses the Spirit of the People	Contract Law as Universal in the Sense that it is the Same Everywhere

For Savigny, potentialities law had to be transnationally smooth (with the proviso that positive law may vary), whereas actual lived contracts were infinitely particular. At the same time, though the family itself was natural and universal, family law must differ from one nation to the next. We have already encountered this concept, in Story's and Bishop's master-rule for conflict of laws: international contracts cases would choose their law by a single rule ensuring the uninterrupted transnational enforceability of the contract consistent with the will of the parties at the time it was made (*lex loci contractus*); whereas marriage, that universal institution of *ius gentium*, would be enforced under the highly variable law of the parties' residence. And we know that Story sought civilian influence particularly in order to bring American commercial law up to date and out of international isolation.

The remainder of this article tells how the idea of system moved this pattern up from the level of choice of law rules to structural dignity. As

245. *Id.* at 816.
246. Halley & Rittich, *supra* note 2, at 757.

American jurists understood the classicizing impulse and incorporated it into their intellectual practice, they rendered contract general and subtracted from it bodies of law that could not be left to the caprice of individual will. Contract governed the faceless individual of liberalism; status housed the particularized, increasingly deviant persons who could not be entrusted with will-saturated freedom.[247] Marriage joined other statuses. such asinfancy and insanity, as the opposite of contract.

VIII. STATUS LAGS: MAINE

In Sir Henry Sumner Maine's version of our story, marriage was not merely exceptional, and it was no longer fundamental: it was *retardataire*, a throwback. This is the implication of his famous formulation of legal modernity as a progress *from* status *to* contract:

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil society takes account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.[248]

Maine clearly thought that progress affected even the Family, introducing elements of individualism and contract to relations which had been intensely reciprocal and fixed—subtracting people and activities from the Family and transporting them to Contract:

> In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no true place in law of modern European

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247. As we have also already seen, Bishop has started the process of winnowing the individual activated by will from the abnormal persons.

248. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 168-69 (Frederick Pollock ed., London, John Murray, 1912) (1861).

> societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity.[249]

Thus Maine explains the residual relations—the personal statuses that could not be restructured as contract—as a coherent class of persons lacking the capacity *to* contract:

> The apparent exceptions are of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? . . . [T]he classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.[250]

As we have seen, Parsons didn't like putting wives on the list of disabled persons, but he was willing to do it.[251] Maine, by contrast, elides wives altogether. Why? He has just told us that adult women, if they were not married, had been emancipated from the Family and could deal for themselves in Contract. Moreover, he's not just describing the rules; he's justifying them. It made sense to exclude infants, orphans, and lunatics from contract because they lacked not only the legal but also the mental capacity to form their own agreements. To include married women in this list would have made them not merely the legal but the *cognitive* equals of children, orphans, and lunatics. The law making the wife a disabled person is being subjected here to a highly motivated forgetting.

The final peroration gives us a new definition of status:

> The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to be sufficiently ascertained. All the forms of Status taken notice of in the Law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If we then employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we

249. *Id.* at 169-70.
250. *Id.* at 170.
251. *See supra* notes 39-41 and accompanying text.

> may say that the movement of the progressive societies has hitherto been *from Status to Contract.*[252]

In Maine's retrospective view, status reigned in an era of thoroughgoing legal and cultural ascription. At that time, all legal relations were mediated in some way through the patriarchal Family, quintessentially an ascriptive social form. Status survives as a residual legal category reserved from the wreck of a bygone legal order because of the sad fact that not all individuals can make themselves independent and walk through the door that separates the family from the market and status from contract. The patriarchal Family has disappeared, but that "Family, as held together by the Patria Potestas, is the nidus out of which the entire Law of Persons has germinated."[253] Status remains, in the law of persons: now as then it is ascriptive; now as then it is amenable to complete state control—but now it is marginal, the legal and cultural domain for those who cannot progress.

Once again, this closing paragraph does nothing to clear up the place of then-contemporary marriage at the Status/Contract threshold. It is the "immediate or remote result of agreement"—everyone was still insisting that marriage was a civil contract and that the agreement of husband and wife to enter the relation was essential to its formation—but it also houses the *femme couverte* and the infant, the legal equivalents of lunatics. Maine relinquished the executed marriage to status, but he did so silently.

Understandably perhaps, these passages have been read to state Maine's own aspiration for status-to-contract progress for wives. Clearly Maine celebrated the emancipation of married women from tutelage and their progress to contractual capacity; by implication we can imagine that he would have cheered the passage of the Married Women's Property Acts with their partial emancipation of wives from their traditional contractual disabilities. But there was a deeper problem evaded by Maine's oblivion about marriage as he worked his way to the climax of this chapter. No one was suggesting that *marriage itself*—the portfolio of rules governing entry into, duties during, and exit from marriage—be exempted from state monopoly control and remitted to individuals and their agreements.

Sir Frederick Pollock noted this problem in his 1912 edition of *Ancient Law*. Defending Maine from the implication that he thought marriage could undergo such progress, he wrote: "Assimilation of marriage, as a

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252. MAINE, *supra* note 248, at 170.
253. *Id.* at 152.

personal relation, to partnership is not within the scope of practical jurisprudence . . .. Status may yield ground to Contract, but cannot itself be reduced to Contract."[254] He attempted to save Maine's formulation by attributing to it a proviso excepting marriage from "the head of Status" (then there would be no claim that it had been merged into contract): "if the term is thus restricted, the gravest apparent objection to Maine's dictum is removed."[255] (One marvels at the labor Pollock was willing to undertake to save the classificatory scheme by seemingly heroic but actually merely lexical revision.)

But Maine never said that *marriage itself* was shifting to contract: rather, he ignored marriage altogether, arguing instead that the replacement of the patriarchal family as the basic unit of social life and of economic production by contract was definitive of modernity. For Maine, marriage didn't even warrant a mention; it could remain a residual institution producing individuals fit for modernity outside its bounds.

IX. THE NEWLY "DOMESTIC" RELATIONS: SCHOULER

In 1870, something new arrived into the Bishop-dominated legal landscape I have drawn: *A Treatise on the Law of the Domestic Relations Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant*, by James Schouler.[256] As far as I can tell, this is the first *domestic relations* treatise published in the U.S. It marks a big shift in the place of marriage in the legal order, pushing it deeper into the exceptional recess which it will occupy in classical legal thought. It will be worth our while to examine Schouler's intervention in some detail.

Schouler admitted that he was substituting "domestic relations" for Blackstone's "oeconomical relations."[257] Why ditch "oeconomical"? By

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254. MAINE, *supra* note 248, at 184.

255. *Id.* What really puzzled Pollock, interestingly, was whether the term "status" was now, as some had apparently claimed, coterminous with social legislation, particularly public regulation of the market. He asked: are modern company law (recognizing the corporate "person"), tax law, laws governing worker's accidents, and the Trade Disputes Act of 1906 (exempting workers and employers from some aspects of contract law)—are these all new contributions to the law of persons, new forms of status? *Id.* at 184-85. He presages here the next solution to the anomalous place of marriage in a legal order dominated by the will theory: de-exceptionalize marriage by making it just one, or the paradigm, instance of the state's obligation to adjust social interests—of "the social."

256. JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT (Boston, Little, Brown & Co., 1870).

257. *Id.* at 4.

the time Schouler wrote, "economic" had completely ceased to refer to the household and was primarily a term for monetary, financial, and commercial relations, with a smattering of meanings tying it to thrift and good management of those relations.[258] That is to say, the word "economic" had been completely captured for the market. For Reeve, in 1812, deleting it made sense, because it avoided the ambiguity latent in a word that referred both to the well-managed household and to its not-yet-opposite, the market. But by 1870 it would have made no sense at all to carry forward Blackstone's term. It had to go.

The word "domestic," by contrast, had carried the meaning "[o]f or belonging to the home, house, or household; pertaining to one's place of residence or family affairs[,]" since Shakespeare's time, and still did (and does).[259] It seems a pretty anodyne choice, but some close reading may reveal more content than is immediately visible.

Schouler not only claimed that the term "domestic relations" is "the modern legal usage"; he claimed to derive it from none other than Blackstone and Reeve! In fact, Reeve never used this term in his title. It does appear in the Preface to Reeve's second edition,[260] and this must have been because, as we have seen,[261] "domestic relations" had come into common use as the everyday shorthand for Reeve's treatise. The term did have respectable vintage through the lawyers, not the treatise-writers. Among them, it was on the rise in the middle decades of the nineteenth century as the "go to" heading.[262] And by mid-century, books began to

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258. In addition to the senses quoted *supra* notes 12 & 15-16, see OED, *Economic*, *supra* note 12, at B.3.a (meaning "[e]sp. of a person: characterized by thrift (sometimes parsimony); careful in the management of financial resources," first example dated 1755); *id.* at B.3.b (meaning "[c]haracterized by or tending to economy in the use of resources; efficient, not wasteful," first example dated 1794); *id.* at B.4.c (meaning "[r]elating to the generation of income; maintained for the sake of profit," first example dated 1854).

259. *Domestic Definition* A.2.a, OXFORD ENGLISH DICTIONARY ONLINE,. http://www.oed.com/view/Entry/56663?redirectedFrom=domestic# (last visited December 20, 2010) [hereinafter OED, *Domestic*].

260. TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, OF MASTER AND SERVANT, AND OF THE POWERS OF COURTS OF CHANCERY, WITH AN ESSAY ON THE TERMS, HEIR, HEIRS, AND HEIRS OF THE BODY, at iii (Lucius E. Crittenden ed., 2d ed., Burlington, Chauncey Goodrich, 1846).

261. *See supra* note 20.

262. A Westlaw search for "domestic relations" in all U.S. cases of the 19th century reveals the following general trends. First, the term was simply not in use between 1800 and 1810. The search revealed no cases in that interval. Between 1810 and 1840, several cases referred to Reeve's treatise as *Domestic Relations,* and several used the term to describe his topics; in each case the numbers are low, fewer than 10. Between 1840 and 1850, the rate of both of these uses tripled — the numbers are still low, but both ideas (that Reeve's treatise is about domestic relations, and that "domestic relations" is the right term for husband/wife, parent/child, master/servant and guardian/ward) are

appear giving "domestic relations" a distinctly social-descriptive meaning: they were the relations that actually, physically resided in the home.[263]

Nevertheless, no book in the Harvard Law Library uses the title Domestic Relations to describe anything close to our topic until a Scottish treatise which Schouler explicitly relied on: Lord Patrick Fraser's *A Treatise of the Law of Scotland, as Applicable to the Personal and Domestic Relations, Comprising Husband and Wife, Parent and Child, Guardian and Ward Master and Servant and Master and Apprentice.* This treatise had been published in 1846; Bishop had relied on it.[264] Schouler noted that Fraser was expounding civil law, and that it would make no sense for a common lawyer to follow him in including master and apprentice as a separate topic.[265] For this reason also Schouler concluded that it made no sense for him to speak of the "personal relations."[266] But Schouler's title page otherwise tracks Fraser's with typographical fidelity.

Where then did Schouler get his new title? I think it's clear that Fraser was his textual model, but that the term had been established in common usage. It replaced the now-unsuitable term "oeconomical" in Blackstone's "*private* oeconomical relations"; but its colloquial connotation resonated with the new separate sphere of home life. And why Domestic Relations instead? From the 1820s forward it was in common use to describe Reeve's topic, by the bench and the bar, and that was probably reason enough.

What were the contents of *The Domestic Relations*? Schouler acknowledged that "marriage and divorce constitute an important topic by

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becoming more commonplace. An explosion in both usages occurs in the 1850s and continues in the 1860s. This is pretty good evidence that the practicing bar and bench adopted the term domestic relations well before Schouler implanted it in the treatise landscape.

263. *See, e.g.*, THE FAMILY AND SLAVERY, SHOWING THE INFLUENCE OF SLAVERY ON THE DOMESTIC RELATIONS, BY A NATIVE OF THE SOUTHWEST (Boston, American Tract Soc. 185?) (date does not appear on the original text and is ascribed by the Harvard Hollis Library Catalog); THOMAS T. HENRY BAYLIS, THE RIGHTS, DUTIES, AND RELATIONS OF DOMESTIC SERVANTS, THEIR MASTERS AND MISTRESSES: WITH A SHORT ACCOUNT OF SERVANTS' INSTITUTIONS AND THEIR ADVANTAGES (London, Sampson. Low, & Son & Co., 1857); JOHN THOMSON, THE DOMESTIC CIRCLE, OR THE RELATIONS, RESPONSIBILITIES, AND DUTIES OF HOME LIFE (Edinburgh: Johnstone, Hunter &, and Co., [1867]).

264. FRASER, DOMESTIC RELATIONS (1st ed.), *supra* note 103. Schouler explicitly acknowledged that Fraser's *Domestic Relations* was his immediate model. SCHOULER, *supra* note 256, at 4-5. Story had died the year before Fraser's book was published; as we have seen, Bishop cited it, along with Fergusson's *Reports*, as his source for Lord Robertson's canonical statement. Thus Schouler was the first American to note Fraser as the authority for a new name for the field.

265. SCHOULER, *supra* note 256, at 4.

266. *Id.* at 4-5.

themselves; and we find treatises which profess to deal with these alone."[267] This oblique and skeptical reference to Bishop was as close as Schouler came to acknowledging the treatise which had redefined and come to dominate the field. But in his view, Bishop's title and his topic made the wrong generalizations. Under Bishop's influence, Schouler complained, "the term husband and wife is acquiring at law a more limited and technical sense than formerly."[268] Schouler objected to this trend, especially in the face of dramatic legislative changes in the law governing married women's property rights:

> The many and rapid changes to which the entire law of husband and wife has latterly subjected; the growth of divorce legislation on the one hand, and of property legislation for married women on the other, fully justifies a subdivision so important. We shall subordinate, then, the topic of marriage and divorce to that of *the marriage status*, following in this respect the modern legal usage; at the same time noting that if some special term could be coined to distinguish the subdivision husband and wife from that general division which bears the same name, our analysis would be more exact.[269]

This is a little compressed, but here is what I think it means. "Marriage and divorce" is the name for the rules about how parties get into and out of marriage (and all the interstate and federal problems of marriage and divorce recognition that these legal processes involved). That cannot be the *lead topic*. The "*marriage status*" is the general topic, and Schouler used the time-honored term "husband and wife" to designate it. But he was little sorry about that, because the general topic "husband and wife" includes both the rules of entry and exit ("marriage and divorce") and the rules governing the legal relations of husband wife during marriage ("husband and wife"), thus setting up a lexical repetition that makes his scheme less than perfectly exact. But it was worth making the taxonomic change, because recent legislative changes both to divorce and to the property rights of the wife warrant ample, and separate, space for the rules governing the relations of husband and wife in the ongoing marriage within the structure.

This is a significant innovation. Bishop thought he had covered the beach when he added to his *Law of Marriage and Divorce* a separate

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267. *Id.* at 5-6.
268. *Id.* at 5.
269. *Id.* at 6 (emphasis added).

treatise on *Commentaries on the Law of Married Women.*[270] But Schouler notes, correctly, that this framing of the marital domain omitted the specific, reciprocal rights and duties of husband and wife *to each other*—rights and duties which were, thanks to Bishop himself, *not contract.* Schouler's scheme would become the template for a new legal field, travelling not under the retro term he invoked in his Introduction—husband and wife—but the old/new one he supplies in his title: Domestic Relations.

Schouler proceeded to criticize his own classification for not hewing faithfully to the core meaning of the law of the domestic relations, which was—and here we encounter something entirely new—"*the law of the family.*"[271] I will return in a moment to the idea that the social subject is no longer the household but the family and the extremely slow Anglo-American uptake of the term "family law." First, let's focus on Schouler's unhappiness with Reeve's legal relations as a categorical housing for this social form and its law.[272] They will help us to see what Schouler thought the "law of the family" really was.

Schouler's first objection to his own title is that the law of guardian and ward extends well beyond "the private or domestic relations."[273] He declined "to trace with distinctness that shadowy line which separates the temporary parent from the town officer" and wryly observed that, in his chapter on guardian and ward, "one frequently finds himself gliding unconsciously from the law of the family to the law of trusts."[274] He wished he could limit his treatise strictly to the domestic relations, to "the family"—but he was not ready to draw the necessary distinctions and relinquish guardian and ward to the new, general topic of trusts.

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270. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN: UNDER THE STATUTES OF THE SEVERAL STATES, AND AT COMMON LAW AND IN EQUITY (Boston, Little, Brown 1873-75) [hereinafter BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN].

271. SCHOULER, *supra* note 256, at 7 (emphasis added).

272. There may be an influence from Scotland here again: the so-called Second Edition of Fraser's treatise, now titled *A Treatise on the Law of Scotland Relative to Parent and Child and Guardian and Ward* (Hugh Cowan ed., 2d ed., Edinburgh, T. & T. Clark, 1866). This topical idea is entirely new: delete husband and wife and master and servant, and concentrate on the bodies of law relating to children and wards and their various protectors. A Preface signed P.F. (presumably Patrick Fraser) states that "[t]here is no necessary connection between the various subjects in" Fraser's First Edition, indicating a loss of faith very similar to Schouler's in the idea that there was any remaining coherence in the Blackstone/Reeve list of legal relations. *Id.* at Preface, n.p. Fraser's so-called Second Edition may have promoted Schouler to criticize that list as now-outdated. Still, Schouler makes no reference to this text, and, as we will see, proposes a new coherence quite independent of its terms.

273. SCHOULER, *supra* note 256, at 7.

274. *Id.*

We see the same temptation—to generalize public and market-based relations, subtracting out the family to stand in solitary splendor—and the same disinclination to carry through on it, when Schouler turns to the relation of master and servant. Here, "the rule of classification becomes even more uncertain"[275]:

> If servants connected to the household were alone to be considered in a treatise on the domestic relations, the modern cases would be few and simple; but no writer has presumed to limit himself to such narrow bounds. In former centuries, this relation had a marked significance.[276]

The domestic servant still existed, but was numerically unimportant[277]; by implication the law of master and servant had increasingly little to say about the household and thus was increasingly irrelevant in a treatise on the law of domestic relations. It should, Schouler thought, migrate to some other legal topic. Schouler here marked the *de facto* transition from the household (both familial and oeconomic in Blackstone's sense) to the family/market distinction, and regretted that his legal classifications were not up to speed with social changes. The recent emancipation of the slaves had wrought, moreover, a change in attitude: "In these days, we dislike to call any man master."[278] The very title of this heading was a dismal reminder of "the common barbarian accompaniment of barbarian triumphs."[279]

In disparaging the terms master and servant as out of tune with republican sentiment, Schouler acknowledged attitudes that had become widespread almost one hundred years before. As Robert J. Steinfeld demonstrates, by the late eighteenth century American workers were shocking European travelers by refusing point blank to be called servants.[280] Here is one of his examples,a European visitor reporting in the early nineteenth century that:

> [t]he arrogance of domestics in this land of republican liberty and equality, is particularly calculated to excite the astonishment of strangers. To call persons of this description, *servants*, or to speak

275. *Id.*

276. *Id.*

277. *Id.*; *see also id.* at 8 ("[I]t cannot be denied that . . . as one of the purely domestic relations . . . [that of master and servant] rarely attracts attention.").

278. *Id.* at 7.

279. *Id.*

280. STEINFELD, THE INVENTION OF FREE LABOR, *supra* note 148, at 126-27.

> of their *master* or *mistress*, is a grievous affront. Having called one day at the house of a gentleman of my acquaintance, on knocking at the door, it was opened by a servant-maid, whom I had never before seen, as she had not been long in his family. The following is the dialogue, word for word, which took place on this occasion:—"is your master at home." – "I have no master." — "don't you live here?" – "I *stay here*"—"And who are you then?" = Why, I am Mr. ——'s help, and I'd have you know, *man*, that I am no *sarvant*; none but *negers* are *sarvants*.[281]

Schouler is the first text in my genealogy to take note of this strong social trend, and he did so more than 100 years after it emerged, a remarkable lag and an index of how successfully the classical legal order repelled social inputs.

Increasingly, the law of master and servant was useful only in analogies to legal relations that, Schouler implies, have nothing to do with the family and everything to do with wage labor:

> Apprentices are, without much violation of principle, included under this head; they are generally bound out during minority and brought up in families. Clerks are not so readily confined within the circle of domestic relations as formerly; and the same is to be said of factors, bailiffs, and stewards. The *employés* of a corporation are frequently designated as servants; so are laborers generally. But it cannot be denied that master and servant is rather a repulsive title, and fast losing favor in this republican country; . . . and that in sounding its legal depths one often loses sight of his landmarks, and finds himself drifting out into the more general subject of principal and agent.[282]

We can see here the work of generalization, begun but not completed. Apprentices over the age of minority, apprentices boarding out, clerks, factors, bailiffs, stewards: these relations, cut free of the household, were in search of a generalization. And what about the employees of big corporations and "laborers generally"? Perhaps these are all, at their most abstract, really just relations of principal and agent. If someone would just write the treatises on trusts, on public responsibility for orphans and truants, and on principal/agency relations, the residue—the law of the family, under the heading "domestic relations"—could achieve classical

281. *Id.* (quoting ALBERT MATTHEWS, THE TERMS HIRED MAN AND HELP 28 (Cambridge, John Wilson & Son, 1900)).

282. SCHOULER, *supra* note 256, at 7-8.

coherence.

Clearly Schouler had read his Maine. But, as we have seen, Maine only tacitly admitted that the family would lag behind the general progress of civilization from status to contract. By contrast, Schouler avidly asserted that the domestic relations were and should hang back, and that attempts at progress in this domain were perverse. On the aboriginal antiquity of this domain, he had this to say:

> [T]he family may justly be pronounced the earliest of social institutions. . . . Natural law, or the teachings of a divine providence, supplied these regulations. Families preceded nations. . . . But the law of the domestic relations is nevertheless older than that of civil society. . . . The supremacy of the law of family should not be forgotten.[283]

We have seen this original, essential, mystical, transtemporal and transpatial family before, in Bishop's representation of marriage as status. By contrast with Bishop's "not contract" moves, however, Schouler's are much more closely attuned to market ideology as the *differand* giving conceptual and normative bite to the family as a separate sphere:

> To an unusual extent, therefore, is the law of family above and independent of the individual. Society provides the home; public policy fashions the system: and it remains for each one of us to place himself under rules which are, and must be, arbitrary.
>
> So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business firms.[284]

Family law exceptionalism has arrived. It is precisely on this template that, almost 100 years later, Justice Douglas wrote that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[285] This uncanny echo of Schouler's formulation, transposed into a vocabulary of constitutional rights that was not ascendant until the third globalization, signals the deep integration of the family/market distinction into

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283. *Id.* at 8-9.
284. *Id.* at 9.
285. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

American legal thought.

As the family emerged from the household and differentiated itself from the market, the word "family" made an etymological transition, one which Schouler wished to track in his halting, intuitive, incomplete new map of his field. The word derives from the Latin term for servant or slave (*famulus*), and its first English meaning was "[t]he servants of a house or establishment; the household."[286] Not husband and wife/parent and child/master and servant: just the servants. The *Oxford English Dictionary* (OED) indicates that this sense is quite old (the earliest example dates from 1400) and that it is obsolete; it provides no examples after 1794. But we could add an example from 1839, a rare item in the Harvard Law Library, its first book titled "Family Law": *The Family Law Advisor: Containing Plain Advice to Landlord and Tenant . . . Master and Servant . . . Executors and Administrators . . . To Make a Will.*[287] This title shows that it still made sense then to think of the family as a managerial network rather than a domestic space. The next sense to emerge was "[t]he body of persons who live in one house or under one head, including parents, children, servants, etc."[288] In 1631, the Star Chamber heard a case involving a man of whom it was said, "[h]is family were himself and his wife and daughters, two mayds, and a man."[289] This sense emerges in the mid-sixteenth century; the OED doesn't say it is obsolete but gives no examples after 1859, eleven years before Schouler was to complain that master and servant no longer belonged in Domestic Relations. And surely it *is* obsolete: when we now read about antebellum Southern slaveowners expressing concern for "[m]y family, black and white,"[290] the expression strikes us as the absolute height of hypocrisy, but I think we have to face it: to them it was merely descriptive.

Thus, before the Civil War "family" still meant the household, with its

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286. *Family Definition* I.1.a, OXFORD ENGLISH DICTIONARY ONLINE,http://www.oed.com/view/Entry/67975?redirectedFrom=family# (last visited Dec. 20, 2010) [hereinafter OED, *Family*].

287. THE FAMILY LAW ADVISOR: CONTAINING PLAIN ADVICE TO LANDLORD AND TENANT . . . MASTER AND SERVANT . . . EXECUTORS AND ADMINISTRATORS . . . TO MAKE A WILL (London: Henry Washbourne, 1839). This book has no author; the ellipses in the title do not reflect omissions but rather appear on the title page and in the official entry in the Harvard Hollis catalogue. Hollis describes this entry as "[a] publisher's collection of four of his own separately issued popular law manuals, here bound up (without original title leaves) with a general title." Clearly someone thought that this collection of topics made sense to the law-book-buying public.

288. OED, *Family*, *supra* note 286, at I.2.a.

289. *Id.*

290. *See* ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH, 32, 100-01, 133, 204 (1988).

relations of husband and wife, parent and child, and master and servant. So far, the "family" cohered well with Blackstone's "*private* oeconomical relations." But after the Civil War, servants were decidedly dropped from the referent of "family": the standard sense of the word became "[t]he group of persons consisting of the parents and their children, whether actually living together or not; in wider sense, the unity formed by those who are nearly connected by blood or affinity."[291] The OED quotes James Mill referring in 1869, just one year before Schouler's *Domestic Relations* was published, to the still smaller unit sometimes called the companionate, nuclear, or bourgeois family: "The group which consists of a Father, Mother and Children, is called a Family."[292]

This modernized, nuclearized, and privatized group is Schouler's family. And his new *legal* idea is that the law governing it should be distinct from the law of the market and the law of the state. This is something new. It transforms Robertson's and Bishop's status/contract distinction, reframes Bishop's marriage/contract distinction, and transposes them into a series of continguous distinctions: family/contract, family/market, and family/state.

Why was Schouler willing to publish a confessedly defective treatise? He was clearly aware of the classical project and knew how to modernize Reeve's legal categories. His introduction is a virtual manual for classicizing reform. But he didn't bother to do that work, mustering his energies instead for a conservative attack on recent changes to the substantive law governing the ongoing marriage. This was something new: up until now, the treatises regretted coverture while conceding its necessity. Schouler cemented a new conservatism for his field. It will be worth our while, I think, to learn the contents of this new commitment.

Schouler's special targets were the Married Women's Property Acts (the MWPAs), the earnings statutes, and readily available divorce:

> The danger to be apprehended from all legislation of this sort is that it will weaken the ties of marriage by forcing both sexes into an unnatural antagonism; teaching them to be independent of one

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291. OED, *Family*, *supra* note 286, at I.3.a. From the earliest to the latest dates comprised by this story, an additional, always less salient meaning also existed: "Those descended or claiming descent from a common ancestor; a house, kindred, lineage," *id.* at I.4.a. Almost all the examples tip the term in the direction of aristocratic lineage: "People of no 'family,'" *id.* at I.4.b. This is the sense in which Savigny used the term. But there was no useable sense of "family" at this time, in America, to correspond with the affinal patriarchal family which was Savigny's actual object of attention.

292. *Id.* at I.3.a (quoting 2 JAMES MILL, ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND, xxii, 218 (London, Longmans Green 1869)).

> another, and to earn their own living apart; whereas God's law points to family and the mutual intercourse of man and woman as among the strongest safeguards of human happiness. . . . Add to this loose divorce laws, loosely administered, and can it be said that the marriage relation is encouraged and fostered by the State? That it should be admits of no question.[293]

Schouler's is the first treatise we have examined which offered open resistance to increased equality for wives. On this question he was explicitly conservative. Schouler protested that the MWPAs gave wives equality and freedom while preserving their paternalistic protections. Male legislators were being pussy-whipped:

> Either the ultimate object should be to place the wife on an independent footing and enable her to maintain herself against the world, or else providing honorably, faithfully, and generously against all possible misfortune, to teach her still to lean upon the stronger arm of her husband, and to look to man for guidance. But our legislators sometimes appear to attempt both systems together, as if goaded on by the gadfly of feminine persistency. Laws which invite married women to embark in separate trade, tend plainly to the wife's independence. Laws, on the other hand, which class widows and orphans together as subjects for special protection, preserve homestead exemptions, permit of settlements against the husband's creditors, are founded on the policy of the wife's dependence. . . . Certain it is that woman cannot claim the privileges of the two sexes: if she would grasp at civil honors she must surrender her time-honored tribute of chivalrous homage.[294]

Indeed, the MWPAs installed an unfair bias in favor of wives at the expense of husbands. Wives could be individualists, but husbands were required to carry on as altruists:

> Equality and freedom are precious words; but if the respective spheres of man and woman are equally honorable, equally useful, equally free, need they be precisely identical? As a logical proposition, if woman in her pursuits has the right to become a man, man has no less the right to become a woman. . . .
>
> A calm and dispassionate investigation of many acts shows that the common-law disabilities of the wife have been more carefully pruned than those of the husband. Some legislative changes in

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293. SCHOULER, *supra* note 256, at 17-18.
294. *Id.* at 18-19.

> favor of the latter are desirable. Thus the common law obliged the husband to pay his wife's antenuptial debts, because he might have received a fortune by her; if then she retains her property, notwithstanding the marriage, this liability on his part should not continue. Again, it is possible that the husband, in some States, has lost his tenancy by the curtesy in his wife's lands; if so, is there any reason why the wife should retain a dower interest in her husband's lands. . . . Nor is it clear that where a married woman being of ample means retains her property independent of her husband, while his income continues slender, he ought to be held as strictly liable for her necessaries as in the days when the beneficial enjoyment of her property would have vested in him.[295]

This was all terrible, but the worst effect of the MWPAs, Schouler concluded, was "the constant temptation they hold out to fraud and perjury."[296] By inviting debtor husbands to convey their property to wives to protect it from creditors, the MWPAs forewent the protections against frauds of this kind that were intrinsic to the common law, the community-property and the civil law marital property systems. "Let us not forget that the marriage relation is a close one, and in pecuniary matters places two persons before the world somewhat in the light of partners."[297] Here indeed the man becomes a woman—a perverse travesty on natural and divinely ordained sex differences. And "it is supreme folly to chafe and fret and struggle continually against the fetters of sex."[298]

Finally, Schouler resisted the trend towards readily available divorce. He defined marriage "in the first instance, [as] that act by which a man and woman unite for life . . . ."[299] And he insisted that, once the "status or relation" of marriage is thus formed, "[b]eing once bound they are bound for ever. . . . Death alone dissolves the tie[.]"[300]

All of these conservative interventions lead me to suggest that Schouler not only tolerated but actually *liked* the antique vibe sent by Reeve's table of contents. It asserted the past purity of the common law rules against new legislation.[301] And it asserted a new relation of domestic relations to

---

295. *Id.* at 19-20.
296. *Id.* at 20.
297. *Id.*
298. *Id.* at 17.
299. *Id.* at 22.
300. *Id.*
301. The conservative politics of Schouler's treatise were, if anything, intensified by his posthumous editor Arthur W. Blackmore. *See* Joseph Warren, Book Review, 22 COLUM. L. REV. 88 (1922) (reviewing SCHOULER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND

progress: it was no longer the locomotive speeding to modernity but a defensive, almost reactionary, redoubt—a haven of dependency in the heartless world of the modern market.

Kennedy argues that the characterization of marriage as status-not-contract both relieved contract of the values of "regulation, paternalism, community and informality" and cabined them in marriage.[302] Schouler proposed that domestic relations should be the principal new legal housing for these values. He wanted to limit that domain, moreover, to the "law of the family" and to the special setting of the household. This is a newly separated domestic sphere. He did not want to set up a Law of Altruistic Relations: rules governing non-family members with express obligations to act paternalistically on behalf of others—whether guardians of wards or town officers—should go elsewhere. Master and servant was no longer, realistically speaking, a domestic relation; it should migrate to a new domain, principal and agent, where it would be governed by the values of "facilitation, self-determination, autonomy and formality"[303] appropriate to the contracts of employees and laborers generally.

When all those changes had taken place—and more or less exactly, they did—Domestic Relations would be residual, the remainder left in the field defined and animated by Reeve after the law of work in the marketplace and the law of wardship for incapacitated persons had departed for elsewhere in the clarifying classical order. It would progress—as Maine had suggested it would—by staying put.

X. THE RISE OF CONTRACT: KEENER AND BISHOP

Domestic Relations became residual because something else was becoming general. Not surprisingly, given our story so far, that something was *contract*. In this section, I retell Kennedy's story of the rise of contract not merely as a category opposed to marriage and Domestic Relations, but as the default legal topic, the general one, the one from which Domestic Relations became a structural, not merely lexical, exception.

Kennedy argues that the rise of the will theory—the theory that the primary legitimate purpose of law is to give effect to the will of individuals exerted as self-actualizing individuals or, if legally bound to

---

DOMESTIC RELATIONS (Arthur W. Blackmore ed., 6th ed., Albany, Matthew Bender 1921) (1870)).

302. KENNEDY, RISE AND FALL, *supra* note 6, at 185.

303. *Id.*

each other, by willed agreement—caused legal thinkers of the late nineteenth century to rename and reorder the basic topics of private law:

> The adoption of the will theory was manifested in (a) the dismantling of contracts by spinning off of Quasi-Contract and Tort; (b) the rise in jurisprudence of an ordering of private law based on two distinctions: rights against the world versus rights against individuals; and rights arising from private agreement versus those created by the state; (c) the emergence of the concept of status to deal with legal relationships inconsistent with this scheme; (d) the reordering of the residuum of pure contract in terms of the will of the parties and the will of the sovereign; and (e) the organization of the brand new field of tort law into intentional tort, negligence and absolute liability.[304]

Implicit in these shifts is a desire to make the system make sense *as a system*: a classically classical impulse.

Kennedy's account of this classicizing rise of contract identifies two big shifts affecting the "status" element:

> 1.The undermining and eventual rejection of the ideas of "status," "relation," and "condition" as the operative sources of the great mass of contract rules.
>
> 2. The emergence of a specialized law of persons, and of a new category of status, that grouped together and explained the peculiar character of rules incompatible with the new vision of the nature of 'real' contracts.[305]

Contract was increasingly the domain of "facilitation, self-determination, autonomy and formality"; rules formerly thought to be about contract, but actually implicating "regulation, paternalism, community and informality" had to go elsewhere.[306] The former was abstracted in part by the piecemeal but relentless subtraction of the latter:

> The Classics created . . . by subtraction. It was these authors of the 1870's [Leake, Langdell, Pollock, Anson, Holmes, Markby and Holland] who purged quasi-contract, status and tort from the subject. In the place of the imperialistic claims of Parsons, they began with elaborate descriptions of all the things "contract" was *not*. They created also by abstraction, by asserting and then trying to show that there had been an essence hidden at the core of the

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304. *Id.* at 171.
305. *Id.* at 185.
306. *Id.*

pre-Classical hodgepodge.[307]

To the extent that contract was modern, quasi-contract, tort and status were residual. They progressed along with everything else, but by being segregated.

As Kennedy indicates, Domestic Relations was not the only domain to emerge in this way. The Classics recruited the old term quasi-contract to house legal obligations that were formerly "implied," leaving "contract" for assented-to obligations.[308] Torts, too, broke off from the great glacier of Blackstone's Law of Wrongs and gained its independence as a legal topic—a new iceberg on its own trajectory.[309] As we have seen, marriage, now status-not-contract, eventually docked in Domestic Relations, understood as the "law of family"—the law of the people who, with the rise of bourgeois companionate marriage and its nuclear family, share life in the *home*.

The resulting order was not born in a day. Instead, the treatise writers seem to be staggering to revise a large, recalcitrant body of legal material to conform to a system whose principles were only glimmeringly visible and whose shape emerged only through intensely competitive sallies of publication. The relationship between ideology and taxonomy would become clear only in retrospect. Consider, for instance, James Kent's immensely influential *Commentaries on American Law*, first published in 1826-30 and remaining in print almost to the end of the century. This super-authoritative treatise followed precisely Blackstone's Table of Contents, and thus included a section on the "rights of persons" complete with corporations.[310] Holmes produced a new edition of Kent's *Commentaries* in 1872, adding a footnote updating the text to conform with Bishop's status-not-contract conception of marriage.[311] But Holmes's edition, like all the others, followed Kent's original plan. Indeed, throughout its publication history Kent's *Commentaries* retained

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307. *Id.* at 207. See STEPHEN MARTIN LEAKE, THE ELEMENTS OF THE LAW OF CONTRACTS (London, Stevens & Sons 1867) and THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS AS APPLIED BY COURTS OF LAW (New York, Hurd & Houghton 1867), for early examples of the contracts-only treatise.

308. KENNEDY, RISE AND FALL, *supra* note 6, at 173-75.

309. For what may be the first effort in this direction, see FRANCIS HILLIARD, THE LAW OF TORTS, OR PRIVATE WRONGS (Boston, Little, Brown & Co. 1859).

310. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW at Table of Contents (New York, O. Halstead 1827).

311. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 129 n.1 (O. W. Holmes ed., 12th ed., Boston, Little, Brown & Co. 1873) (1826). Thanks to KENNEDY, RISE AND FALL, *supra* note 6, at 198 for calling this edition and amendment to my attention.

their original outline *in toto*; revised editions added and modified lower-level headings without redrawing the basic structure. We can imagine some date after 1896, the date of Kent's last published edition (again with Holmes on the masthead),[312] as the moment when the classical order finally shed earlier taxonomies, merged into legal common sense, and rendered Kent's *Commentaries* a relic.

Meanwhile, Bishop struggled mightily to get his *oeuvre* right, and his changes of heart show us how lurching and exploratory the process was. In 1871-73, almost 20 years after the first edition of *Marriage and Divorce,* he published his two-volume *Commentaries on the Law of Married Women.*[313] This book was, basically, the law of coverture. He thus persisted until the end of his career in missing Schouler's generalizing point that the central core of husband-and-wife as a legal topic was the full panoply of legal relations between them.

But Bishop made several substantial efforts to get the contradisguished field, contracts, right. His first effort was a little handbook, *Doctrines of Contract*, published in 1878,[314] which he effectively withdrew as mistaken in 1887. That year he published his *Commentaries on the Law of Contracts upon a New and Condensed Method*, noting on the title page that it is "A New Work, Superseding the Author's Smaller One."[315] This *pentimento* illuminates the coevolution of our topic and is worth spelling out.

Bishop's first contract treatise offered a new ordering for this legal topic: contracts were general as to subject matter but distinguished primarily as to form, so that the first chapters addressed Contracts Under Seal, Contracts of Record, Oral Contracts, Simple Contracts in Writing, Contracts Implied as of Fact, Contracts Implied as of Law, and Contracts

---

312. The last edition of which I am aware appeared in 1896. KENT, COMMENTARIES ON AMERICAN LAW (John M. Gould ed., 14th ed., Boston, Little Brown & Co. 1896) (claiming on the title page Holme's 12th edition as its own pedigree).

313. BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN, *supra* note 270.

314. JOEL PRENTISS BISHOP, THE DOCTRINES OF THE LAW OF CONTRACTS, IN THEIR PRINCIPAL OUTLINES, STATED, ILLUSTRATED, AND CONDENSED (St. Louis, Soule, Thomas & Wentworth 1878) [hereinafter BISHOP, CONTRACTS IN THEIR PRINCIPAL OUTLINES].

315. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS: UPON A NEW AND CONDENSED METHOD (Chicago, T.H. Flood & Co. 1887) [herinafter BISHOP, CONTRACTS UPON A NEW AND CONDENSED METHOD]. For the retraction, see BISHOP, CONTRACTS UPON A NEW AND CONDENSED METHOD, at iv ("In most respects, [the earlier] work satisfied me, as far as it went. But, on reflection, I deemed that its sphere might be most profitably enlarged. So I have extended its scope . . . have changed in a measure the arrangement; and above all, have made more prominent the reasons of the law, constituting as they do the law itself. And otherwise I have rendered the book new.").

Implied from Express Ones.[316] It was no easy task deducing this new taxonomy:

> This book is the outgrowth of a plan to collect, in simple and compact language, and *arrange in an order of my own*, the essential doctrines of the law of contracts; referring mainly to the larger books, which the reader was expected to consult as he had occasion, for illustrations and the adjudged cases. But on proceeding to do what I had thus undertaken, I found the plan impossible . . . . When I felt, in those books, for the ribs in the body of the law of contracts, and for the spinal column, I could not distinguish rib or backbone from muscle.[317]

Only in his second contracts treatise did Bishop find the armature of classical contract. Here we find an introduction to "The More General Doctrines" divided into two parts: "Elements of a Contract" and "The Consideration." Only then did Bishop list off the various special contract forms. The struggle to generalize, and the impediments offered by the old legal forms, could hardly be more patent. It's almost as though Bishop knew, but could not himself say, that even his reformed taxonomy was "not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice."[318] It was left to William A. Keener, from whom I take this scornful judgment, to make the break.

Keener's 1893 *Treatise on the Law of Quasi-Contracts* insisted that:

> A true contract, whether it be a simple contract, a specialty, a contract in the nature of a specialty, or a contract of record, exists as an obligation, because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound.[319]

That is, contract law was the law of the will of the parties; nothing else belonged there. Keener's exceptionalizing treatise rejected any idea that express contracts and those implied in fact were categorically different: only a willed contract was a contract, and if the parties had willed an obligation, the distinction between express and implied-in-fact

316. BISHOP, CONTRACTS IN THEIR PRINCIPAL OUTLINES, *supra* note 314, at vii.

317. *Id.* at iii (emphasis added).

318. WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 3 (New York, Baker, Voorhis & Co. 1893).

319. *Id.* at 4.

agreements was merely evidentiary.[320] Abstracted, contract is willed obligation. The subtracting move? Contracts implied in law weren't contracts at all, and should be restyled "quasi-contract." The will of the state had to migrate *out* of contract proper into quasi-contract. Here Keener parked obligations to act arising by record and by positive or customary law, and also obligations imposed by judicial doctrine to prevent unjust enrichment.[321] That is to say, where official stipulation of some kind was wanting, quasi-contract was the law of ethical obligation to make restitution of unjustly acquired benefits. It was the will of the state, not that of the parties. It did not belong in contract at all.

Keener also subtracted some rules which Schouler would have housed in Domestic Relations from that domain, and made them rules of quasi-contract. For instance, the duty of husbands to reimburse third parties who supply necessaries to their wives was more properly understood to arise from the doctrine of unjust enrichment than from marriage itself.[322] Where the doctrine of unjust enrichment has nothing to say, however, Keener laid off of the law of husband and wife and of parent and child: the duties of husband and wife and of parent and child *to each other* simply don't appear. Those could stay where their specializers had put them—in the new legal categories, marriage and divorce and the special rules of coverture (Bishop), or, more classically, in Domestic Relations (Schouler). We are seeing the residualization of Domestic Relations not only from contract but now from contract's *other* new opposite, quasi-contract.

The emerging map was divided into four parts: contract was the modal law; quasi-contract, tort, and domestic relations all stood together in opposition to it. Bishop then took this process one step further, constructing a high legal barrier between his *Marriage and Divorce* and *all* the other domains of "regulation, paternalism, community and informality." In Bishop's last classicizing effort, he redivided the legal field *in partes tres:* contract, *non-contract law*, and marriage and divorce. *Non-Contract Law* required a treatise of its own.[323] This "follows a natural division in the legal field, instead of driving a mere artificial

320. *Id.* at 5.

321. *Id.* at 16. How is quasi-contract distinct from tort? The former brings an obligation to act; the latter an obligation to refrain. *Id.* at 15.

322. *Id.* at 15, 22.

323. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT OR THE EVERY-DAY RIGHTS AND TORTS (Chicago, T. H. Flood, 1889) [hereinafter BISHOP, NON-CONTRACT LAW].

furrow."[324] Prior treatise-writers who had tried to make torts a topic[325] labored in hopeless conceptual error; tort was to noncontractual duties as breach was to contractual ones. It was not a general topic at all but merely the "civil wrong" housed within it.[326] The *general* topic was "common affairs not of contract."[327]

The newly-fundamental will theory provides the principle against which these noncontractual duties could arise. Bishop now understood freedom of individual will in ferocious Darwinian terms. The two chief principles from which the non-contract law arises are these:

> **§ 10. The Right to Exist.** Every person is entitled to live as long as, without feeding on his fellows or otherwise injuring them, he can. This is a self-evident truth. Hence,—
>
> **§ 11. Active—Do as Will.** As no man can live by simply sitting down and breathing, every one has the right to be constantly active. And as necessarily each one is moved by impulses from his own mind, not another's, all are permitted to obey, because they must, their several wills. The consequence is that, while one abstains from the purpose to injure another and, beyond this, is careful to avoid such injury, he cannot be called to account though an unintended harm results to the other.[328]

Where intentional injury or a failure to take legally required care could be assigned, then a noncontractual duty arose and the law required a remedy. But this was the special case; the right to obey one's own will was general. Vast swaths of uncompensated injury were a necessary consequence of the will theory, but Bishop did not blink: "Better is it for all that the law should keep the other vigilant by stimulating him to look out for himself."[329] We may well now have travelled as far as it is possible to go from Parsons's idea that contract, express and implied,

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324. *Id.* at iii.

325. Bishop indignantly claimed that he had foreseen the need for a treatise on torts long before anyone else, but that demented law-book publishers had refused his proposal to publish one. *Id.* at 2 n.1. Instead, in *Non-Contract Law*, he found himself obliged to recognize the first wave of torts treatises: C.G. ADDISON, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS (V. and R. Stevens & Sons, 1860); HILLIARD, *supra* note 309; FREDRICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW (London, Stevens & Sons, 1887). Bishop, NON-CONTRACT LAW, *supra* note 323, at 2, 2 n.1.

326. BISHOP, NON-CONTRACT LAW, *supra* note 323, at 3.

327. *Id.* at title page, 3.

328. *Id.* at 5-6.

329. *Id.* at 6.

permeated all of social life, forming the very "web and woof" of human interaction.

What of the relations *among* the deviant legal fields? Bishop did include a summary of the duties of husbands for their wives' torts and the duties of parents, masters, and guardians for those of legal infants. He made a weaker distinction between the law of family and his own topic than Keener did: while for Keener, the law of marriage ended where the law of quasi-contract began, Bishop thought that marriage and parentage might be the site of non-contractual duties and provide rules conditioning their legal extent. Of the two, Keener was the stricter classicizer. But even for Bishop, despite its appearance as a "tangle" of canon law, common law, and equitable sources, the law of marriage was "a whole"; it could be "made luminous" to legal minds if they were willing to "understand the . . . parts and the combined whole."[330]

Bishop's topic "non-contract law" was not to survive, but the larger divisions he respected and helped to construct were intrinsic to the classical order. Contract was general; it housed the will of the parties; the domains of law assigned to "regulation, paternalism, community and informality"—quasi-contract, tort, and the law of family—were special. Bit by bit they were subtracted from the classical center of the legal field. As we have seen, marriage was the first to go: even before this process had really discernably begun, it was already *status-not-contract.* Again this *parole* is settling into a new *langue.* This time, given the exalted place accorded contract and the will theory in classicizing thought, given the idea of progress which Maine's authority injected into the work, we now see the sheer deviance of domains of law dedicated not to the will of the parties but to the will of the state. And with this came a felt need to keep them narrow so as to enlarge the scope of freedom of contract.

Nor was marriage—or Domestic Relations or the law of family—continuous with its co-deviant fields, quasi-contract and tort. The latter were general, just as contract was general, in that they governed all persons equally. But Domestic Relations retained a commitment to its highly specific legal persons and to the idea that they were differentiated from the faceless liberal individual by *status.*

Finally, we can see in Bishop's struggle signs that the *retardataire,* special, state-pervaded domain of marriage and divorce (or, in the increasingly common usage, domestic relations) was losing prestige as a

330. *Id.* at 241-42 n.1.

legal field. Recall that, in 1891, Bishop crowed that he had made marriage and divorce coherent. The introduction to the 1891 edition of his *Law of Marriage and Divorce,* Bishop celebrated himself not only for replacing the incoherent, contradictory, and fragmented body of case law described in his first edition on this topic by a (supposedly) consolidated, coherent, and fully rational legal order, but for convincing his colleagues to *see* the field his way.[331] That's not how his achievements looked to him in 1898, when he published *Non-Contract Law*:

> The profession has never looked upon the subject [of the law of married women] as one susceptible of being made luminous, or even as proper for any thorough instruction to students. I do not think there ever was a practitioner, a judge, or a law student who even so much entertained the suggestion of *reading* this work of mine [*Married Women*]. Simply it was used as a digest is, therefore with little more profit. And the thought that it or any other book on the subject can be made more useful has probably never entered a half dozen minds in the entire country. I will illustrate this by saying, that a very eminent lawyer of my acquaintance who, I know, reads and appreciates my works generally, instead of reading this, wrote me,—"You may have removed the difficulties of the subject, but I do not believe it." If I could have begun to untangle things in the *right place*,—namely, in the professional mind of the country,—I should have made a great success of this Married Women book.[332]

What a poignant testimony to the degradation of marriage law in the emerging classical order!

CONCLUSION

This Part tells how the law of husband and wife, parent and child, master and servant, and guardian and ward evolved into the law of status—also designated the law of marriage—and became the opposite of contract. It tells how the law of marriage underwent further evolution into the law of Domestic Relations, became public law, became conservative, and became deviant; and how the law of contract shed its public normativity and became the archetypical domain of the will theory, became private law, became emblematic of progress, and became

331. *See supra* notes 107, 108 and accompanying text.

332. BISHOP, NON-CONTRACT LAW, *supra* note 323, at 241-2 n.1.

fundamental to the legal order. It tells how the law of master and servant migrated to contract; and how contract shed its will-of-the-state elements for reconstruction as quasi-contract and tort. At the time that the status/contract distinction took hold in America, marriage-as-status-not-contract was deemed both exceptional and fundamental to the legal order. By the time all the categorical changes I've described in this Part were completed, it was exceptional but no longer really fundamental: it lost is diacritical command, shed its epistemic and professional prestige, and became a backwater in the law.

To this day, our law curriculum and legal ideology retain this basic structural template dividing the law of the family from the law of the market. This family/market, status/contract, law-of-intimacy/law-of-business distinction is not ideologically innocent. It carries with it the idea of marriage as status, the idea that it is either status *or* contract, and the idea that it is exceptional. Thus it carries the idea that the market is free, while the family is entrenched in moral or natural command; it carries the idea that the market is the site of progress, while the family is or should be slow to change. It is a linchpin of liberal legal thought—so large and pervasive that it is almost hidden in plain sight. My goal in this genealogy is to make its historicity and its varying ideological investments discernable and available for resistance.

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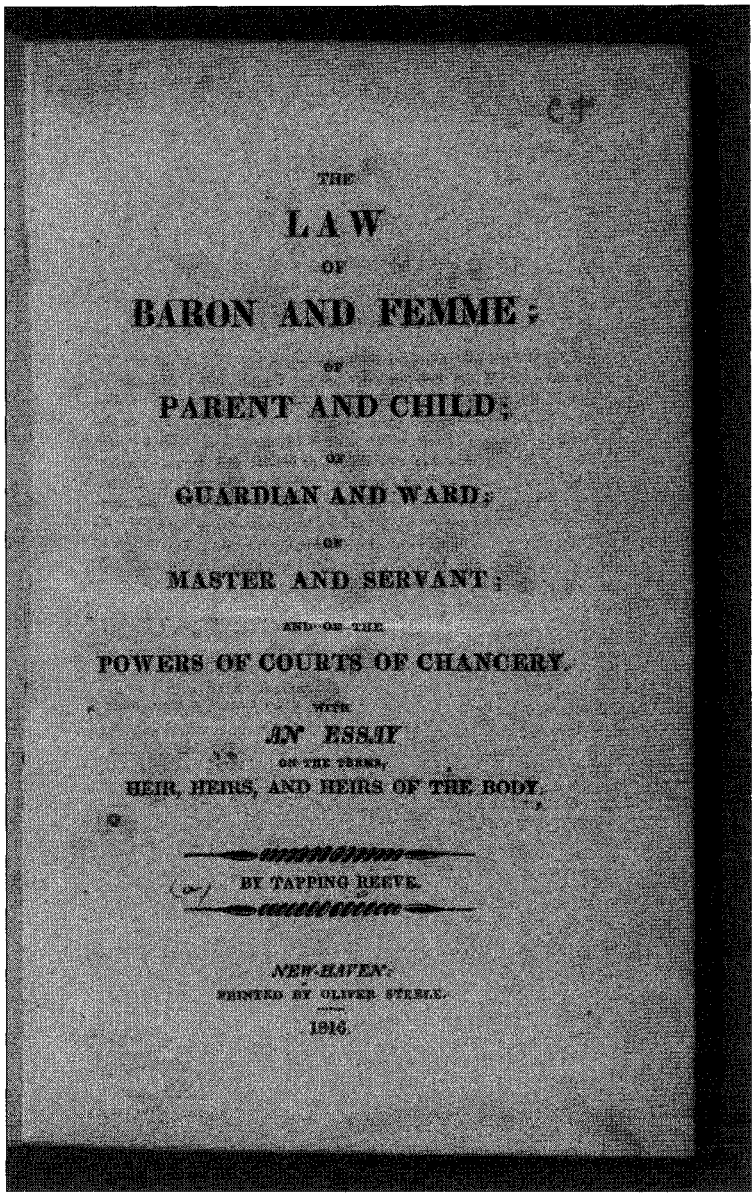
1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, xiv-xvi (14th ed.) (A. Strahan, London 1803). Reproduced by permission of the Harvard Law Library and of Gale, *Making of Modern Law database*, © Gale, a part of Cengage Learning, Inc., www.cengage.com/permissions.

Appendix 2

Reeve



THE
LAW
OF
BARON AND FEMME;
OF
PARENT AND CHILD;
OF
GUARDIAN AND WARD;
OF
MASTER AND SERVANT;
AND OF THE
POWERS OF COURTS OF CHANCERY.
WITH
AN ESSAY
ON THE TERMS,
HEIR, HEIRS, AND HEIRS OF THE BODY.

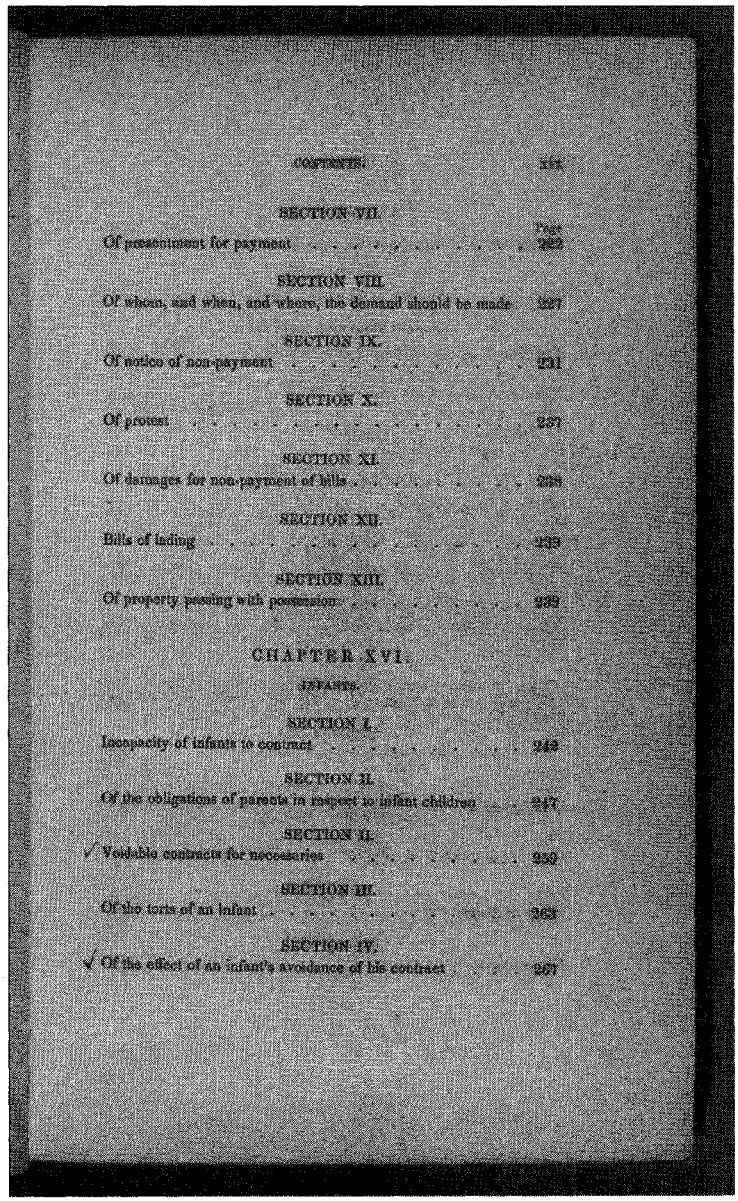
BY TAPPING REEVE.

NEW-HAVEN:
PRINTED BY OLIVER STEELE.
1816.

TAPPING REEVE, THE LAW OF BARON AND FEMME; OF PARENT AND CHILD; OF GUARDIAN AND WARD; OF MASTER AND SERVANT; AND OF THE POWERS OF COURTS OF CHANCERY, WITH AN ESSAY ON THE TERMS, HEIR, HEIRS, AND HEIRS OF THE BODY, title page (New Haven, Oliver Steele 1816). Reproduced Courtesy of Historical and Special Collections, Harvard Law Library.

Appendix 3

Parsons



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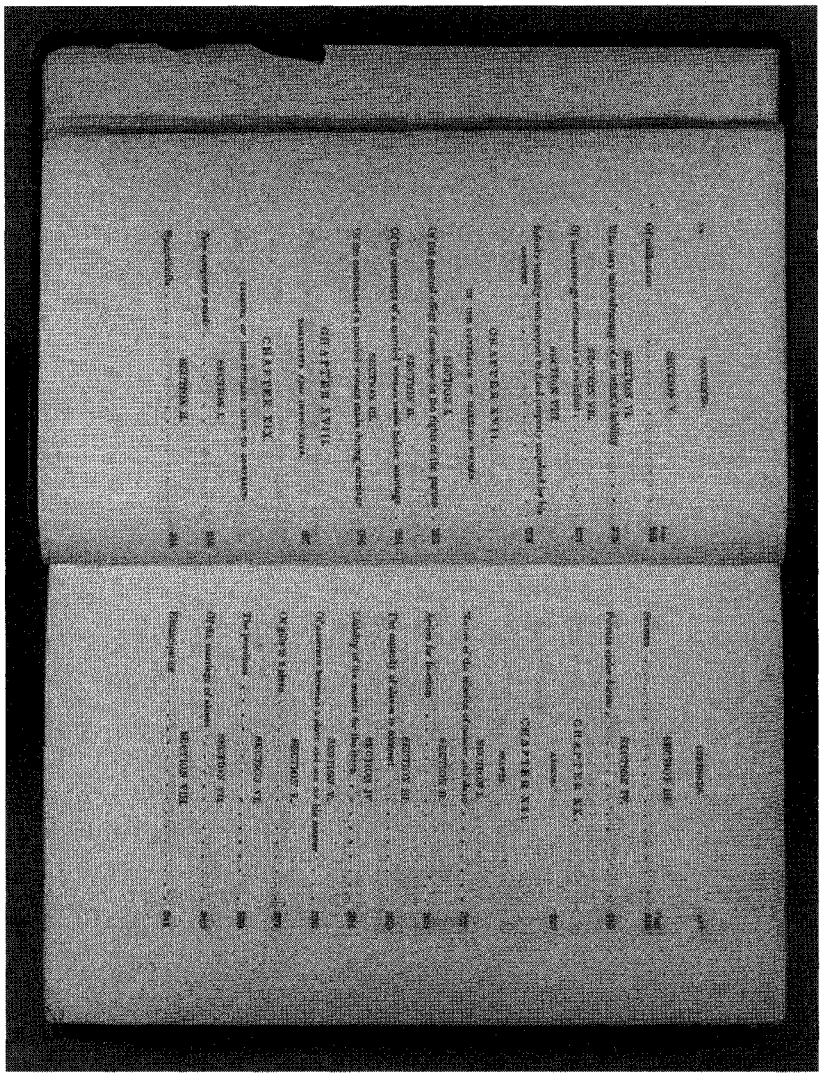

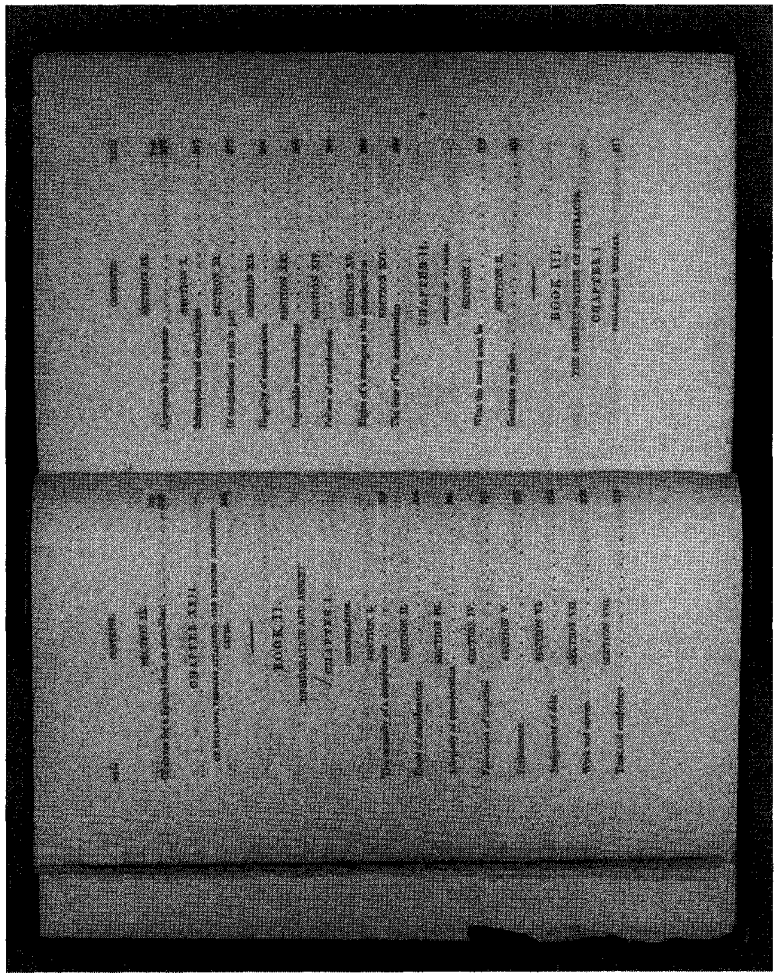

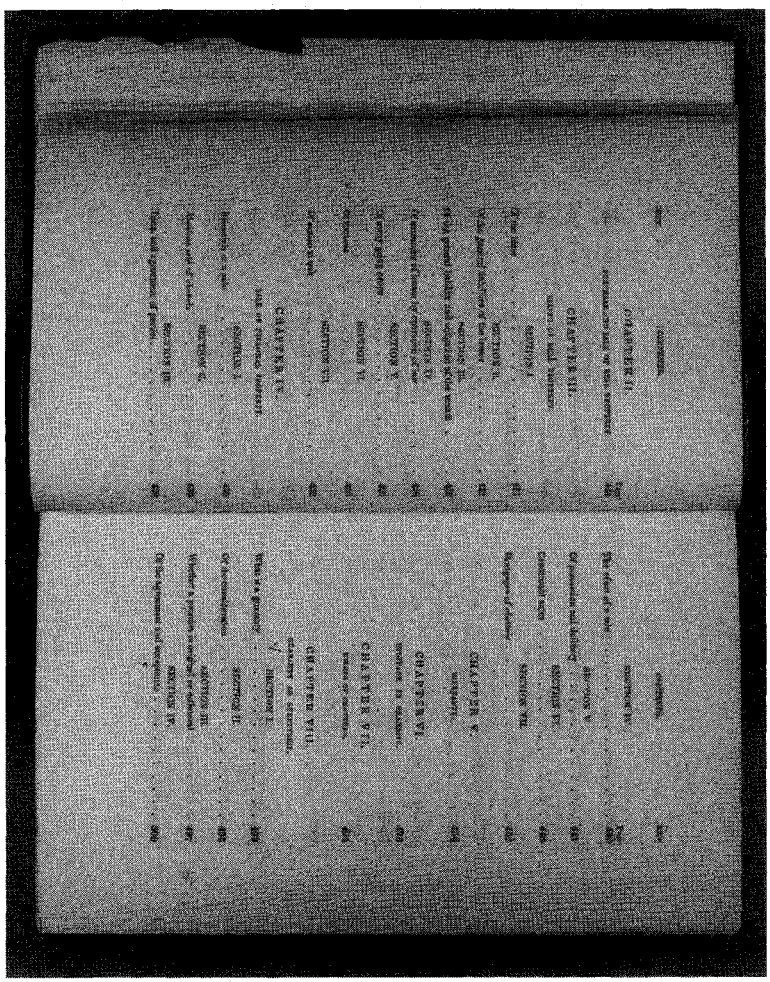

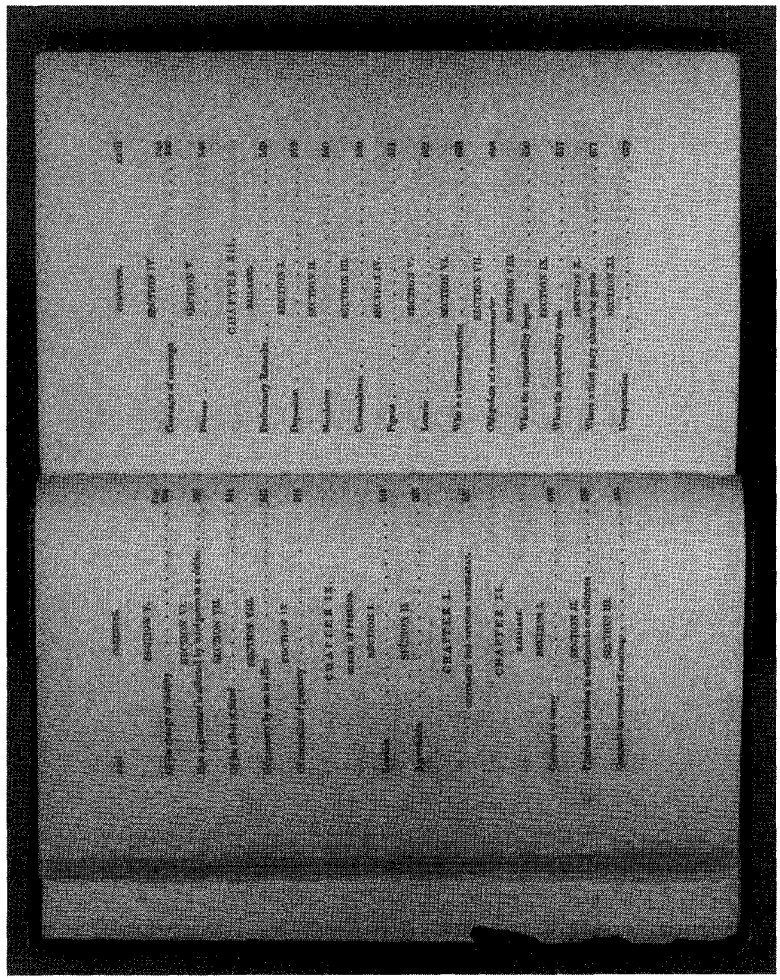

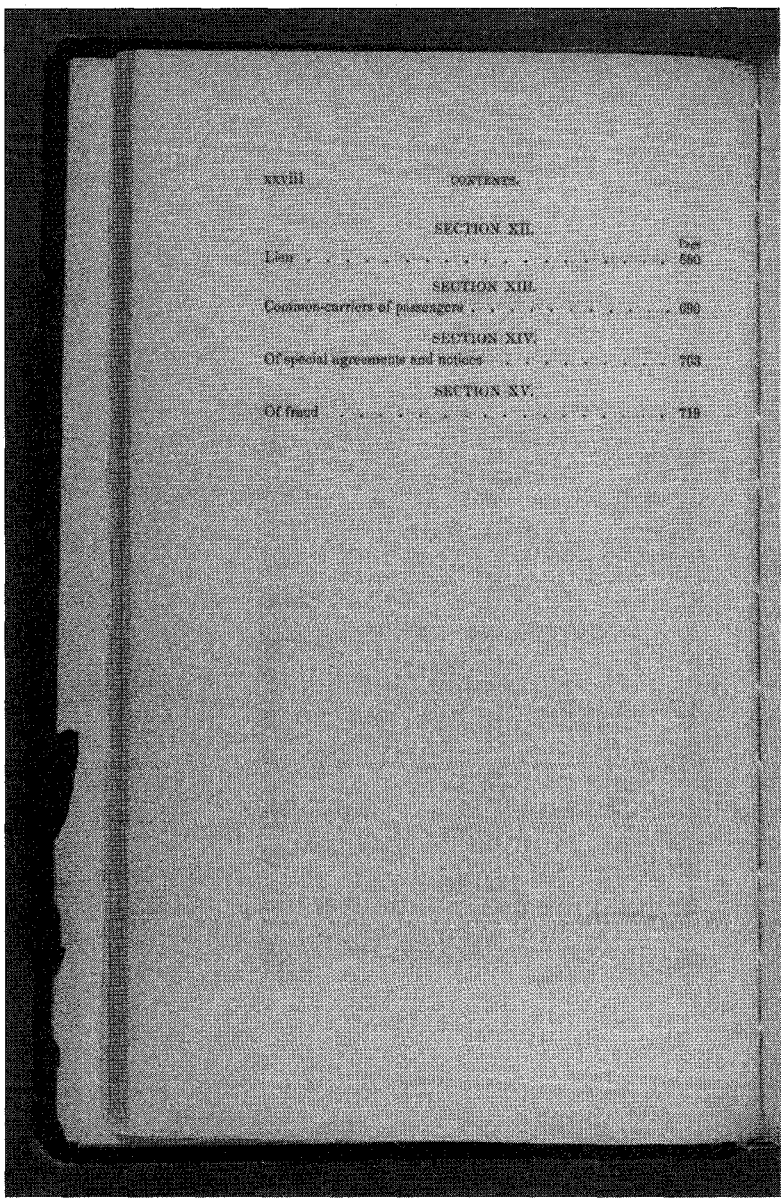

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Appendix 5

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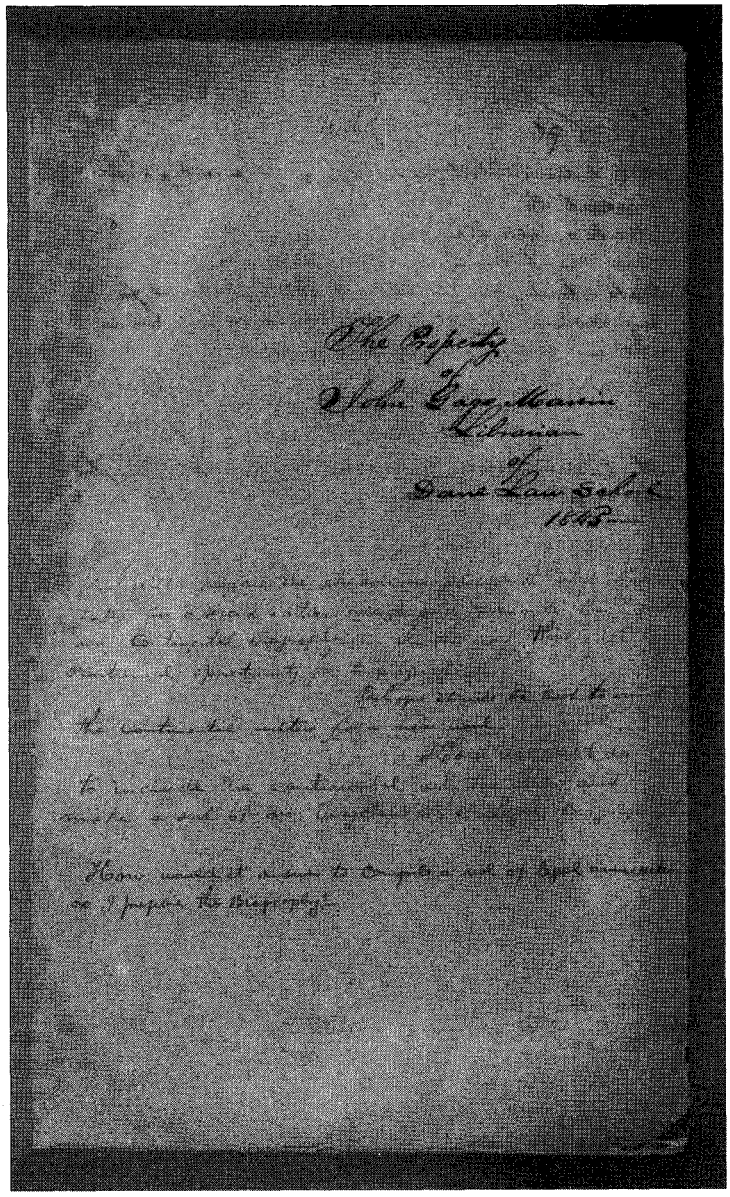

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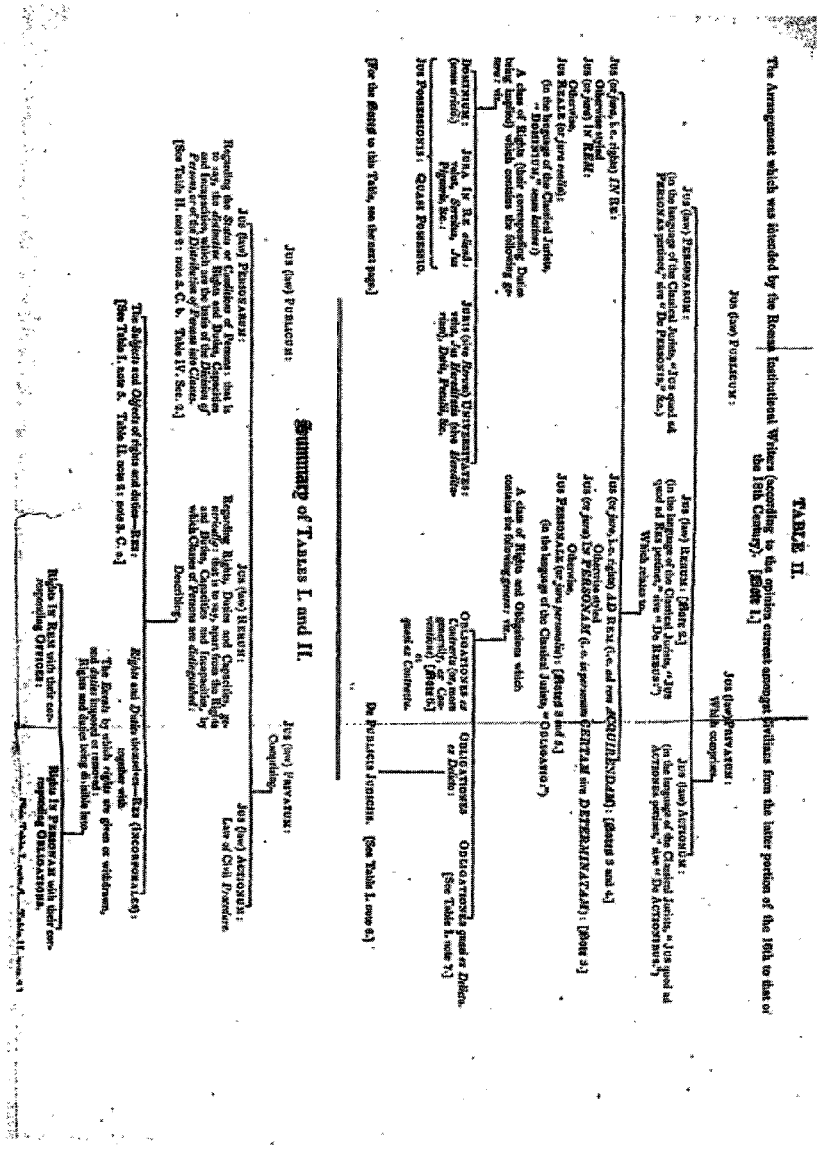
Appendix 6

Austin



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